Justice Denied: The Waco Civil Trial

Stuart A. Wright

ABSTRACT: A critical analysis is conducted of the wrongful death lawsuit brought against the United States government by Branch Davidian survivors and relatives. It is argued that a flawed verdict, exonerating the government of wrongdoing, was the result of evidentiary and procedural rulings by the trial judge that prevented the jury from hearing key evidence. The substance of this evidence is discussed and evaluated for its implications in producing an engineered verdict.

This past summer, a jury in the Waco civil lawsuit returned a verdict finding no fault with federal law enforcement in the disastrous siege and standoff at Mount Carmel Center in 1993 that led to the deaths of eighty-six people: four agents of the Bureau of Alcohol, Tobacco, and Firearms (BATF or ATF) and eighty-two Branch Davidians. Given the damning information revealed in the final joint report by the House Committee on Government Oversight and Reform and the Committee on the Judiciary[1] and in numerous scholarly studies and investigative reports,[2] how did a jury come to such a bewildering conclusion? As an observer at the trial and one who has studied the Branch Davidian tragedy for seven years, I want to address some of the problems surrounding the proceedings that I believe contributed to a flawed verdict. Specifically, I argue that the federal trial in Waco failed to deliver a just verdict because evidentiary and procedural rulings prevented the jury from hearing all the evidence.

First and foremost, Judge Walter Smith Jr. granted a "discretionary function" exemption to federal officials, giving them immunity for "bad judgments" in actions taken against the Branch Davidians. The intent of the discretionary function exemption is to protect law enforcement agents from being second-guessed in situations requiring urgent decision-making in the course of their duties. But how this exemption is applied is left to the judgment of the court and can be interpreted broadly or narrowly. Judge Smith chose the broad interpretation.

A similar claim was made by the government in the Randy Weaver case when FBI sniper Lon Horiuchi accidentally shot and killed Weaver's

wife, Vicki, during a standoff which occurred less than six months before the Waco incident.[3] Horiuchi was part of the FBI's Hostage Rescue Team (HRT), the same unit that was in charge of the standoff at Mount Carmel Center. Mrs. Weaver was standing at the door of her cabin, holding her infant child when the .308 caliber bullet pierced her neck, severed her carotid artery, then exited, ripping away most of the left side of her jaw and half of her face. Horiuchi was attempting to shoot Kevin Harris, a friend of the Weaver family, who was running toward the cabin door, but missed, killing Mrs. Weaver instead. Prosecutors in Boundary County, Idaho, filed murder charges against Horiuchi. But officials from the Justice Department filed a motion claiming that Horiuchi had immunity from prosecution based on the discretionary function exemption. The trial court agreed and in a 2-1 decision, the United States 9th Circuit Court of Appeals upheld the lower court's ruling. In a sharply worded dissenting opinion, however, Judge Alex Kozinski, criticized the sniper's action as unprovoked and indefensible, declaring that the court's opinion "waters down the constitutional standard for the use of deadly force by giving offenders a license to kill even when there is no immediate threat to human life."[4]

In the Waco case, a Justice Department official confirmed that the government enjoyed a distinct advantage as a result of this ruling before the case ever went to trial. In an Associated Press report on 15 July 2000, Department of Justice spokesman, Thom Mrozek, was quoted as saying, "Even before we got to trial, the case was whittled down significantly to relatively narrow legal issues, in large part because a lot of things we did are protected by the nature of discretionary function."[5] Was this evidentiary ruling critical to the case? Did it create an uneven playing field, giving the advantage to the government? I believe so.

There were at least three "bad judgments" that were excluded from jury consideration under the discretionary function exemption. The first was the decision by BATF agents to engage in a dangerous, high-risk, paramilitary assault on a residence housing infants, children, pregnant women and elderly persons, in order to execute a search and arrest warrant for a single individual. It is clear that David Koresh could have been arrested away from the Mount Carmel property, thus avoiding the reckless endangerment of 130 people who were not charged in the warrants. The second was the decision by the FBI agents to abandon *conciliatory negotiations* with the sect only ten days into the standoff, in favor of a "psychological warfare" strategy which, according to CIA documents, is a counter-terrorism tactic developed by the military designed to induce fear, emotional and psychological instability, sleep deprivation, distrust, dissension and hopelessness in the mind of the enemy.[6] The third was the decision to assault the complex with CS gas—a chemical weapon which is banned by international treaty for use even in wartime against our worst enemies—and using tanks to crush and demolish the

building. Each of these so-called bad judgments were protected by discretionary function exemptions and contributed to the disastrous outcome at Waco.

