Waco Redux: Trial and Error

by Stuart A. Wright

During the week of June 25, I attended the civil trial in Waco of the wrongful death lawsuit brought against the federal government by survivors and relatives of the Branch Davidians. I had been looking forward to the trial with anticipation—and some amazement—since for many years it looked like it would never come about.

The 1994 criminal prosecution had been disastrous for the embattled sect even though a San Antonio jury acquitted all defendants of murder and conspiracy to murder. The jury did find five Davidians guilty of the lesser charges of aiding and abetting the voluntary manslaughter of a federal officer. And, confused by Judge Walter Smith's instructions, the jurors convicted on a weapons count under the assumption that it was tied to the manslaughter charge—whereas it was tied *only* to the murder charge. Faced with this inconsistent verdict, the judge set aside the verdict, but then, at the behest of the federal prosecutors, changed his mind and reinstated the convictions.

Prosecutors argued that perhaps the jury was split—half wanted a murder conviction and half wanted a complete acquittal—hence, a "compromise." Smith didn't bother asking the jurors their intent. (They later filed sworn statements indicating that the inconsistencies were due to confusion surrounding the judge's instructions, not a compromise.) Ruling that the weapons used in the commission of the crime were machine guns, he sentenced five to the 40-year maximum allowed by federal sentencing guidelines, while three others received lesser terms. A unanimous Supreme Court later reversed these sentence enhancements, finding that the type of firearm used should have been determined by a jury during presentation of evidence.

Given his rulings in the criminal case, it seemed very likely that Smith would dismiss the civil charges and let the government off the hook. But in August 1999, investigators for plaintiffs' attorneys discovered pyrotechnic devices in the evidence storage room in Austin. The FBI had denied for six years that its agents used pyrotechnic devices that might have caused the fatal conflagration during its "insertion" of CS gas on April 19. The FBI also failed to turn over audio tapes and other documentation of pyrotechnic rounds—which to some indicated a cover-up. The Attorney General, angry about the misrepresentations and concealment of evidence, appointed a special counsel, former Missouri senator John Danforth, to open a new investigation. Pressured by the new discoveries, Judge Smith allowed the Davidian lawsuit to go forward, much to the chagrin of the Justice Department.

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So, seven years after the worst debacle in federal law enforcement history, here we were back in Judge Smith's courtroom to hear the case. As I looked around, I recognized several news reporters. Jennifer Autry, whom I had spoken with a few days earlier in an interview, was there for the *Ft. Worth Star-Telegram*. Lee Hancock, who broke the story on the discovery of the pyrotechnic devices, was covering the story for the *Dallas Morning News*. Dick Reavis, author of *Ashes of Waco*, was representing the *San Antonio Express*. Mark England and Tommy Witherspoon were both on hand for the *Waco Tribune-Herald*. Robert Bryce, whom I didn't know before but befriended during my stay in Waco, was covering the story for the *Austin Chronicle*, an alternative weekly, as well as for the on-line magazine *Salon*. Terry Ganey of the *St. Louis Post-Dispatch* sat quietly in the back of the courtroom each day. Not present, at least in terms of daily coverage, were two major news organizations in the state, the *Austin American-Statesman* and the *Houston Chronicle*. As for the national news organizations—the *New York Times*, *Washington Post*, *USA Today*, *Time*, *Newsweek*, TV network news, etc.—they were conspicuous by their absence.

My principal objective in attending the trial was to continue gathering data for what now had turned into a seven-year study of the Branch Davidian standoff. I was also curious to compare notes with news reporters, weighing the relative importance of testimony, evidence, and argument. As a sociologist I wondered if our evaluations or assessments would be similar. How much background or history of the incident would journalists understand? Would they be able to grasp the politics of the case? Would they ask the right questions? Who would have the best coverage? These were significant issues, since the media "narratives" would help frame the attitudes and perceptions of the public as much, perhaps, as the verdict.

Most items of interest to the public were conveyed reasonably well by reporters. In the first days of the trial, plaintiffs' attorney Michael Caddell

showed video images of the children who died at Mt. Carmel. The testimony of surviving children, who described the horrors of lying low on the floor, bullets flying overhead, and glass shattering, was widely reported. Lawyers for the Davidians also revealed videotaped depositions of FBI officials, such as Deputy Assistant FBI Director Danny Coulson and FBI Director William Sessions, who said the destruction of Mt. Carmel during the insertion of CS gas was not in the plans. One of the most shocking news stories concerned the first public airing of a 1993 videotaped deposition of Attorney General Reno telling investigators that senior FBI officials told her to "butt out" after she agreed to the CS plan.

