

## Field Notes from Waco: *Isabel Andrade et al v. U.S.*

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**D**uring the week of 25-30 June 2000, I observed the trial of the wrongful death suit brought by Davidian survivors and family members against the federal government. The plaintiffs' suit charged that federal law enforcement agencies acted recklessly and with negligence, using unnecessary and excessive force that led to the deaths in 1993 of eighty-two sect members at Mount Carmel, the Davidians' residence near Waco, Texas. Attorneys Michael Caddell and Cynthia Chapman represented approximately fifty plaintiffs. Ramsey Clark represented two of the surviving Davidians, Clive Doyle and Sheila Martin. James Brannon represented the three deceased children of David Koresh.

The government was represented by a full complement of attorneys, legal assistants, and technicians, filling one entire side of the courtroom. The lead cocounsels were Mike Bradford, the United States Attorney for the Eastern District of Texas, and Marie Hagan, a veteran prosecutor with the Justice Department. Bradford was assigned to the case after the Assistant United States Attorney of the Western District of Texas, Bill Johnston, was recused for being a whistleblower. Johnston was instrumental in the discovery of pyrotechnic devices by plaintiffs' investigators, much to the chagrin of Justice Department officials.<sup>1</sup> The pyrotechnic devices in question were utilized by FBI agents on 19 April 1993 to deliver tear gas into the Davidians' residence. For six years, the FBI had denied using pyrotechnic devices that could have caused the fire in the CS gas assault.<sup>2</sup> When two shell casings from pyrotechnic grenades were found in the evidence storage room, Johnston passed the information up the chain of command. However, Attorney General Reno continued to deny the use of pyrotechnics leading Johnston to believe that senior personnel in the Justice Department were withholding information from her. Johnston then broke rank and wrote to Reno directly. His reward for this effort was a sharp rebuke by Hagan and a subsequent indictment handed down by special prosecutor John Danforth accusing Johnston of obstructing justice and lying to a grand jury.<sup>3</sup> Bradford was a logical replacement for Johnston on the case, preserving continuity with the regional culture for the small town Texas jury. No doubt, Jus-

tice Department officials were worried that Marie Hagan would be perceived by jurors as an “outsider” and Washington bureaucrat.

While the final ruling in Judge Walter Smith’s court—essentially finding no fault with the government’s actions—was disappointing, it should not have come as a surprise. I have argued elsewhere that the most important aspects of this trial were the evidentiary and procedural rulings that prevented the jury from hearing all the evidence.<sup>4</sup> It is not my intention to restate those arguments here. Rather I want to briefly address two disturbing but recurrent problems that surfaced during the trial which should have given the jury reason to question the credibility of the government’s case. These concerns are: 1. the mishandling of evidence, and 2. false or misleading statements by federal officials.

### MISHANDLING OF EVIDENCE

On 25 June, plaintiffs’ attorney Michael Caddell called Department of Public Safety (DPS) officer David Keys to the stand. Keys was present at Mount Carmel on 19 April 1993, the day of the FBI tank and CS gas assault. He testified that around 3:00 P.M., after the fire which erupted around noon had subsided, he saw agents load what looked like a door into a U-Haul truck. Indeed, during the demolition by tanks of the Davidians’ residence that led up to the fire, television crews filmed a Combat Engineering Vehicle (CEV)<sup>5</sup> dragging the doors away, but subsequently the FBI reported that the right front door was missing. Government attorneys interrupted Keys’ testimony with an objection, and there was a bench conference. Judge Smith disallowed the testimony about the door, ruling that it was speculative. The right front door was important evidence, because it would have shown whether the bullet holes were caused by mostly incoming or outgoing rounds. Bureau of Alcohol, Tobacco, and Firearms (ATF) agents maintained that on the occasion of the 28 February 1993 raid on Mount Carmel, Davidians shot first through the door, initiating the gun battle that killed four ATF agents and five Davidians. The Davidians denied they shot first, saying that the door would prove their innocence. During the 51-day siege, sect member Steve Schneider told FBI agents that “the evidence from the front door will clearly show how many bullets and what happened.”<sup>6</sup> Mysteriously, the right door disappeared. In a videotaped deposition, which was not shown in court, Keys testified that the U-Haul truck remained at Mount Carmel for approximately one-half hour. A photograph of Keys shows the truck in the background at the site on 19 April, and the time on his analog wristwatch is 3:55 P.M. Keys said that when the truck departed, it did not turn south on Double E Ranch Road—the direction from which it had arrived—past the media checkpoint

