
Chapter 6

A Critical Analysis of Evidentiary and Procedural Rulings in Branch Davidian Civil Case¹

Stuart A. Wright

On 14 July 2000, a jury in the Branch Davidian wrongful death lawsuit returned a verdict finding no fault with federal agents in the disastrous siege and standoff at Mt. Carmel in 1993. The federal actions precipitated the deaths of eighty sect members. Government attorneys praised the verdict, saying it was a vindication of federal law enforcement. Lead co-counsel for the government, U.S. Attorney Michael Bradford, boasted after the verdict: "What this shows is that the responsibility for the tragedy that happened at Waco is with David Koresh and the Branch Davidians." He added, "It's time to put this to rest and move on." But few scholars and observers think this verdict will put the Waco incident to rest. There are far too many lingering and disturbing questions about the civil trial.

The most troubling aspect of the trial is the discretionary authority exercised by Judge Walter Smith in limiting evidence and crafting procedural rulings that handcuffed plaintiffs' attorneys. Indeed, Davidian attorneys waged an unsuccessful battle to have Judge Smith removed from the case for over a year prior to the trial. Based on Smith's rulings in the earlier criminal trial of Davidians in 1994, the plaintiffs believed they could not receive a fair hearing in Judge Smith's court. Perhaps in response to the expressed concern, Smith empanelled an "advisory" jury in Waco, even though federal civil trials do not require a jury and the court is not bound by its verdict. Some observers suggested that by appointing an advisory jury, Smith was attempting to deflect criticism of bias

arising from problems surrounding the earlier criminal trial. These concerns and criticisms appear to have some validity.

The criminal trial of eleven Branch Davidians in San Antonio in 1994 was fraught with controversy. Judge Smith took the unusual step of issuing to the initial jury pool an 80-item questionnaire to screen potential jurors.² Some of the questions appeared to be entirely inappropriate.³ For example, there were ten items on religion, including questions on frequency of church attendance, degree of religiosity, extent of organizational participation, and formal religious training. One item even asked if the respondent had ever belonged to a "non-traditional" religious group. There were also eleven items on gun ownership. Here, one item asked if the respondent had ever belonged to the National Rifle Association, and another asked if the respondent had ever attended a gun show. The questionnaire was used to eliminate 216 jurors, leaving the attorneys with a group of 84 screened individuals from which to choose. Smith also suppressed efforts by defense attorneys to introduce self-defense evidence. Despite these obstacles, the jury acquitted all defendants of the more serious charges of murder and conspiracy to murder. Five defendants were convicted on the lesser charge of aiding and abetting manslaughter of a federal officer. Confounded by Judge Smith's instructions, however, the jury also convicted on a weapons count, assuming it was tied to the manslaughter charge. Technically, the charge of carrying a firearm during the course of a crime was tied only to the murder charge. Faced with the inconsistent verdict, the judge set aside the verdict, but then, at the behest of the prosecutors, changed his mind and reinstated the convictions. Prosecutors successfully argued that perhaps the jury was split, some wanting a murder conviction and some wanting an acquittal. Smith failed to ask the jurors their intent (jurors later filed sworn statements to the effect that the confusion arose from the instructions, not a split decision). The judge ruled that the weapons used in the commission of a crime were machine guns, and he sentenced the five Davidians to forty years each, the maximum allowed by federal sentencing guidelines. On appeal, the U.S. Supreme Court unanimously reversed Smith on the sentence enhancements, finding that the district court improperly decided during sentencing that the firearms used were machine guns. According to the court's ruling, the type of firearm used should have been determined by presentation of evidence during the trial.

Another indication of Smith's prejudice appears in the sentence findings and opinion in the criminal trial. Incredibly, Smith referred to the deaths of the federal agents as "homicide," and boldly asserted that the Davidians "engaged in a conspiracy to cause the deaths of federal agents."⁴ Smith's written opinion blatantly ignored the verdict, riding roughshod over the findings of the jury that acquitted all the defendants of murder and conspiracy to murder.