The second of the three I just mentioned, the decision by the FBI to abandon conciliatory negotiations, has been of particular interest to me. After the 1995 House of Representatives hearings on Waco, Attorney General Janet Reno mandated that the FBI overhaul the HRT to improve internal communications and give negotiators more voice and power in future hostage-barricade incidents. Following the debacle at Mount Carmel, negotiators complained that they were ignored and undercut by the tactical unit, making the negotiations ineffective (which was then used as a rationale for the insertion of CS gas). The FBI was told by Attorney General Reno to develop an advisory group of experts on unconventional religious movements whom they could consult in similar incidents should they arise in the future. I was asked to serve on the advisory group of experts to the renamed Critical Incident Response Group (CIRG). One of the first things I sought to determine was the soundness of existing hostage-barricade protocols. Did the feds do their homework, incorporating grounded theory and research in psychology, sociology and communications to develop crisis negotiations? To my surprise, I learned that the materials were well-grounded in scientific research. They were excellent. The only problem was that they were entirely ignored in the Waco standoff. In the 1999 summer issue of the international journal, *Terrorism and Political Violence*, I published an extensive analysis of the FBI's crisis negotiations during the 51-day standoff.[7] Using materials culled from the FBI's own curriculum to teach law enforcement agents from all over the world how to conduct hostage-barricade incidents, I identified sixteen violations at Mount Carmel. Space does not permit a full examination of these violations here, but let me mention one.

A key principle in crisis negotiation is reducing the stress of the hostage-taker or the barricaded subjects. According to a crisis negotiation manual authored by two veteran negotiators, "one task of the negotiator is to reduce stress.... If the negotiators want themselves or the hostage-taker to come up with new ideas, they need to reduce stress levels as much as possible."[8] "[H]igh levels of stress interfere with negotiators' performance.... Stress affects the hostage-taker's decision-making skills. Stress elevates emotions, speeds physiological processes and interferes with cognitive processing. The ability to make decisions is hindered or even ceases."[9] If the negotiator is effective, stress levels will dissipate and provide an atmosphere conducive to a peaceful resolution: "With time, the negotiator can reduce stress, calm the hostage-taker, improve decision-making skills and fulfill most need states. The hostage-taker feels better and works to resolve the incident."[10]

So what did the FBI do? The HRT's response plan at Mount Carmel Center after 17 March 1993 was referred to as a "stress escalation" program in the Justice Department log.[11] By stress escalation, the plan refers to the intensification of physiological and psychological pressures. "The constant stress overload," according to Dr. Alan Stone who was asked to review the actions of the FBI at Waco, "is intended to lead to sleep deprivation and psychological disorientation. In predisposed individuals, the combination of physiological disruption and psychological stress can also lead to mood disturbances, transient hallucinations and paranoid ideation."[12] The stress escalation strategy also entailed the alternation of conciliatory and hostile gestures to confuse the target (carrot and stick approach sending mixed messages), the deployment of high-powered stadium lights at night, combined with amplification of recorded sounds of rabbits being slaughtered, dentist drills, and chanting. Stone reports that the recorded sounds deployed exceeded 105 decibels which could produce nerve deafness in children as well as adults. The use of debilitating light and sound were deployed as psychological irritants to induce sleep deprivation.

Dr. Robert Cancro, another expert asked to review the FBI's actions at Mount Carmel Center, was confounded by this approach. He stated: "From a behavioral science perspective it is not clear what benefits were expected from imposing sleep deprivation on the members of the compound. If anything, this was likely to make their behavior more erratic and less predictable."[13] Nonetheless, the Justice Department report states that around this same time, Special Agent in Charge Jeffrey Jamar decided it was time to increase the pressure on the Davidians. Stone notes that "[b]y March 21, the FBI was concentrating on tactical pressure alone."[14]

The psychological warfare program also utilized the threat of force—using tanks to demolish the children's toys (bicycles and motor bikes), crushing automobiles, driving Combat Engineering Vehicles (CEVs) over the graves of Davidians buried outside the complex, and encircling the building with tanks and helicopters to "tighten the noose," as the Justice Department report documents.