where hordes of cameras and reporters were waiting. Instead, the truck turned north. Asked if he gave any thought to the truck taking a more circuitous route, Keys replied, “To me, it was like they didn’t want to bring any attention to something that had come from where the remains were.”<sup>7</sup>

On 27 June, a videotaped deposition of Joey Gordon, a Texas Ranger, was shown in court. Gordon inventoried the federal evidence compiled and stored in a secure Department of Public Safety facility in Austin, Texas. Gordon found proof that at least one of the military rounds had been photographed by crime scene photographers after the CS gas assault on 19 April. However, he acknowledged that the round later disappeared and was never logged into evidence records. In addition, he found some items mislabeled and other items entered into the log but missing. Four or five pyrotechnic flashbang grenades were misidentified as “silencers” by the FBI Crime Lab. These included Q1237 projectiles. Also, Q379 and Q380 prototypes were found, and they had been fired, thus raising further questions about how the conflagration could have been started. The FBI also misidentified “cooked off” rounds of ammunition. Ranger Gordon said he found “very few expended rounds” attributed to the Davidians, even though ATF agents alleged that they were “out-gunned” on 28 February 1993.

At best, it would appear that the handling of evidence was sloppy and riddled with error. At worst, one might conclude that government agents tampered with the evidence, a problem that has plagued the FBI Crime Lab and federal investigations in recent years.<sup>8</sup>

On 29 June, Colonel William Petit was called by government attorneys to testify. Petit was commander on board a Blackhawk helicopter that circled Mount Carmel during the 28 February 1993 ATF raid. He testified that the three National Guard helicopters received fire from the ground by Davidians, but that he never saw any gunfire from the helicopters. During cross-examination, the question of a FLIR (infrared) tape arose, which would have recorded gunfire. Colonel Petit acknowledged that a FLIR was operating on board the Blackhawk. Petit was asked if he had seen the tape. He replied that he had not and did not know what happened to the tape. The FLIR tape, like the right front door and the pyrotechnic military rounds, had disappeared.

Add these items of mishandled evidence to the already lengthy list of government miscues and mishaps—the blank videotape of the ATF raid, the FBI’s bulldozing of the crime scene after the fire, the missing or lost photos taken by the coroner’s office, the missing page from the Justice report to congressional subcommittees mentioning the military rounds, alteration of the transcripts of listening devices,<sup>9</sup> the FBI’s refusal to allow independent inspection of Davidian weapons to determine if they had been altered,<sup>10</sup> records of telephone logs between top officials blackened out on the pretext they were “classified,” the lost

(and later found) audiotapes recording the authorization of the use of pyrotechnic devices on 19 April 1993, and the failure of the refrigeration unit storing Davidian corpses preventing investigation of controversial autopsy findings, among others.

### **FALSE OR MISLEADING STATEMENT BY FEDERAL OFFICIALS**

On 27 June, plaintiffs' attorneys played portions of a video deposition of FBI agent Monty Jett. Jett had been a weapons and explosives training technician at the FBI Academy, Quantico, Virginia, since 1978. He was responsible for ordering the chemical agents for the CS gas assault. Jett claimed that he only ordered ferret rounds, which are not pyrotechnic, to deliver the CS gas. He was not aware of any pyrotechnic military rounds (M651). He said he did not know where the Hostage Rescue Team (HRT) operative at Mount Carmel would obtain M651s. However, he testified that he had seen some old military rounds stored in a tunnel at Quantico. They disappeared at some point, and he assumed that they had been destroyed. Caddell pointed out that on 19 April 1993 the HRT ran out of ferret rounds during the insertion of CS gas and requested more from Fort Hood. Were some of these military rounds? Jett said he did not order any military rounds, even though FBI agent David Corderman, who served as a tank gunner at Mount Carmel, testified that on 19 April 1993 he fired three pyrotechnic military rounds at the residence.<sup>11</sup> Curiously, none of the agents in the HRT chain-of-command knew where the military rounds came from.

