# I. THE TRAGEDY AT WACO:
# AN ANNIHILATION OF AUTONOMY

In early 1993 there was played out on the plains of Texas near Waco the gravest church-state confrontation since the federal vendetta against the Mormons in the second decade after the Civil War. It is chronicled here at some length because of its implications for the theme of this volume. In a rare prodigy of ostensible self-examination, two departments of the federal government issued lengthy reports to the public on the events and their part in them, complete with comments by "outsiders," some of them clients or former officials of the agencies under review. Not surprisingly, the reports—though critical of some tactics—found the purposes and strategies employed by the government to be entirely justifiable. Others—including four outside commentators recruited by the agencies from the ranks of human relations experts—were not as supportive of the federal actions. Their critiques are excerpted extensively because they cast a very different light on the governmental role.

The Waco tragedy was a kind of culmination of executive assaults on the autonomy of small, unconventional religious bodies chronicled earlier in this work: the California Attorney General's 1979 imposition of receivership on the Worldwide Church of God[1] and the FBI's 1977 raid on the headquarters of the Church of Scientology.[2] These overly aggressive assertions of executive authority were not confined to religious bodies, but have been inflicted on others as well.[3] But these excesses are particularly offensive when they impinge upon the collective free exercise of religion.

Few church-state encounters have been as tragic or as fully documented as this one. It provides an absorbing and edifying case study of how *not* to treat a high-energy, high-commitment new religious movement. Principal sources for what follows are the government reports themselves. Though not "law," they represent

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1. See § E1 above.

2. See § G7 above.

3. Foremost in this catalog is the shoot-out by federal agents with Randy Weaver in 1992 at Ruby Ridge in Idaho, in which a marshal and Weaver's wife and son were killed; Weaver was acquitted on the basis that he acted in self-defense (*N.Y. Times*, July 9, 1993, p. 1). See also Pate, James L., "No Longer Untouchable," *The American Spectator*, Aug. 1993, p. 35, for a catalog of several such instances. See also article by Gideon Kanner in *Wall St. J.*, Aug. 25, 1993, relating a similar event in California. A somewhat more restrained approach was employed by the FBI in coping with a group calling itself "Freemen" in Montana in 1996. These were instances in which religion did not seem to be the organizing theme as it was with the Branch Davidians at Waco.

official *apologias* (though not apologies) for what happened and are thus more weighty than private or press chronicles. Other important sources are the transcript of the criminal trial of nine survivors of the debacle, the decision of the Fifth Circuit Court of Appeals on the appeal of that trial's outcome and the report of a congressional investigation of the events.

### 1. "Report of the Treasury Department on the Investigation of Vernon Wayne Howell by the Bureau of Alcohol, Tobacco, and Firearms"

This 500-page report was prepared by a high-level task force, the Waco Administrative Review Team. The first page of the report was devoted to a black-bordered dedicatory panel bearing the words "In Memory of" and the names of the four agents of the Bureau of Alcohol, Tobacco and Firearms (ATF or BATF) who were killed in the assault on the religious community at Mt. Carmel near Waco, Texas. There was no black-bordered page bearing the names of the six members of the religious group killed in that assault.

Nine outside consultants on technical and tactical matters submitted comments that were appended to the report. There were no consultants with expertise on new religious movements, and the religious dimension of the tragedy was barely alluded to in the report. One of the few references focusing on the religious dimension was a footnote on the first page of the report. It read as follows:

> The Branch Davidian movement was started by a number of Seventh Day Adventists who believed strongly in the prophecies of the book of Revelation. David Koresh, then named Vernon Wayne Howell, took over leadership of the group in 1987. The Compound residents were extremely devoted to Koresh, and many apparently believed that he was the lamb of God.

**a. The Investigation**. The federal involvement began when "In late May 1992, Chief Deputy Sheriff Daniel Weyenberg of the McLennan County Sheriff's Department informed the Austin, Texas, ATF office that suspicious United Parcel Service deliveries had been received by certain persons residing at the Compound, known as Mount Carmel."[4] Inquiries were begun by Special Agent Davy Aguilera of the Austin ATF office. Aguilera used the UPS invoices of deliveries to Mt. Carmel to trace back to the suppliers the various purchases that had been made. Eventually he compiled a list of purchases totaling over $43,000. He prepared an affidavit listing the armaments he had traced to Mt. Carmel.

On February 25, 1993, after obtaining approval from his superiors, Aguilera signed a sworn affidavit detailing the evidence he had gathered substantiating the contention that illegal firearms were being collected, fashioned, stored and used at the Mt. Carmel premises, and on that date a federal magistrate issued an arrest warrant

4. Treasury Report, p. 17.

for Koresh for violating federal firearms laws and a warrant to search both the residence and a warehouse maintained by the group about two miles away (called the "Mag Bag") for evidence of that crime.

In January 1993, the ATF had established an "undercover house" near the residence, where agents were assigned to keep watch on it around the clock. One of the agents, Robert Rodriguez, began to visit the residence and eventually became acquainted with David Koresh, who invited him to join one of the daily Bible study sessions, which he did. Several days later, Koresh invited Rodriguez to join him in target practice. He did so, and discovered Koresh to be an excellent shot and very knowledgeable about firearms components, including "drop-in sears"—a device placed inside a semiautomatic weapon to convert it into a fully automatic machine gun. On one visit Koresh showed Rodriguez a videotape produced by Gun Owners of America portraying the Bureau of Alcohol, Tobacco, and Firearms as an evil threat to the liberties of Americans.[5]

**b. The Tactical Decision: Plans and Preparations**. At the end of January, ATF tactical planners met in Houston to decide how to proceed against the Branch Davidians. They decided on a raid, or in ATF parlance, a "dynamic entry." Three factors were essential for this tactic to succeed: surprise, speed and diversion, and the greatest of these was surprise.[6] (Actually, all three elements were lost.) The ATF began to make elaborate preparations for a raid. The key factor in the raid was to be its suddenness, coming upon the target area unexpectedly and discouraging resistance by a show of overwhelming force.

**c. The Raid.** On the morning of February 28, 1993, many converging lines were moving toward a closure. A convoy reached the staging area at Bellmead at 7:30 AM. Two helicopters warmed up at the command post at the Texas State Technical College airfield twelve miles away. ATF's National Command Center in Washington was opened to monitor the raid. Rodriguez entered the compound for Bible study at 8:00 AM. The media also began to hover around. Several cameramen and reporters from the TV station were driving around the area. One of them, Jim Peeler, got lost and asked directions of a passing local letter carrier driving a car with "U.S. Mail" painted on the door. In the course of conversation, Peeler warned the mailman, David Jones, that some type of law enforcement action was about to take place at "Rodenville."[7] After they parted, Jones headed straight for Mt. Carmel because, unknown to Peeler, he was David Koresh's brother-in-law!