This is the most obvious and defiant breach of fundamental hostage and barricade protocol evidenced by the government. It is virtually impossible to reconcile a *stress escalation* strategy with the principle of *stress reduction.* No amount of government spin can erase the inexplicable and inexcusable contradiction. The only rationale offered for the stress escalation plan was that it would "drive a (psychological) wedge between Koresh and his followers,"[15] in the apparent hope that group fragmentation would occur. Tragically, the strategy produced the opposite effect, bonding members together against a perceived common enemy, a basic sociological axiom. All sixteen violations were of this nature. Bad judgments? I conclude that the violations were too systematic and uniform to be accidental. In any case, the jury never got to hear any of this evidence.

On another front, Judge Smith restricted presentation of evidence to the 51 days between the initial BATF raid on 28 February 1993 and the final conflagration on 19 April 1993. Why was this exclusion of evidence important? Since the jury was being asked to determine whether the BATF agents used excessive force in the execution of the warrants, it stands to reason that facts and events leading up to the raid were crucial to a complete understanding of the excessive force issue. The use of a high risk "dynamic entry" is brought into relief when one considers that the BATF agents had less lethal and far less dangerous options that they did not exercise. Indeed, the whole BATF plan of operation was castigated by the Treasury Department report and Congressional investigations into Waco. Consider the summary conclusions in the final joint report by the House Committee on Government Reform and Oversight and the Committee on the Judiciary regarding the BATF raid on Mount Carmel Center:

1. The ATF's investigation of the Branch Davidians was grossly incompetent. It lacked the minimum professionalism of a major Federal law enforcement agency.

2. While the ATF had probable cause to obtain the arrest warrant for David Koresh and the search warrant for the Branch Davidian residence, the affidavit filed in support of the warrants contained an incredible number of false statements. The ATF agents responsible for preparing the affidavits knew or should have known that many of the statements were false.

3. David Koresh could have been arrested outside the Davidian compound. The ATF chose not to arrest Koresh outside the Davidian residence and instead were determined to use a dynamic entry approach. In making this decision ATF agents exercised extremely poor judgment, made erroneous assumptions, and ignored the foreseeable perils of their course of action.

4. ATF agents misrepresented to Defense Department officials that the Branch Davidians were involved in illegal drug manufacturing. As a result of this deception, the ATF was able to obtain some training from (military) forces which would not have otherwise provided it....

5. The decision to pursue a military style raid was made more than 2 months before surveillance, undercover, and infiltration efforts were (even) begun. The ATF undercover and surveillance operation lacked the minimum professionalism expected of a Federal law enforcement agency. Supervisors failed to properly monitor this operation.

6. The ATF's raid plan for February 28 was significantly flawed. *The plan was poorly conceived, utilized a high risk tactical approach when other tactics could have been successfully used,* was drafted and commanded by ATF agents who were less qualified than other available agents, and

used agents who were not sufficiently trained for the operation. Additionally, ATF commanders did not take precautions to ensure that the plan would not be discovered.

7. The senior raid commanders, Phillip Chojnacki and Chuck Sarabyn, either knew or should have known that the Davidians had become aware of the impending raid and were likely to resist with deadly force. Nevertheless, they recklessly proceeded with the raid, thereby endangering the lives of the ATF agents under their command and the lives of those residing in the compound. *This, more than any other factor, led to the deaths of the four ATF agents killed on February 28.*[16]

The jury never heard the findings of the official report because they fell outside the time-frame that Judge Smith permitted the jury to consider.