Later the same day, Caddell introduced into evidence a memo from FBI negotiator, Gary Noesner, who coordinated the negotiation team. The memo stated that he had reservations about the chief negotiator, Byron Sage, and the on scene commander, Jeffrey Jamar. He wrote, "Sage is very religious," and suggested that Sage might prejudice the negotiations. Noesner also wrote that "Jamar's style exhibited hostility."<sup>12</sup> Finally, Noesner thought that using CEVs to punch holes in the residence to insert CS gas was a dangerous idea and complained to officials that he was not consulted about this plan.

Caddell then submitted a written deposition from Frederick Lanceley, a veteran HRT negotiator who was critical of the FBI decision to insert CS gas into Mount Carmel. Lanceley stated that he agreed with the assessment by Gary Noesner. A 1993 government report of an interview with Noesner after the Mount Carmel fire was then read. It stated: "Noesner . . . determined that no one asked the negotiators and behavioral scientists what the response would be if the tanks punched holes in the building. Noesner sees this as a fundamental flaw in the implemen-

tation of the operation. He believes that is what triggered the starting of the fires and the shooting of the children.”<sup>13</sup>

Caddell also introduced into evidence an internal memo by former FBI Deputy Assistant Director, Danny Coulson. The memo ridiculed the on-site commanders’ contention that inserting CS gas would confuse the Davidians and prompt the women to rush out of the building with their children. “I am pretty disappointed with this approach. Everything is moving toward a gas attack. . . . I have stated that I believe it is unwise. We have more to negotiate. . . . HRT needs to be told that we are not going to assault that compound in any fashion, including gas. If he (Rogers) can’t accommodate this objective, he should be brought back to Washington.”<sup>14</sup> Richard Rogers was the commander of the Hostage Rescue Team during the operation at Mount Carmel.

Caddell then introduced statements made by Clint Van Zandt, another veteran negotiator and behavioral science specialist for the HRT. Asked about Richard Rogers, Van Zandt said, “I think he believed very strongly in himself; in his ability in the use of force. *He saw negotiations as getting in the way. He is a strong proponent and advocate of tactical resolutions to situations.*”<sup>15</sup> A key argument by plaintiffs’ lawyers was that Rogers and Jamar violated an approved plan and prematurely began demolishing the building only two hours after the CS insertion began. The written plan approved by Justice Department officials called for waiting forty-eight hours after the introduction of CS gas before tanks began dismantling the building.

The significance of this evidence can hardly be overstated. It documents the internal discord in the FBI over strategy, and records criticism by key HRT personnel (Noesner, Lanceley, Coulson, and Van Zandt) of Rogers and Jamar as being hostile, aggressive, and predisposed to tactical resolutions. Similar allegations made by scholars and critical observers were repeatedly denied for years by the FBI. As one of the chief critics of the HRT’s actions at Waco, these revelations proved to be especially galling.<sup>16</sup> It is nothing short of criminal conduct that the memos corroborating these allegations were withheld in previous discovery motions in the 1994 criminal trial of Branch Davidians and in three rounds of congressional hearings.

Taken together, the withholding of evidence, the alteration and mishandling of evidence, and the numerous false statements made to the court, defense attorneys, congressional committees, and the public, should have stripped the government of any credibility in the Waco civil trial. I can only speculate that the disturbing record of official malfeasance was offset by the manipulative evidentiary and procedural rulings of Judge Smith and the successful demonization of the Davidians by federal prosecutors, who painted them as cultists, terrorists, and crazed killers.