At Mt. Carmel, Koresh was engaged in Bible study with Rodriguez and others. David Jones entered and told his father, Perry Jones [Koresh's father-in-law], what

5. Ibid., pp. 34-5.

6. Inid., p. B-48.

7. That was a name used by many local people to refer to the Branch Davidian community since the days of George Roden's leadership. He was Koresh's predecessor, who had been displaced by Koresh several years before.

had happened. Perry Jones called to Koresh that he had a phone call from England.[8] Koresh came out and was informed of what Jones had learned. When Koresh returned to the Bible study group, Rodriguez observed that he was visibly agitated, shaking and having difficulty holding his Bible. He exclaimed, "Neither the ATF nor the National Guard will ever get me. They got me once and they'll never get me again."[9] He walked to the window and looked out, saying, "They're coming, Robert, the time has come." Rodriguez, afraid that the raid was about to begin, made his excuse that he had to leave for a breakfast appointment. Koresh shook hands with him and said, "Good luck, Robert." Rodriguez immediately returned to the surveillance house and notified the raid leaders that Koresh knew the raid was coming.

Soon the ATF agents arrived in two cattle trucks. As they pulled into the driveway of Mt. Carmel, there was no sign of activity inside or outside.

> The trucks stopped in front of the main building as planned.... Agents with fire extinguishers for holding the Compound's dogs at bay were the first to exit the trailer. One agent opened the gate in the wall in front of the Compound, and another discharged a fire extinguisher at the dogs. Simultaneously, agents began exiting the second trailer. Koresh appeared at the front door and yelled, "What's going on?" The agents identified themselves, stated they had a warrant and yelled "freeze" and "get down." But Koresh slammed the door before the agents could reach it. Gunfire from inside the Compound burst through the door. The force of the gunfire was so great that the door bowed outward. The agent closest to the door was shot in the thumb before he could dive for cover into a pit near the door. Then gunfire erupted from virtually every window in the front of the Compound.... Agents scrambled for cover. One of the first shots fired hit the engine block of the lead pickup truck. Consequently, neither the first, nor the second vehicle were able to leave.[10]

The attack group assigned to climb onto the roof and enter Koresh's room where the guns were supposed to be kept was met with heavy fire; two were killed and others wounded. They retreated from the roof. All the agents were pinned down by heavy fire from within,[11] which continued until a cease-fire was arranged by mutual agreement between the ATF and Koresh, negotiated over a tenuous telephone linkage

8. This was apparently done to draw Koresh away from Rodriguez, who cult members leaving the Compound after the raid said had long been suspected by Koresh of being an undercover agent (Treasury Report, p. 88, n. 25).

9. This statement was reported again by Rodriguez at the criminal trial, but was characterized by one of the defense attorneys as "typical law enforcement addition."

10. Ibid., p. 96. Testimony at trial disputed the assertion that the agents had identified themselves or that gunfire burst out through the door or "bowed" it "outward."

11. Some of these assertions were also contested at trial.

via the Waco 911 center. The cease-fire enabled the agents to recover and attend their wounded, and they withdrew to a safe distance.

One of the leaders of the ATF force called Washington and suggested that the FBI Hostage Rescue Team—which had experience with prolonged standoffs and hostage negotiations—be brought in to handle what had become a siege situation. The FBI director had already offered such assistance, so the AFT leadership in Washington accepted the offer. On the morning of March 1, the FBI was on the scene and in charge of the federal forces. With that shift, the Department of the Treasury ceased to be the primary mover, and the Department of Justice took over. Therefore, the Treasury Report's narrative concluded with that transition.

**d. The Report's Conclusions**. The Report devoted 118 pages to the narrative of events and 100 pages to its evaluations. It rejected accusations that the ATF had exceeded its proper scope in investigating Koresh and undertaking violent enforcement methods.

> These criticisms are not supported by the evidence. A review of the investigation makes it clear that the ATF inquiry into the activities of Koresh and his followers was consistent with the agency's congressional mandate to enforce federal laws regulating the possession and manufacture of automatic weapons and explosive devices. Indeed, ATF would have been remiss if it had permitted considerations of religious freedom to insulate the Branch Davidians from such investigation.
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> While some have suggested that ATF targeted Koresh because of his religious beliefs and life-style, the Review [Team] has found no evidence of any such motivation. Indeed, ATF recognized early the delicacy of an investigation of such an unorthodox community. Aguilera's supervisors appropriately classified the case as "sensitive," thus ensuring greater supervisory scrutiny of a case that was perceived from the outset to have the potential for raising thorny religious issues as well as difficult safety issues, particularly regarding the women and children living at the Compound.
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> Whatever controversy there might be about the types of weapons American citizens should be permitted to maintain, federal laws draw a definite line at fully automatic guns and explosive devices such as grenades, which are thought to be more suited for battlefield use than any other purpose. That a private individual has access to a single unlawful machinegun must be cause for federal concern. Where a group is found to be stockpiling many such weapons and to be developing the capability to manufacture many more, ATF must pursue the case. And while the group's religious beliefs should not be cause for targeting it, neither should the beliefs insulate the group from federal scrutiny.[12]

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12. Ibid., pp. 120-122.

Some critics of ATF's enforcement actions have questioned why ATF felt compelled to take any action at all at the conclusion of Aguilera's investigation—even assuming there had been probable cause to believe federal violations had taken place. Any suggestion that Koresh should have been left to produce and stockpile machineguns and explosives, however, is without merit. The weapons and explosive violations disclosed by the investigation went to the heart of ATF's mission, as defined by duly enacted statutes, and fell squarely within the range of unlawful conduct the agency routinely investigates. Moreover, the information uncovered by Aguilera indicated that Koresh and his followers posed a far greater threat to society than might be posed by an individual who quietly keeps an illegal weapon or even a collection of such weapons.

Of greatest concern to Aguilera was the evidence that Koresh had a propensity toward violence and intimidation. Indeed, Koresh's control of the Compound originated with his triumphant gunfight with Roden, which only was ended by armed deputies who "got the drop" on Koresh before he and his followers could "finish off" the pinned-down and defeated Roden.[13] Furthermore, not only did armed guards receive UPS deliveries, but also they were reported to have been given standing orders by Koresh to shoot any "intruders." On one occasion, the guards opened fire on a newspaper delivery person. Koresh's pronouncements [to a Texas social worker who came to investigate allegations of child abuse] that his time was coming and, that when it did, the Los Angeles riots would pale in comparison also marked him as someone ready to use the machineguns and grenades he was stockpiling.[14]

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Perhaps most troubling, in light of his collection of weapons and his threatening rhetoric, was Koresh's apocalyptic theology and his renaming the Compound "Ranch Apocalypse."[15] Although Koresh might simply have been preparing to defend himself against an apocalyptic onslaught, ATF justifiably feared that Koresh might soon have been inspired to turn his arsenal against the community of nonbelievers. In fact, the Review has learned that well before the ATF action on February 28, Koresh made plans for just such an event. He told his followers that soon they would go out into the world, turn their weapons on individual members of the public, and kill those who did not say they were believers. As he explained to his followers, "you can't die for God if you can't kill for God." Koresh later cancelled the planned action, telling his followers that it had been a test of their loyalty to him.