Finally, Judge Smith revealed a pattern of bias against the Davidians and their attorneys in a number of procedural decisions. For example, the interrogatories given to the jury were so narrowly structured that one could have found substantial fault with the government but answered in the negative to the interrogatories. In the first interrogatory, the jurors were asked to decide if excessive force was used. But jurors were only allowed to consider the question in terms of whether agents fired: 1) indiscriminately into the complex, and 2) without provocation. The question, as worded, clearly ignores Texas state law that says excessive force may exist in the form of a *threat* even before a shot is fired. The applicable law, which I cite below in its entirety, allows for a citizen to resist forcibly an arrest or search if, before any resistance is offered, he or she reasonably believes a peace officer is using or attempting to use greater force than necessary. I will return to this argument momentarily. Smith also lumped all Davidians into a single group, not allowing the jury to consider that some sect members, such as the children, were innocent victims of aggressive government actions. This lumping together was done despite the fact that during *voir dire* (jury selection), Smith specifically asked potential jurors if they could consider each of the plaintiffs *individually*. Plaintiffs' attorneys were led to believe that the judge would give the jury this charge in their deliberations. The Davidian attorneys built their case on this presumption. When Smith reneged, Michael Caddell, the plaintiffs' lead counsel, was outraged and publicly accused the judge of trying to "engineer a verdict." In an 18-page motion filed after the trial, Caddell alleged that Judge Smith showed a "deep seated prejudice" towards his clients.[17] In one instance, the motion stated that Smith referred to one videotaped defense witness, Livingstone Fagan, as a "lying, murdering son of a bitch." Elsewhere in the motion, it stated that Smith referred to plaintiffs' transcripts of government surveillance recordings as "bullcrap," even though it was later shown that their transcripts were more accurate than those submitted by government lawyers. The motion also stated that the judge admitted

that he had not read some evidence introduced by the Davidians. In one other instance, Mr. Caddell's motion said the judge acted improperly by shaking the hand of a government lawyer during a recess and congratulating him for "a good job" after a grueling cross-examination of a Davidian, Clive Doyle.

To give this last point its full meaning and context, let me say that I observed the cross-examination referred to in Caddell's motion. James Touhey, the government attorney, viciously attacked Doyle's religion, ridiculed his belief that Koresh was a prophet, and portrayed the Davidian survivor as a derelict father and duped cultist. It was a surreal episode, reminiscent of the Salem witch trials. That Judge Smith took the unusual effort to seek out and congratulate Mr. Touhey after this degradation ritual speaks volumes to the question of impartiality. I also noted that Smith barked and snapped at plaintiffs' co-counsels, Ramsey Clark and James Brannon, evidencing notable contempt and sending not-too-subtle messages to the jury.

In the end, justice was not served in Smith's court. The finding that excessive force was not used in the initial BATF raid is particularly troubling. If Waco does not rise to the standard of excessive force, one could reasonably conclude the standard is a legal fiction. But Texas state law clearly defines excessive force and the rights of citizens to protect themselves under these circumstances. The *Texas Penal Code*, in Subchapter C, "Protection of Persons," section 9.31, states:

> The use of force to resist an arrest or search is justified: (1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and (2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

Did the Davidians exercise reasonable belief that BATF agents in the raid, before any resistance was offered, used or attempted "to use greater force than necessary"? Specifically, could a paramilitary assault by eighty armed agents in camouflage and full combat gear, including Kevlar helmets and flak jackets, wielding MP-5 submachine guns, semiautomatic AR-15s, Sig Sauer 9MM semiautomatic pistols, .308-caliber high power sniper rifles, shotguns, and concussion grenades, rushing a residence housing infants, children, pregnant women and elderly persons, with only an arrest and search warrant for a single individual, be grounds for a reasonable belief that the agents were attempting to use greater force than necessary? If allowed to consider all the evidence, what jury would exonerate federal agents of any culpability under Texas state law?

In the 1994 criminal trial of eleven Branch Davidians, Judge Walter Smith Jr. declared that he would "not allow the government to be put on trial."[18] Judging from the proceedings of the recent civil trial, he still hasn't. In September 2000, Davidian attorneys Michael Caddell and Ramsey Clark announced plans to appeal the verdict in the civil case. Based on the earlier motion filed by Caddell, it would appear that attorneys will attempt to convince an appeals court of an appearance of bias or impropriety by the trial judge. The case will now go to the United States 5th Circuit Court of Appeals.

ENDNOTES

[1] 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, 1996).

[2] See Stuart A. Wright, ed., *Armageddon in Waco: Critical Perspectives on the Branch Davidian Conflict* (Chicago: University of Chicago, 1995); James D. Tabor and Eugene V. Gallagher, *Why Waco? Cults and the Battle for Religious Freedom in America* (Berkeley: University of California Press, 1995); Dick J. Reavis, *The Ashes of Waco: An Investigation* (New York: Simon & Schuster, 1995); Catherine Wessinger, *How the Millennium Comes Violently: From Jonestown to Heaven's Gate* (New York: Seven Bridges Press, 2000); John R. Hall with Philip D. Schuyler and Sylvaine Trinh, *Apocalypse Observed: Religious Movements and Violence in North America, Europe and Japan* (New Brunswick: Rutgers University, 2000).