Given the history of Smith's rulings in the criminal case, it was hardly surprising that Davidian attorneys sought to have the judge removed from the civil proceeding. Actually, up until August 1999, it seemed likely that the civil lawsuit would be dismissed altogether. But things changed dramatically in early

August when it was revealed that the FBI had lied about discharging pyrotechnic devices in the CS gas assault on the Davidian settlement that might have caused the conflagration. After six years of official denials about using pyrotechnic or "military" rounds, investigators for plaintiffs' attorneys discovered the devices in the evidence storage room in Austin. It was later learned that the FBI also failed to turn over audiotapes and written documentation that would have revealed the use of pyrotechnic rounds. The mishandling or concealment of evidence and the false statements made by government officials suggested a cover-up. Pressured by government missteps and the new evidence, Judge Smith was compelled to allow the Davidian lawsuit to go forward.

This promising development, however, did not mean that Davidian survivors and their kin would get a fair trial. As an observer in the courtroom during the civil trial and one who has studied the Branch Davidian tragedy for seven years,⁵ I want to address some of the problems surrounding the proceedings that I believe contributed to a flawed verdict. Specifically, I contend that the federal trial in Waco failed to deliver a just verdict because evidentiary and procedural rulings handicapped the plaintiffs and prevented the jury from hearing all the evidence.

KEY EVIDENTIARY AND PROCEDURAL RULINGS

To begin with, Judge Smith granted a "discretionary function" exemption to federal officials granting 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, of course, was made by the government in the Randy Weaver case when FBI sniper Lon Horiuchi shot and killed Weaver's wife, Vicki, during a standoff which occurred less than six months before the Waco incident.⁶ Horiuchi was part of the FBI's Hostage Rescue Team (HRT), the same unit that was in charge of the standoff at Waco. 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. The debris from the gunshot showered her children with blood and bits of skull. 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 U.S. 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."⁷

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 wire service report on 15 July, 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."⁸ Was this evidentiary ruling critical to the case? Did it create an uneven playing field, giving the advantage to the government? It appears that it did.

There were at least three "bad judgments" that were excluded from jury consideration. The first was the decision by ATF 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 Mt. 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 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.⁹ The third was the decision to assault the complex with CS gas—a chemical weapon that 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 "bad judgments" just mentioned (FBI decision to abandon conciliatory negotiations) is of particular interest. After the 1995 U.S. House of Representatives hearings on Waco, Congress mandated that the FBI overhaul the HRT to improve internal communication and give negotiators more voice and power in future hostage-barricade incidents. Following the debacle at Mt. 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 CS insertion). The FBI was told by Congress 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, available 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 of Terrorism and Political Violence*, I published an extensive analysis of the FBI's crisis negotiations during the 51-day standoff.¹⁰ 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, sixteen violations at Mt. Carmel were identified. Space does not permit a full examination of these violations. Instead, the focus below concerns just one.

A key principle in crisis negotiations is reducing the stress of the hostage-taker or the barricaded subjects. According to a crisis negotiations 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."¹¹ "(H)igh levels of stress interfere with negotiators performance. . . . Stress affects the hostage-taker's decisionmaking skills. Stress elevates emotions, speeds physiological processes and interferes with cognitive processing. The ability to make decisions is hindered or even ceases."¹² 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."¹³

So what did the FBI do? The HRT's response plan in Waco after March 17 was referred to as a "stress escalation" program in the Department of Justice log.¹⁴ 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."¹⁵ 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 beings slaughtered, dentist drills, and chanting. Stone reports that the recorded sounds deployed exceeded 105 decibels that 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 Waco, 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."¹⁶ Nonetheless, the

Justice report states that around this same time, special agent in charge, Jeff Jamar, decided that it was time to increase the pressure. Stone notes that "By March 21, the FBI was concentrating on tactical pressure alone."¹⁷

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 CEVs over the graves of buried Davidians outside the complex, and encircling the buildings with tanks and helicopters to "tighten the noose" as the Justice 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 for the stress escalation plan was that it would result in "driving a psychological wedge between Koresh and his followers," 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? More likely, it would seem, the violations were too systematic and uniform to be accidental. In any case, the jury never got to hear any of this evidence.