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13. This account and its supposed implications have been disputed.

14. Ibid., p. 125.

15. This appellation has been disputed by survivors, who say that it was—if anything—an in-house joke, expressed only once—by Perry Jones—outside the community and then in jest.

This paragraph would seem to belie the government's claim that the group was not targeted because of its religious character, since here that supposed character was cited as justification for the government's actions.

> The extraordinary discipline that Koresh imposed on his followers, which enabled him, for example, to obtain all of their assets and to establish exclusive sexual relationships with the Compound's female residents, while not itself cause for ATF intervention, made him far more threatening than a lone individual who had a liking for illegal weapons. The Compound became a rural fortress, often patrolled by armed guards, in which Koresh's word—or the word that Koresh purported to extrapolate from the Scriptures—was the only law. And the accounts by former cult members, including an abused child, that Koresh was sexually abusing minors made it clear that Koresh believed he was beyond society's laws. Were Koresh to decide to turn his weapons on society, he would have devotees to follow him, and they would be equipped with weapons that could inflict serious damage....
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> The question remains, however, whether ATF selected the appropriate enforcement option when it decided to forcibly execute search and arrest warrants at the Branch Davidian Compound.[16]

**e. Evaluation of the Decision to Raid the Compound**. Although defending the need for action by ATF, the Report criticized the planners for choosing the raid option on the basis of inadequate and sometimes faulty information.

> A massive raid against a heavily armed, disciplined and well-positioned group will always, however cunningly planned, be a risky operation, especially when children and other innocent persons are present. If less risky alternatives that can achieve the same ends are possible, they ought to be pursued. ATF did not adequately pursue these options. The agency's failure to gather the information needed to assess the chances of such alternatives succeeding made its rejection of them, and its choice of the raid option, far too premature.
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> The threshold issue presented to ATF was whether any force would be needed to execute the arrest warrant for Koresh and the search warrant for the Compound. Some have suggested that, having obtained such warrants, ATF should simply have asked Koresh to surrender himself and his weapons or asked him for free passage into the Compound so that ATF could conduct a search for unlawful firearms and explosives. Claiming that Koresh had surrendered previously to local law enforcement authorities after his shoot-out with George Roden in 1987, critics have argued that ATF's decision to use force made a violent confrontation inevitable and played into what they have characterized as Koresh's apocalyptic vision of a final battle between his army and law enforcement

16. Ibid., pp. 127-128.

> agents, whom he called "the Assyrians." The Review finds no basis for these criticisms and believes that the decision not to rely on Koresh's goodwill was entirely appropriate and rested on valid considerations.
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> There was, in fact, no evidence that Koresh was prepared to submit to law enforcement authorities or that he had done so in the past.... While Koresh's apocalyptic vision should have suggested using an enforcement approach that afforded an opportunity to first ask for voluntary compliance and to avoid an initial, potentially provocative show of force, it was not a valid reason for ATF to forsake its law enforcement responsibilities.
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> Having understandably decided not to rely solely on Koresh's voluntary compliance with the warrants, ATF tactical planners initially focused their attention on arresting Koresh while he was away from the Compound, either by luring him off or by waiting until he had left it on his own accord. Koresh's followers, the planners believed, had become so accustomed to relying on his leadership and guidance that they would be far less likely to resist ATF in any organized way if Koresh could be removed from the scene....
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> It is now impossible to know whether ATF's execution of the search warrant would have been aided by arresting Koresh while he was away from the Compound. Still, the planners' reasoning on this score makes sense, and their consideration of this option indicates an effort to minimize the risk to agents and Branch Davidians. That effort, however, was not sufficient, because it was abandoned prematurely, without adequate exploration of its feasibility.[17]

The Report reviewed the reasons the planners rejected the option of a siege and concluded that they were attracted to the promise they thought the raid option offered—a promise also based on faulty and inadequate information. In discussing the siege option, the Report expressed one of its few indications of awareness of the uniqueness of dealing with high-energy religious groups.

> Several of the planners told the Review that they assumed, in substance, that when dealing with a cult, mass suicide is a serious risk.... Nonetheless, before allowing the specter of mass suicide to deter them from pursuing the siege option—which they considered less risky to all involved—the planners should have sought assistance from psychologists and other experts who were better equipped to evaluate the accounts of the former Branch Davidians [who warned of mass suicide]. Consultation with such experts could also have improved AFT's overall understanding of Koresh and his followers, including the group dynamics among the cult members inside the Compound and their extraordinary belief systems. Such an understanding, in turn, might have broadened ATF's consideration of enforcement options other than a raid, and heightened their appreciation

17. Ibid., pp. 134-137, *passim*.

> of the dangers of raiding a group that apparently shared an apocalyptic theology.[18]

By process of elimination, then, the planners settled on the *raid* option. The Report faulted them—in so doing—for relying on the same sort of "inadequately evaluated intelligence that led [them] to prematurely discount the possibility of Koresh ever leaving the Compound." The Report also faulted them for doing "virtually no contingency planning." The Report noted that the planners assumed that the men would all be working, unarmed, at the construction project at the pit outside the main buildings from 10:00 on. This assumption was contradicted by logs kept by observers in the undercover house, but those logs were apparently not checked against the planners' assumptions, and when the day of the raid came, the commanders rushed the convoy to arrive *before* the 10:00 AM hour when the men would supposedly go to work beyond the residence.[19] These and many other somewhat technical shortcomings—such as the clumsy command structure and the unapproachability of the top leadership of ATF—pale in relation to what the Report saw as the main and fateful error of the entire undertaking: the failure to call off the raid when the element of surprise was lost.

> The chief reason why Rodriguez's report did not lead ATF's decisionmakers to call off the operation, or even to make further inquiries into whether Koresh had indeed been tipped off, appears to be that they did not appreciate that surprise itself was critical to the operation's success.... On hearing that Rodriguez had seen no weapons in the Compound, the decisionmakers decided that they could still succeed so long as they hurried up the raid and got the agents to the Compound before conditions changed. Should Koresh mobilize his followers while the agents were en route, [the decisionmakers] assumed that they would learn of the danger from the forward observers positioned in the undercover house with sights on the Compound, and could abort the raid if necessary.
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> [Their] calculations apparently rested on two false premises: first, that Koresh would not mobilize his followers as soon as he learned that agents were coming; and, second, that if an ambush were prepared, signs of it would be visible to the forward observers more then 250 yards away.
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> [T]he raid commanders thought they should hurry up. This, too, made no sense. If Koresh was not going to arm and deploy his followers, there was no need for haste.... If, on the other hand, Koresh was going to resist the agents, any acceleration of the raid would again not help. It would still take at least 30 minutes...to get from the staging area to the Compound. This delay would give Koresh more than enough time to hand out

18. Ibid., pp. 141-142.

19. bid., pp. 145-147. Actually, a number of the men, including the attorney, Wayne Martin, had jobs in Waco. They would have been away at work on weekdays, but were at the residence on Sunday, the day of the raid. —Prof. James E. Wood, Baylor Univ., Waco, Texas.