[3] See Alan W. Bock, *Ambush at Ruby Ridge* (Irvine, CA: Dickens Press, 1995); Jess Walter, *Every Knee Shall Bow* (New York: Harper/Regan Books, 1995).

[4] On appeal, the United States 9th Circuit Court *en banc* has agreed to hear the arguments for this government motion.

[5] Susan Gamboa, "Immunity Helped Turn Waco Trial," Associated Press, 15 July 2000.

[6] Christopher Simpson, *Science of Coercion: Communication Research and Psychological Warfare 1945-1960* (New York: Oxford University, 1994), 12.

[7] Stuart A. Wright, "Anatomy of a Government Massacre: Abuses of Hostage-Barricade Protocols during the Waco Standoff," *Terrorism and Political Violence* 11 (1999): 39-68.

[8] Michael J. McMains and Wayman C. Mullins, *Crisis Negotiations: Managing Critical Incidents and Hostage Situations in Law Enforcement and Corrections* (Cincinnati: Anderson, 1996), 125.

[9] McMains and Mullins, *Crisis Negotiations*, 129.

[10] McMains and Mullins, *Crisis Negotiations*, 129.

[11] U.S. Department of Justice, *Report to the Deputy Attorney General on the Events at Waco, Texas: February 28 to April 19, 1993.* Redacted version, October 8 (Washington, D.C.: U.S. Government Printing Office, 1993), 138.

[12] Alan A. Stone, "Report and Recommendations Concerning the Handling of Incidents Such as the Branch Davidian Standoff in Waco, Texas, November 8, 1994," in *Report to the Deputy Attorney General*, 28.

[13] Robert Cancro, "Letter to Deputy Attorney General Philip B. Heymann," in U.S. Department of Justice, *Recommendations of Experts for Improvement in Federal Law Enforcement after Waco* (Washington, D.C.: U.S. Government Printing Office, 1993), 4.

[14] Stone, "Report," 10.

[15] U.S. Department of Justice, *Report to the Deputy Attorney General*, 129

[16] House of Representatives, *Investigation*, 3, emphasis added.

[17] Lee Hancock, "Davidians' Attorney Vents Anger at Judge," *Dallas Morning News*, 13 September 2000.

[18] Quoted in David B. Kopel and Paul H. Blackman, *No More Wacos: What's Wrong with Federal Law Enforcement and How to Fix It* (Amherst, NY: Prometheus, 1997), 238.

"Showtime" in Texas: Social Production of the Branch Davidian Trials

James T. Richardson

ABSTRACT: This article analyzes the two major legal trials involving surviving members of the Branch Davidian sect that was involved in the fiery conflagration outside of Waco, Texas, in 1993. The criminal trial, which took place in 1994, and the wrongful death civil trial against the federal government, which occurred in 2000, are analyzed from the perspectives of the sociology of law and deviance theory. The analysis presumes that both trials were *social productions* designed to present a certain definition of the situation and the parties involved in that situation. Using the analogy of the trials as socially produced dramas, this article describes the ways that *discretion* operated within a judicial system acting in a normative role, with special attention paid to the role of the judge in both cases.

The two major trials involving the Branch Davidians have attracted considerable attention in the United States and elsewhere. Much has been written in the popular media about both the initial criminal trial of surviving Davidians in 1994 and the more recent wrongful death civil action in 2000 in which the federal government was defendant. My analysis here treats the trials as *social productions* designed to promote a certain definition of the situation involving the Davidians. That definitional effort involved *stigmatization* and even *degradation,* as efforts were made by some key figures associated with the trials to present the Branch Davidians as extreme deviants, fully culpable for the tragedy that occurred in 1993.

My approach is informed by the seminal work of Erving Goffman, whose dramaturgical approach, while often focused on individual behavior, has broad implications for institutional actions as well.[1] Goffman's discussions of "performances" and "impression management," although not applied directly to legal settings by him, can offer insights