Judge Smith also restricted presentation of evidence to the fifty-one days between the initial ATF raid on 28 February and the final conflagration on 19 April. Why was this important? Since the jury was being asked to determine whether the ATF 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 ATF had less lethal and far less dangerous options that it did not exercise. Indeed, the whole plan of operation by the ATF was castigated by the Treasury Department report and Congressional investigations on 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 ATF raid on Mt. Carmel:

The ATF's investigation of the Branch Davidians was grossly incompetent. It lacked the minimum professionalism of a major Federal law enforcement agency. 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. 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 judgement, made erroneous assumptions, and ignored the foreseeable perils of their

course of action. ATF 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. . . .

The decision to pursue a military style raid was made more than 2 months before surveillance, undercover, and infiltrations 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. 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. 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.*¹⁸

The jury never heard the findings of the official report because it fell outside the time frame that Judge Smith would permit the jury to consider evidence.

Finally, Judge Smith revealed a pattern of bias against the Davidians and their attorneys in a number of bench decisions. For example, the interrogatories given to the jury were so specific and narrow 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, cited below in its entirety, allows for a citizen to forcibly resist 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. We 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 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 eighteen-page

motion filed after the trial, Caddell alleged that Smith showed a "deep seated prejudice" towards his clients.¹⁹ In one instance, the motion stated that Smith referred to one videotaped defense witness, Livingston 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 Davidian Clive Doyle. The government attorney conducting the cross-examination, Jim Touhey, viciously attacked and ridiculed Mr. Doyle's religion and belittled his belief that Koresh was a prophet. Mr. Touhey's performance invoked frightening images of the Medieval Inquisition and the Salem witch trials. The government's challenge to the legitimacy of Davidian theology was a broadside against constitutionally protected, albeit unconventional, religious belief. Perplexing was the fact that plaintiffs' attorneys failed to object to this line of questioning. When asked later why he did not raise objections during the cross, Michael Caddell responded that he thought the tactic would backfire and that the jury would see through it. It did not, and they did not.

As an observer, I noted that Smith barked and snapped at plaintiffs' co-counsel, Ramsey Clark and James Brannon, showing notable contempt and sending less-than-subtle messages to the jury. Smith lost patience with Clark on several occasions, evidently irritated by Clark's slow and methodical style of questioning witnesses. In one exchange, Smith's face turned bright red as he yelled at Clark, demanding that he quicken his pace and "get to the point." Smith interrupted both Clark and Brannon routinely, demanding explanations for questions posed to witnesses, challenging their competency and credibility with the jury. Overall, this left me with the impression that the irascible Judge Smith harbored considerable disdain for plaintiffs' attorneys.

In the end, justice was not served in Smith's court. The finding that excessive force was not used in the initial ATF 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. 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 ATF officers in the initial raid were "using or attempting 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, semi-automatic AR-15s, Sig Sauer 9MM semi-automatic 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 officers were using or attempting to use greater force than necessary? If allowed to hear all the evidence, what jury would completely exonerate federal agents of such charges?

In the 1994 criminal trial of eleven Branch Davidians, Judge Smith declared that he would "not allow the government to be put on trial."²⁰ Judging from the proceedings of the recent civil trial, he still will not. 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. Federal courts, however, are very reticent to overturn decisions based on the alleged bias of the trial judge. The case will now go to the U.S. 5th Circuit Court of Appeals in New Orleans, thought by many to be the most conservative in the country. In all likelihood, the Davidians will not find relief in the appellate proceedings, closing the final chapter of legal redress available to the surviving sect members and their families.

CONCLUSION

The annals of American law will show that the government prevailed in all its legal challenges. But one must ask, at what price? Historically, no religious sect has ever been more brutally victimized by the U.S. government. Scholars have already made comparisons to the Oglala Sioux at Wounded Knee.²¹ Waco is now a permanent part of our culture and serves as a symbol of raw state power and control. In the end, what was achieved in legal victory pales in comparison to what was lost in civility, confidence in public officials, and belief in our system of justice.