> weapons and deploy his followers in a Compound that appeared to be designed for just such defensive measures. And it was scarcely likely that anyone stationed outside the Compound would be able to tell that an ambush was being prepared. Cult members with access to machineguns and semiautomatic assault weapons should not have been expected to display their weapons out the windows while they lie in wait.
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> [The commanders] hurried up when they should have slowed down.[20]

The Report of the Treasury Department dealt with events through the ill-fated raid of February 28, 1993. The events that followed after were reviewed in the other major inquiry reported on by the Department of Justice.

### 2. "Report to the Deputy Attorney General on the Events at Waco, Texas, February 28-April 19, 1993"

This report included a 350-page review of the events at Waco as they unfolded after the FBI took over the confrontation with the Branch Davidian religious group following the disastrous attack by the ATF on February 28, 1993. The large volume included an eighty-six-page chronology that gave a blow-by-blow description of events as they unfolded during the fifty-one-day siege and briefly thereafter. Perhaps the most important assertion from the viewpoint of the federal agency was that "after February 28, no weapons of any type were fired by any law enforcement officer, whether state, local or federal."[21] Other summary statements were made, including that "there were a minimum of 719 law enforcement personnel committed on-site at Waco on any given day during the stand-off."[22]

> The 51 day standoff at the Branch Davidian compound was unprecedented in the annals of American law enforcement. Never before have so many heavily armed and totally committed individuals barricaded themselves in a fortified compound in a direct challenge to lawful federal warrants, and to duly authorized law enforcement officials.[23]

**a. Conclusion of the Chronology of the Siege.** The chronology concluded with an account of the tragic culmination of the standoff on April 19th.

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20. Ibid., pp. 170-173, *passim*.

21. Justice Report, p. 9. The federal report apparently did not count as "weapons of any type" the "flash-bangs" (nonlethal projectiles designed to cause a loud report and bright flash of light, a number of which were used by the FBI to dissuade Davidians from going outside the buildings) or "ferret rounds" (cannisters of tear gas fired through the windows of the buildings). A similar claim could be made for the Branch Davidians as well. From the end of the ATF raid on Feb. 28 until their home was invaded by tanks inserting tear gas on April 19, they did not fire weapons of any type, even to shoot out the floodlights or loudspeakers that were so annoying to them.

22. Ibid., p. 10.

23. Ibid., p. 12.

Apr. 18 — Attorney General Reno notified President Clinton that she had approved the FBI's tear-gas plan. The U.S. Attorney's office in Waco obtained arrest warrants for everyone in the compound. Armored vehicles removed remaining obstacles around the compound. Koresh called the FBI and expressed anger at the removal of the vehicles, especially his Chevrolet Camaro. One FBI sniper saw a cardboard sign in one of the compound windows reading FLAMES AWAIT.

Apr. 19 — At 6:00 AM the FBI called the compound and informed those within that tear gas was to be introduced, but that it was not an assault. No FBI agents would enter the building, and no one should fire weapons. That message was repeated over loudspeakers all morning. At 6:02, the Combat Engineering Vehicles (CEVs) began to "insert" tear gas in one corner of the structure. The plan was to put tear gas in gradually over the next 48 hours, filling one room and then another to make successive areas uninhabitable. But if the FBI was fired upon, the plan was to fill the entire structure. At 6:04 AM the Davidians began shooting at, and hitting, the CEVs. The FBI then began firing "ferret rounds" (tear-gas canisters) through the windows.

At 6:41 AM someone threw the field telephone out the front door. At 9:47 AM someone came out to retrieve the phone, but the wires had been cut (probably by the treads of the CEVs as they circled the building), and contact was never reestablished.

> At approximately 12:07 PM, the Davidians started fires at three separate locations within the compound. At approximately the same time, an HRT observer saw a male starting a fire in the front side of the building. By 12:12 PM the compound was on fire in several locations.
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> At 12:16 PM a male left the compound from the 2d floor roof. At first, he refused assistance from the FBI. Two minutes later he jumped off the roof and surrendered. Between 12:20 and 12:30, seven additional individuals came out of the compound and were arrested. At approximately 3:10 PM the last survivor emerged....
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> One woman left the compound, saw the FBI vehicles, then ran back into the building. An HRT agent risked his life by leaving his armored vehicle, running into the flames, and saving the reluctant woman. She fought the agent the entire time he was rescuing her.
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> While the fire was still burning, and ammunition was exploding, another group of HRT agents risked their lives by entering the tunnels in the compound to search for survivors, especially children.... [N]o survivers were located.
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> The arson team concluded that the Davidians had started the fire at three separate places inside the compound, and that the FBI's actions did not

> cause the fire. The arson team also concluded that the Davidians could have escaped the fire if they had wanted.[24]

**b. Some Elements of Evaluation by Justice Department Staff Team.** The FBI felt that its efforts were "fraught with difficulties from the outset, because the FBI had been brought to Waco to `salvage a failed tactical effort.'" The FBI's strategy was "to seek a negotiated settlement, to shrink the perimeter gradually, to deny the Branch Davidians creature comforts in an effort to secure their surrender...and to resort to deadly force or conduct an assault only as a last resort."[25]

Because of the suspicion that there were .50 caliber rifles in the compound that could penetrate any tactical vehicle in the FBI's inventory, the FBI secured nine Bradley fighting vehicles from the Army—"without barrels, pursuant to an agreement between the FBI and the Army to avoid *posse comitatus* prohibitions" [against using military forces in domestic civil law enforcement]. Later, because of threats by Koresh to "blow the Bradleys fifty feet in the air," the FBI obtained two Abrams tanks and five CEVs [tanks] from the Army.

FBI Director William Sessions informed President Clinton on March 1 that the FBI would follow a "waiting strategy" to "negotiate, watch and contain." The president approved that strategy and asked to be advised of any change in it.

On March 17 the FBI decided to begin a campaign of harassment because they had concluded that Koresh's sole objective was to delay, and that he had the resources to wait out the FBI if nothing more than negotiation was done. The negotiators agreed to this strategy, but felt that the tactical force (HRT) manning the perimeter was working at cross-purposes with the negotiations, seeming to "punish" the Davidians immediately after some people came out. There was a serious failure of communications between the two elements of the FBI effort. Although both felt they provided full information to the commander, he did not seem to relay it to the other element, so both were often unaware of what the other was trying to do.

The maintenance of the perimeter was a constant source of concern. Several individuals did get through to the compound from the outside, and others tried to do so. There were reports of organized groups coming to Waco to support the Davidians.[26]

The FBI also had its would-be "helpers."

> A... number of offers came from individuals lacking a firm grip on reality, such as people claiming to be God or Jesus offering to "order" Koresh to leave the compound.[27]

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24. Ibid., pp. 111-113.
25. Ibid., pp. 118, 120.
26. See list on pp. 151-153 of the Justice Report.
27. Ibid., p. 156.