A central issue concerned ATF claims that its agents did not expect a violent response to the initial raid and were "ambushed" by the Davidians. After testifying that he and other agents only expected a "fistfight," ATF agent Gerald Petrilli admitted under cross examination that they learned to treat "sucking chest wounds," administer intravenous lines, give shock treatment and other emergency medical care in the field during two days of training at Ft. Hood in preparation for the raid. Agents also had their blood types stenciled on their necks, were adorned in camouflage and full military combat gear (including Kevlar helmets and flak jackets), and carried MP-5 submachine guns, semi-automatic AR-15s, Sig Sauer 9 MM semi-automatic pistols, high-power sniper rifles, and concussion grenades. The government countered by detailing the sect's extensive arsenal, including illegally converted machine guns and AK-47 assault rifles. Government attorneys also called on ATF agents injured or fired upon by Davidians who claimed they were "outgunned" at Mt. Carmel. News stories gave a good account of the back and forth.

But reporters paid insufficient attention to critical rulings by Judge Smith that narrowed the evidence presented at trial and rendered the final result all but inevitable. For starters, the judge granted "discretionary function" exemptions to federal officials, essentially giving them immunity for having made bad decisions in choosing the actions to take against the Davidians. The intent of the discretionary function exemption is to protect law enforcement agents from being second-guessed in situations requiring urgent and spontaneous decisions in the course of their duties. But it's up to the court to decide how broadly or narrowly to interpret it. Judge Smith chose a very broad interpretation. No evidence could be offered concerning the FBI's decision to abandon conciliatory negotiations early in the standoff in favor of "psychological warfare," a counter-terrorism program developed by military special forces. Nor could a challenge be mounted to the decision to insert massive amounts of CS gas, a chemical weapon banned internationally for use even in wartime.

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In addition, the judge restricted the scope of evidence to the 51 days between the initial ATF entry on February 28 and the final conflagration on April 19, 1993. The jury never got to hear evidence about the faulty raid plan, which a joint report by the House Committee on Government Reform and Oversight and the Senate Judiciary Committee called "grossly incompetent" and concluded was largely responsible for the deaths of the four ATF agents. The jury never learned that the ATF misrepresented to Department of Defense officials that the Davidians were involved in illegal drug manufacturing in order to obtain military assistance and equipment. The jury was not privy to information regarding the ATF's planning of a high-risk "dynamic entry" two months before surveillance, undercover, and infiltration operations were even begun. It did not hear that the ATF ignored opportunities to serve the warrants on Koresh alone—which would have avoided the unnecessary endangerment of 130 other residents at Mt. Carmel who were not named in the warrants. And no evidence was presented regarding the decision by ATF commanders to proceed with the military-style raid even after the element of surprise was lost.

Judge Smith also narrowed the interrogatories posed to the jury so severely that jurors could have answered "no" to the specific questions but still have believed that the government had some culpability in the case. For example, the jurors were asked to decide if excessive force was used only in regard to whether agents fired 1) indiscriminately into the complex and 2) without provocation. 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. This so upset the plaintiffs' lead attorney, Michael Caddell, that he publicly accused the judge of trying to "engineer a verdict" in an interview with reporters before jury deliberations were completed. Judge Smith was livid and castigated Caddell at length for his remarks to the press. By the end of the trial, the Davidian attorneys were resigned to defeat.

To their credit, Bryce of the *Austin Chronicle* and the *Morning News*' Hancock both raised hard questions about the effects the evidentiary rulings had on the outcome of the trial. In an August 18 article, Bryce pointed out that the Davidians were not allowed to present evidence regarding "proof that the Bureau of Alcohol, Tobacco and Firearms lied about their actions at Waco or covered up evidence," the "type and extent of training given to ATF by Army Special Forces at Fort Hood," or the "FBI's failure to follow its

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own hostage-negotiation guidelines during the 51-day standoff." Bryce also quoted Davidian survivor David Thibodeau saying, "The biggest outrage is, we had experts from everywhere, and Judge Smith wouldn't let us put them on." For her part, Hancock gave comprehensive coverage to complaints about the judge by plaintiffs' attorneys. In a July 14 story, she cited Michael Caddell's charge that the judge was issuing jury instructions designed to favor the government. She noted that during the jury selection process, Smith told prospective jurors: "You can't treat all of the plaintiffs as one single group." Yet when the judge gave instructions to the jury before deliberations, he lumped all the plaintiffs together.