## ENDNOTES

<sup>1</sup> The operation of a pyrotechnic device produces a spark that can possibly ignite a fire. Pyrotechnic devices are distinct from incendiary devices, which are designed to set a fire.

<sup>2</sup> CS gas is chlorobenzylidene malononitrile.

<sup>3</sup> Johnston is accused of withholding notes made during the government review of the 1993 Waco incident which may have shown that "military rounds" (i.e., pyrotechnic projectiles) were fired by the FBI. Johnston denies the charge and says he does not recall any discussion of the rounds. He admits withholding notes because he believed that Justice Department officials were trying to set him up.

<sup>4</sup> Stuart A. Wright, "What the Waco Jury Never Heard," *Houston Chronicle*, 23 July 2000; idem, "Waco Redux: Trial and Error," *Religion in the News* 3, no. 3 (Fall 2000):16-18; and idem, "Justice Denied: The Waco Civil Trial," *Nova Religio* (forthcoming).

<sup>5</sup> A CEV is a tank that is not equipped with destructive weapons. The five CEVs at Mount Carmel were converted M-60A1 tanks equipped with bulldozer blades and battering rams. Additionally, two Abrams (M1A1) tanks were operative at Mount Carmel. Carol Moore, *The Davidian Massacre: Disturbing Questions about Waco that Must Be Answered* (Franklin, Tenn., and Springfield, Va.: Legacy Communications and Gun Owners Foundation, 1995), 223.

<sup>6</sup> Robert Bryce, "Prying Open the Case of the Missing Door," *Austin Chronicle*, 18 August 2000.

<sup>7</sup> Ibid.

<sup>8</sup> The FBI was fined by Judge Edward Lodge in the Randy Weaver case for altering and removing evidence for photographs at the crime scene at Ruby Ridge, Idaho, in 1992. See Kenneth L. Stern, *A Force Upon the Plain* (New York: Simon and Schuster, 1996). See also John F. Kelly and Phillip K. Wearne, *Tainting Evidence: Inside the Scandals at the FBI Crime Lab* (New York: Free Press, 1998).

<sup>9</sup> David P. Kopel and Paul H. Blackman, *No More Wacos: What's Wrong With Federal Law Enforcement and How to Fix It* (New York: Prometheus, 1997), 239.

<sup>10</sup> In the final joint report by the House Committee on Government Reform and Oversight and the Senate Judiciary Committee, it was noted that during the House hearings, committee members asked the FBI to turn over the weapons for independent analysis because they were concerned that the weapons may have been altered after the 19 April 1993 fire. The Justice Department refused to turn over the weapons to the congressional committees. See House of Representatives, *Investigation into the Activities of Federal Law Enforcement Agencies toward the Branch Davidians: Thirteenth Report by the Committee on Government Reform and Oversight Prepared in Conjunction with the Committee on the Judiciary together with Additional and Dissenting Views* (Washington D.C.: U.S. Government Printing Office), 9.

<sup>11</sup> Dick J. Reavis, "Agent Tells of Pyrotechnics' Use at Waco," *San Antonio Express*, 12 July 2000; John Danforth, *Interim Report to the Deputy Attorney General Concerning the 1993 Confrontation at the Mt. Carmel Complex, Waco, Texas*, 21 July 2000, 49.

<sup>12</sup> From personal trial notes. On file with author.

<sup>13</sup> Mark England, "Woman Burned in Mount Carmel Fire Testifies for Davidians," *Waco Tribune-Herald*, 28 June 2000.

<sup>14</sup> Lee Hancock, "Sect Could Have Been Coaxed Out, FBI Figure Told Officials," *Dallas Morning News*, 23 June 2000.

<sup>15</sup> Jim Henderson, "Woman Says Tanks Prevented Escape," *Houston Chronicle*, 27 June 2000 (emphasis mine).

<sup>16</sup> Stuart A. Wright, "Anatomy of a Government Massacre: Abuses of Hostage-Barricade Protocols during the Waco Standoff," *Journal of Terrorism and Political Violence* 11, no. 2 (1999):39-68.