The FBI obtained advice from several experts it consulted (both inside and outside the Bureau). "Significantly, all the experts agreed that Koresh would not leave the compound voluntarily." But they did not agree on the possibility of mass suicide. The Report mentioned that Koresh did not write his messages to the outside because he suffered from dyslexia—a matter he discussed several times with the negotiators.[28] The report related the findings of Dr. Bruce Perry, who examined the children who came out, but did not mention his comment—reported in the press—that their pulse rate was elevated to 140 rather than the normal 70 to 90 and that it took three weeks to get their pulse down below 100, which he attributed to "a persistent state of fear."[29]

The FBI averred that it did not solicit advice from any "cult experts" or "cult deprogrammers," although it received some unsolicited offers of assistance from them and from former Branch Davidians, such as Marc Breault in Australia—a person who had been trying to prod law-enforcement agencies to investigate Koresh for years.[30]

The Report offered a summary insight:

> Probably the most important observation that can be made about the Waco standoff is that after all is said and done, after all the analysis, investigations, hearings, and so forth, nothing would have changed the outcome because the people who remained inside [the compound] had no intention of leaving.[31]

**c. The Davidians' Outlook.** The closest the Report itself came to perceiving the mind-set of the people who were the object of so much concentrated federal attention was the following:

> Perhaps the most important attitudinal attribute of those who perished in the April 19 fire was their determination to remain inside the compound. The March 9 videotape,[32] containing a series of interviews

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28. Ibid., p. 174. In addition to dyslexia, Koresh "was very shy, and suffered from a speech impediment," according to one of the acquitted survivors, Clive J. Doyle, "He could barely talk, but once he started preaching about the Bible he could show you things no one else could." *N.Y. Times,* Feb. 28, 1994, p. A14.

29. *N.Y. Times*, May 4, 1993, p. B11. Perhaps another characterization would be "a persistent state of excitement" (of which fear is often a component) such as might be attributable to living with the "Lamb of God" and then having one's home attacked by the government and then being separated from one's parents and put in a strange environment.

30. Interviewed by ATF Agent Aguilera by telephone in January 1993, he was reported to have told about participating in firearm shooting exercises with Howell, but Aguilera did not mention in his affidavit on which the warrants were based that Breault was legally blind. Wattenberg, Daniel, "Gunning for Koresh" *The American Spectator*, Aug. 1993, p. 34.

31. Justice Report, p. 207.

32. The reference is to a videotape made by the Branch Davidians themselves in response to a tape sent in by the FBI designed to show that the children who had "exited" earlier were being well treated.

> with adults inside the compound, provides powerful evidence of that attitude. Each person on the video—male and female, young and old—spoke in a calm, assured tone of their desire to remain inside, even after the experience of the ATF raid only a few days earlier.... The abiding impression is not of a bunch of "lunatics," but rather of a group of people who, for whatever reason, believed so strongly in Koresh that the notion of leaving the squalid compound was unthinkable....
>
> The Branch Davidians' religion emphasized the apocalyptic nature of Koresh's preachings. They believed Koresh was the "Lamb" through whom God communicated to them. They also believed that the end of the world was near, that the world would end in a cataclysmic confrontation between themselves and the government, and that they would thereafter be resurrected. The...ATF raid only reinforced the truth of Koresh's prophetic pronouncements in the minds of his followers.
>
> The key to Koresh's hold on his followers was his ability to recite lengthy portions of the Bible from memory, and to "harmonize" disparate, seemingly unrelated scriptures by showing how they "tied together." This ability, combined with Koresh's charismatic/mercurial personality and the low self-esteem of his followers, created an environment in which Koresh was elevated to near God-like status....
>
> Koresh's charismatic hold permitted him to take extraordinary liberties with his followers. Koresh preached that as the "Lamb of God" only his "seed" was pure, meaning that only he could have sex with the over-puberty aged girls and women in the compound, and that none of the men could have sex....[33]

Attorney General Reno was under the impression that children were still suffering sexual and physical abuse during the standoff, and so informed the president on April 18, the day before the tear-gas assault. The FBI had no evidence that such was occurring at the time, though it may have occurred prior to February 28. The attorney general corrected this "misstatement" at her April 28 testimony to the House Judiciary Committee.[34] Since the allegation that little children were still being beaten was ostensibly a significant factor in her decision to approve the tear-gas attack and the president's acceding to that decision, it was no small misstatement.

**d. Reasons for the Tear-gas Action: The President's Explanation.** In a statement provided by President Clinton for the Justice Report, the following recollection of the reasons for the tear-gas "insertion" appeared:

> I asked Attorney General Reno several questions, the first being: "Why are you taking this action now, after seven weeks?" The Attorney General gave several reasons in response. First, there was a limit to the length of time the federal authorities could maintain the quality and intensity of the

33. Justice Report, pp. 205-206; for further discussion of alleged sexual abuse of minors, see ibid., pp. 217-223.

34. Ibid., p. 227.

> coverage of the scene. Resources were limited, and the experts might be needed in other parts of the country. Second, the people who had reviewed the situation had concluded that no progress had been made recently and that, in their opinion, no progress would be made using normal means of getting Koresh and the other cult members to come out. Third, it was felt that the danger of their doing something to themselves or to others was likely to increase with the passage of time. Fourth, there were reasons to believe that the children who were still at the compound were being abused and were being forced to live in unsanitary and unsafe conditions.[35]

The FBI was also concerned about the possibility of an "armed mass breakout by cult members, and the concern that children might be used as human shields in such a breakout." The FBI also "asserted that law enforcement on the scene in Waco could not safely maintain the security perimeter indefinitely...." They also "expressed concern about the possible incursion of fringe groups intent on coming to Koresh's aid."[36]

### 3. Summary of Evaluations by Social Science Experts

Several social science experts were among the nine outside specialists asked to comment on both the Treasury Department Report and the Justice Department Report with a view to suggesting how federal law enforcement methods could be improved after the Waco tragedy. They were given extensive briefings and access to a number of the federal participants in the events in question. Their assessments were so cogent and so different from the official reports that they are excerpted at length here.

**a. Nancy T. Ammerman**, Professor of Sociology of Religion, Candler School of Theology, Emory University in Atlanta.

> In their attempt to build a case against the Branch Davidians, BATF did interview persons who were former members of the group and at least one person who had "deprogrammed" a group member. Mr. Rick Ross, who often works in conjunction with the Cult Awareness Network (CAN), has been quoted as saying that he was "consulted" by the BATF.... The Network and Mr. Ross have a direct ideological (and financial) interest in arousing suspicion and antagonism against what they call "cults."... It seems clear that people within the "anti-cult" community had targeted the Branch Davidians for attention.
>
> Although these people often call themselves "cult experts," they are certainly not recognized as such by the academic community.... At the very least, Mr. Ross and any ex-members he was associated with should have been seen as questionable sources of information. Having no access

35. Ibid., p. 247.
36. Ibid., pp. 268, 269.

to information from the larger social science community, however, BATF had no way to put in perspective what they may have heard from angry ex-members and eager deprogrammers.