The AP's Susan Gamboa likewise deserves mention for a report focusing on the evidentiary rulings in a July 15 story quoting Department of Justice spokesman Thom Mrozek 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."

Beyond the rulings themselves, the press largely ignored the tension between the federal judge and the plaintiffs' attorneys. It was clear to me from the outset that the Davidian attorneys had to argue their case before a judge who was ill at ease with this lawsuit against the government. The appointment of an advisory jury might have lessened the judge's discomfort somewhat. But I was struck early on by the judge's reproachful disposition toward the plaintiffs' attorneys, particularly Ramsey Clark and James Brannon. Smith barked and snapped at the two several times during the trial, sending not-too-subtle messages to the jury. I found this display of behavior in a court of law deeply disturbing. (Social psychologists have demonstrated that people tend to rely on "paramessages"—verbal and nonverbal cues that shape their assessments, especially when conveyed by a respected authority figure.) Bryce was one of the few reporters to address this tension, writing in an August 18 story that "while the Davidians had plenty of faith in God, they had no faith in Judge Smith. Indeed, the Judge's enmity toward the Davidians is long and deep."

Given the choreography of the trial—the "discretionary function" exemption granted the government, the restriction of evidence to the 51 days, the narrowing of the interrogatories, the lumping together of all plaintiffs, and the paramessages—the verdict exonerating the government was hardly surprising.

In mid-September, approximately two months after the verdict, Michael Caddell filed an 18-page motion alleging that Judge Smith had showed a "profound" and "deep-seated prejudice" in the trial. The motion alleged that Smith exhibited personal animosity and hostility toward the plaintiffs, their attorneys, and witnesses. During one bench conference, Caddell claimed, Smith referred to a videotaped witness, Livingstone Fagan, as "a lying, murdering son of a bitch." Smith even offered to exclude Fagan's testimony, though the government made no such motion.

In another instance, Smith told plaintiffs' attorneys that their transcripts of surveillance recordings were "bullcrap," even though they were later shown to be more accurate than the government's. Caddell's motion also said that the judge acted improperly in congratulating a government attorney after a grueling and inquisition-like cross-examination of Davidian survivor, Clive Doyle, which seemed to put the group's religion itself on trial. Caddell also charged that government personnel gave gifts to Smith's staff after the trial: T-shirts labeled "WWPD?" (i.e., What Would the Police Do?—a play on the popular evangelical phrase, "What Would Jesus Do?"). "It was clear soon after the trial commenced," Caddell wrote, "that Judge Smith had made up his mind and he could have written his opinion then."

There were only a handful of news reports covering Caddell's motion, among them a brief and superficial AP story and an only slightly more adequate account by Ganey of the *Post-Dispatch*. Tommy Witherspoon of the *Waco Tribune-Herald* did file an excellent report, but Hancock did the best job, detailing the problematic history of Smith's role in the 1994 criminal trial and revisiting the tensions arising between Smith and plaintiffs' attorneys—including a statement from Caddell that the fight had become "personal." Hancock also incorporated the opinions of legal experts on the intent and possible success of the motion. Northwestern University law professor and judicial ethics expert Steven Lubet observed that the motion appeared to be aimed at convincing an appeals court of an "accumulation of error" or appearance of bias by the trial judge. University of Louisville law professor Leslie Abrahamson noted that a key issue for the appeals court might be the appearance of propriety or "whether a judge's impartiality might be reasonably questioned." Both legal experts opined that such arguments would be difficult to win.

In the end, the significance of the plaintiffs' motion was missed entirely by most news organizations because they failed to look at evidentiary rulings, procedural decisions such as the "results-oriented" jury instructions, and the apparent contempt for the Davidians by the trial judge.

Perhaps the only thing more disconcerting than the ignored subtext of Judge Smith's thinly veiled scorn toward the plaintiffs was the lack of coverage of the trial by the major national news outlets. Outside of Texas, the mainstream media decided that the country didn't want to revisit the painful memory of Waco. In tandem with Special Counsel Danforth, they determined that this unfortunate episode should be put behind us—and permitted a biased judge to sweep legitimate grievances under the rug. As a result, the country in all likelihood missed its last opportunity to correct an agonizing injustice and heal a national wound.