* * *

What, in hindsight, should the BATF and the FBI have taken into consideration in dealing with the Branch Davidians?

1. They should have understood the pervasiveness of religious experimentation in American history and the fundamental right of groups like the Davidians to practice their religion.... We have simply been a very religious people, and there have always been new and dissident religious groups challenging the boundaries of toleration.

And alongside all that religious fervor and experimentation has been our First Amendment guarantee of religious liberty. Only when there is clear evidence of criminal wrong-doing can authorities intervene in the free exercise of religion, and then only with appropriately low levels of intrusiveness....

2. They should have understood that new or dissident religious groups are often "millenialist" or "apocalyptic." That is, they foresee the imminent end of the world as we know it and the emergence of a new world, usually with themselves in leadership roles....

3. They should have understood that the usual fate of new religious movements is quiet extinction through natural causes. Only a fraction of those that begin survive as a group more than a few years, and an even smaller fraction make it through the crisis that is precipitated by the natural death of the leader....

4. They should have understood that new groups almost always provoke their neighbors. By definition, new religious groups think old ways of doing things are at best obsolete, at worst evil. Their very reason for existing is to call into question the status quo. They defy conventional rules and question conventional authorities. Not surprisingly, then, new groups often provoke resistance.... [Scholarly] sources [would] help to put groups like the Cult Awareness Network in context. Such groups are organized "anti-cult" responses that make predictable charges (such as child abuse and sexual "perversion") against groups that are seen as threatening. It is important to see that new religious movements are usually more threatening to cherished notions about how we all ought to order our lives than to our physical well-being.

The corollary to their provocation of neighbors is that they themselves are likely to perceive the outside world as hostile. This almost always takes the form of rhetoric condemning the evil ways of non-believers, and that rhetoric can sometimes sound quite violent. It may also be supplemented by rituals that reinforce the group's perception that they are surrounded by hostile forces (thus reinforcing their own sense of solidarity and righteousness). It is at least *possible* that rhetoric about the BATF as the Davidians' arch-enemy, the purchase of guns, and practicing with those guns served just such rhetorical and ritual purposes. That is, as the group

talked about the evils of the federal government and went through the ritual motions of rehearsing a confrontation with their enemies, they may have been reinforcing their own solidarity more than they were practicing for an anticipated actual confrontation. The irony, of course, is that their internal group rhetoric and ritual did eventually come true.

5. They should also have understood that many new religious movements do indeed ask for commitments that seem abnormal to most of us, and those commitments do mean the disruption of "normal" family and work lives. Most of us are accustomed to seeing religion as relevant only to portions of our lives, with wide areas of decision-making (from marriage partners to what we do at work) kept neatly out of the reach of religious authorities. However, throughout much of the world and throughout much of human history, such neat divisions have not been the norm. People have lived in tightly-knit communities in which work, family, religion, politics, and leisure (what there was of it) fell under one domain. Taking the long view, *not* belonging to such a community is more abnormal than belonging to one. No matter how strange such commitments may seem to the rest of us, they are widely sought by millions of people. A number of social scientists have written accounts of everyday life in such religious groups, and those accounts can help readers to understand the sense of coherence and belonging that outweigh, for the believers, any freedom of choice they give up....

6. They should also understand that the vast majority of those who make such commitments do so voluntarily. The notion of "cult brainwashing" has been thoroughly discredited in the academic community, and "experts" who propagate such notions in the courts have been discredited by the American Psychological Association and the American Sociological Association. While there may be real psychological needs that lead persons to seek such groups, and while their judgment may indeed be altered by their participation, neither of those facts constitutes coercion....

7. They should have understood the ability of a religious group to create an alternative symbolic world. Ideas about "logic" as we know it simply do not hold, but that does not mean that the group has no logic. The first dictum of sociology is "Situations perceived to be real are real in their consequences." No matter how illogical or unreasonable the beliefs of a group seem to an outsider, they are the real facts that describe the world through the eyes of the insider.

8. The agents should have understood that "charisma" is not just an individual trait, but a property of the constantly-evolving relationship between a leader and followers. The leader is a prophet only so long as members believe him (or her) to be so. And those beliefs are sustained by the constant interplay between events and the leader's interpretation of them. So long as the leader's interpretations make sense of the group's experience, that leader is likely to maintain authority. These interpretations are not a fixed text, but a living, changing body of ideas, rules, and practices. Meaning emerges daily in the interaction of sacred

texts (in this case the Bible), events, and the imagination of leader and followers. Only in subsequent generations are religious prescriptions likely to become written orthodoxies....

* * *

Understanding that the relationship between leaders, followers, and practices is a fluid one might have led agents to take more seriously the possibility of suggesting alternative apocalyptic interpretations to Koresh. Such a strategy was suggested (and attempted) by Houston theologian Phillip Arnold and University of North Carolina professor James Tabor.... Tabor writes that after considerable study of the interpretations [of the book of Revelation] being offered by Koresh, they concluded that alternative scenarios—still within *his* system of symbols—were possible...and, most importantly, that he might use those reinterpretations to ask for a delay while he wrote down his insights about the seven seals. Koresh's response to their radio broadcast and tape indicated that he indeed had taken up this interpretive possibility and had begun to work on a book. In a letter sent out on April 14, he said that "as soon as I can see that people like Jim Tabor and Phil Arnold have a copy, I will come out and then you can do your thing with this beast." That he was indeed working on such a book is demonstrated by the existence of a computer disk brought out by one of the survivors who had been typing for him on the day before the fire.[37] Ironically, it was the actions of the FBI on April 19 that evidently forced Koresh to return to his earlier interpretation of the texts—namely that the next event in the unfolding prophetic calendar would be death for his group, rather than a delay while he wrote his book.

And, of course, as soon as the possibility of mass martyrdom became evident, they should have reviewed the events of Jonestown. There, too, an exceptionally volatile religious group was pushed over the edge, inadvertently, by the actions of government agencies pushed forward by "concerned families"....

Finally, they should have understood that any group under siege is likely to turn inward, bonding to each other and to their leader even more strongly than before. Outside pressure only consolidates the group's view that outsiders are the enemy. And isolation decreases the availability of information that might counter their internal view of the world. In this case, the federal government already enjoyed a particularly condemned place in the group's worldview. Taking that fact seriously might have changed the minds of federal agents who argued that using outside negotiators is always a mistake. Persons other than federal agents might have been able to assume a genuine third-party position in this case, translating and mediating between Koresh and the outside world....

* * *

37. See account of this tragically aborted breakthrough (as well as a transcription of the disk of Koresh's work) in Tabor, J., and E. Gallagher, *Why Waco? Cults and the Battle for Religious Freedom in America*, Berkeley, CA: Univ. of Calif. Press (1995).

> V. Conclusions. Knowing these things might not have changed the outcome in Waco. It is unclear to me whether any negotiating strategy could have succeeded in getting most or all of the members to leave the compound. However, paying attention to these basic facts about the nature of religious groups would at least have enabled the federal agents to have a clearer picture of the situation they were in. They were not in a hostage rescue situation. They were in a tragic standoff with a group for whom they were already the enemy foretold to destroy them.[38]

**b. Robert Cancro, M.D.**, Lucius M. Littauer Professor of Psychiatry and Chairman of the Department of Psychiatry, New York University Medical Center, also provided some luminous insights into the psychology of the Branch Davidians (and their opponents).

> For the sake of simplicity it may be useful to make a tripartite division amongst the individuals who come to the attention of the Federal law enforcement agencies. The first group consists of individuals who are not habitual criminals but become involved in an illegal act... The second group may be described as more habitual criminals who have a pattern of repeated law breaking.... The final group consists of individuals and organizations that may break the law technically but which...are not most usefully conceptualized as simple law breakers. This category would include many groups such as the Branch Davidians which do not accept certain of our laws as valid or worthy of obedience.
>
> [A] major characteristic of these groups, so frequently mislabeled as cults, is that they have a shared, very strongly held belief system. This belief system may center on religious, political, tribal, racial, or other organizing themes.... [T]hese convictions are held very deeply and at times in such a fixed and powerful way as to be unalterable by means of reason and/or experience....[T]hese belief systems are frequently *not* a cover or a front for criminal activity. The beliefs usually do not represent rationalizations for breaking the law but rather represent or express a world view that differs significantly from the more conventional world views. These groups are often characterized by a tendency to isolate themselves and through that very isolation become even more convinced of the truth of their belief system.
>
> * * *
>
> The Branch Davidians had an apocalyptic world view in which they expected attack from the outside world. The reason for arming themselves was to protect themselves from such an expected attack. They had been training for a long time to defend themselves against such an effort. It is not probable that with the loss of the element of surprise they would not

38. Ammerman Comments, *passim*. In a subsequent memorandum to the Departments of Justice and Treasury, Prof. Ammerman added that she had received additional information that the ATF and FBI were receptive to information obtained from one Rick Ross, a self-styled "cult expert" whom the FBI described as having a "personal hatred for all religious cults."

be ready and waiting to respond with force. It appears that there was a failure to take into account the perceptions and thinking of the Branch Davidians in the decision making involved in sending in the agents in the manner that occurred. One unintended consequence of this confrontation was the legal situation was changed from one that involved possible violations of gun laws to one that involved actual homicide. This change in legal status could also have contributed to the subsequent decisions and behaviors of the Branch Davidians. Certainly an armed assault by 100 agents had to be seen as an attack *independent* of who fired the first shot. If an armed individual enters your home by force and you have reason to believe that person represents a mortal threat, you are allowed to fire a weapon in self-defense in most states. The law does not usually allow the potential attacker to fire first before a response can be called self-defense.

* * *

The rationale [of the gas attack] appeared to be that the parents would leave the compound in order to protect the children from the potential noxious effects of the gas. While this is a reasonable conclusion in many situations, its applicability in situations such as Waco may be less valid. If a significant percentage of a group are willing to die for their beliefs, the death of their children may not have the same meaning as it would to other people.... [T]o some individuals, death has a very different meaning. It can be seen in terms of birth into a new and better life. Death can be seen as a necessary and desirable transition when it occurs under certain conditions. Members of a group such as this one are more likely to interpret the attack as part of an escalation of wrongful force by the authorities.... [T]he Branch Davidians did not accept the validity of governmental authority. They looked upon our existing government as an expresson of Babylon and therefore not to be trusted or obeyed.

In this context,... the concept of suicide for members of certain groups may well be quite different from that of the average individual. Not to be blasphemous, but it is highly doubtful that Christ considered himself a suicide. It is not clear whether there was an adequate knowledge of the potential role of fire as the vehicle of death in the thinking of the Branch Davidians. If they in fact saw their end coming about through fire, then it might well have been wise in such a situation to be prepared to deal with that eventuality. There was no fire fighting equipment at the scene.

Another behavioral point has to be emphasized concerning what is or is not an assault. Law enforcement might argue that a gas attack is not an assault because the gas is nonlethal. To the people inside the compound, armored vehicles firing gas grenades into their home could only be perceived as an assault. It certainly also would be reasonable for the occupants of the compound to assume at this point that whatever follows the gas attack will be even worse and that they are now faced with the choice of being killed by enemy weapons or by their own hand and by a method of their own choosing.[39]

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39. Cancro Comments, pp. 1-6, *passim*, emphases in original.

**c. Lawrence E. Sullivan**, Director of the Center for the Study of World Religions at Harvard University, castigated the federal agencies for their disregard of the religious dimension in the Waco tragedy.

> Is the federal assault on this religious community near Waco, Texas, together with its ensuing standoff and fiery end, emblematic of the trivialization of religion in official America? Though the Branch Davidians may not, in everyone's view, typify religious life in many American communities, the response of public officials and federal law enforcement agencies may, in fact, reflect the marginal value assigned to religion as a public matter and the reduction of public religious convictions and actions to the realm of private readings, individual affairs, and even "unconventional" behaviors....
>
> In the very moments when a religious reading of reality became increasingly paramount for David Koresh and the Branch Davidians inside their Waco, Texas compound, federal law enforcement officials outside the compound, it seems, gave increasingly less importance and less consideration to religion as a motive for Davidian words and actions. As the crisis pushed toward its climax, Koresh and the Davidians became ever more entrenched in their religious convictions. No one left the compound during the long siege except when Koresh ordered them to do so and, investigators reported, even after the fire began to consume the compound, at least one Branch Davidian ran back into the flames. In the last days before the conflagration, Koresh was intense in his theological articulations: allegedly writing a treatise on the seven seals of the apocalypse (his reading of history and the place of him and his group in it), calibrating Passover and its significance, and dictating letters laden with theological interpretations to law enforcement. The federal siege itself, in the reading of the Davidians, served as an omen, a confirming sign of the onset of imminent apocalypse. Indeed, it seems possible that the large arms build-up that led the ATF to carry out its initial February 28, 1993 assault on the compound may have been in response to Koresh's interpretation of a three-days'-long session of police target practice, held within earshot of the Mt. Carmel compound in March 1992. It was reported in our July 1 briefing that Koresh and his group interpreted the target practice of the Los Angeles Police Department and other police groups (which the Davidians apparently attributed incorrectly to the ATF) in religious terms, as a "brazen" show of force, an ominous sign of the impending apocalyptic showdown between forces of good and the federal forces of evil. It is possible that, from the very beginning of the entire scenario, then, law enforcement agencies played out scriptured roles that they were unaware of. This seems to have continued until the end.
>
> It appears that no expert in religious studies was asked to regularly review Koresh's communications throughout the siege, not even his final letters.... The final letters from Koresh, transcribed onto 14 handwritten pages by Branch Davidian Judy Schneider, were delivered to the FBI on

April 9 and April 10. They consist of page after page of biblical citation and exegesis along with leading questions about the meaning of key phrases and concepts (often underlined for emphasis). Presumably these pages outlined his current theological position and his followers[']commitment to it.

* * *

Arguably these dictations were also carried out for the benefit of Koresh's followers.... They seem also partly to be Biblical exegesis of his wounds. In the light of the chosen Biblical quotations, Koresh's hand and side appear as signs of power and not weakness. These do not appear to be the words and attitude of a leader about to surrender with his followers if they soon meet with escalating interventions by law enforcement. In fact, it appears that Koresh was disinclined to surrender because King Saul had done so and thereby fell out of favor with God.

* * *

It appears that no experts in religion studies were consulted by ATF to help map the religious worldview of the Branch Davidians: their concepts of religious authority (which could explain and predict their devotion to Koresh's leadership), their soteriology of procreation (which apparently motivated wives to leave their husbands' marital beds for Koresh's, those husbands to embrace celibacy, and parents to allow Koresh sexual relations with their minor children), their views of death and afterlife, their interpetation of the apocalyptic end of time, their regimen of religious asceticism (which apparently prepared them for the hardships endured during the siege), their estimation of secular powers (such as the ATF) in their apocalyptic framework, their religious estimation of their own military role in the final apocalyptic battle. These motives, attitudes, and patterns of action, though religiously grounded, would seem to be directly relevant to an assessment of the situation.

* * *

Should the Waco siege and its like be described and conceived of as "hostage" situations? Koresh's followers apparently preferred to remain in the compound. Even those he ordered to leave came out primarily to spread his message and, in some cases, later wished they had remained with those consumed in flames. These are not hostages in any of the ordinary senses of the term.... The attitudes and actions of these "non-hostages" present a conceptual mystery and a tactical problem for law enforcement. The non-hostages cannot be counted on to cooperate with law enforcement or flee for their lives at the first opportunity for freedom or in the face of coercive force. Not fearing death or the danger to themselves, their very existence can become a hazard to others bent on "rescuing" them during the siege.... Part of the problem, it seems, is the tendency to analyze the situation primarily in terms of the individual psychology of the leader, leaving largely unexplained and insignificant the motives, behaviors and beliefs of the groups involved. The tendency to think of religion as a largely private matter leaves analysts unaware and unprepared for the way in which religion galvanizes groups into

> communities of coordinated actions, whether those actions be liturgical spectacles or mass movements.... The agents overlooked the way in which religion, through dense symbolic expressions and interpretations, bundles together individual motives—sometimes even contradictory understandings—into highly energized communities with shared goals and actions.
>
> * * *
>
> The view of religion being used as a cover for a con runs the risk of dismissing religion as an issue. In the Waco case, the dismissal seems accompanied by underestimations of the deep-seated religious motives of the leader and the followers and by a resultant inability, on the part of federal law enforcement, to anticipate religiously-motivated responses to their own interventions.[40]

**d. Alan A. Stone, M.D.**, Touroff-Glueck Professor of Psychiatry and Law, Harvard University Faculty of Law and Faculty of Medicine, submitted his report on November 8, 1993, a month after the report of the Justice Department's official investigation was issued. (His report, unlike those of the other experts appearing in a cover bearing the seals of both the Justice and Treasury Departments, was addressed solely to the role and conduct of the FBI and the Justice Department.) He had been granted an extension of time to complete his analysis because he was not satisfied with the information he had obtained at the time of the publication deadline. He was afforded full access to the FBI agents whose participation in events at Waco was relevant to his inquiry. The upshot of his further study was conveyed in the following excerpts.

> During the third phase of the stand-off, the FBI took a more aggressive approach to negotiation and, when that failed, gave up on the process of negotiation, except as a means of maintaining communication with the compound....
>
> This changing strategy at the compound from (1) conciliatory negotiating to (2) negotiation and tactical pressure and then to (3) tactical pressure alone, evolved over the objections of the FBI's own experts and without clear understanding up the chain of command. When the fourth and ultimate strategy, the insertion of C.S. gas, was presented to Attorney General [AG] Reno, the FBI had abandoned any serious effort to reach a negotiated solution and was well along in its strategy of all-out tactical pressure, thereby leaving little choice as to how to end the Waco stand-off. It is unclear from the reports whether the FBI ever explained to the AG that the agency had rejected the advice of their own experts in behavioral science and negotiation, or whether the AG was told that FBI negotiators believed they could get more people out of the compound by negotiation.

40. Sullivan Comments, *passim*.

By the time the AG made her decision, the noose was closed and, as one agent told me, the FBI believed they had "three options—gas, gas and gas."

* * *

**Evaluating the Risks of Mass Suicide**

[T]here is, to my mind, unequivocal evidence in the report and briefings that the Branch Davidians set the compound on fire themselves and ended their lives on David Koresh's order.[41] However, I am also now convinced that the FBI's noose-tightening tactics may well have precipitated Koresh's decision to commit himself and his followers to this course of mass suicide.

The official reports have shied away from directly confronting and examining the possible causal relationship between the FBI's pressure tactics and David Koresh's order to the Branch Davidians. I believe that this omission is critical because, if that tactical strategy increased the likelihood of the conflagration in which twenty-five innocent children died, then that must be a matter of utmost concern for the future management of such stand-offs.

Based on the available evidence and my own professional expertise, I believe that the responsible FBI decision makers did not adequately or correctly evaluate the risk of mass suicide....

**Gambling with death**

There is a criminology, behavioral science, and psychiatric literature on the subject of murder followed by suicide, which indicates that these behaviors and the mental states that motivate them have very important and complicated links. Family violence often takes the form of murder followed by suicide. Multiple killers motivated by paranoid ideas often provoke law enforcement at the scene to kill them and often commit suicide. Even more important is what has been called "the gamble with death." Inner-city youths often provoke a shoot-out, "gambling" with death (suicide) by provoking police into killing them....

In moving to the show of force tactical strategy, the FBI's critical assumption was that David Koresh and the Branch Davidians, like ordinary persons, would respond to pressure in the form of a closing circle of armed vehicles and conclude that survival was in their self-interest, and surrender. This ill-fated assumption runs contrary to all of the relevant behavioral science and psychiatric literature and the understanding it offered of Koresh and the Branch Davidians.

Furthermore, there was direct empirical evidence supporting the assumption that the Branch Davidians, because of their own unconventional beliefs, were in the "gamble with death" mode. The direct evidence for this was their response to the ATF's misguided assault. They engaged in a desperate shootout with federal law enforcement, which resulted in deaths and casualties on both sides. The ATF claims gunfire came from forty different locations. If true, this means that at least forty

41. This conclusion was not self-evident to others, and remained inconclusive at the criminal trial.

Branch Davidians were willing to shoot at federal agents and kill or be killed as martyr-suicide victims defending their "faith." The idea that people with those beliefs expecting the apocalypse would submit to tactical pressure is a conclusion that flies in the face of their past behavior in the ATF crisis. Past behavior is generally considered the best predictor of future behavior.

**Willing to kill but not cold-blooded killers**

The BATF investigation reports that the so-called "dynamic entry" turned into what is being described as being "ambushed." As I tried to get a sense of the state of mind and behavior of the people in the compound, the idea that the Branch Davidians' actions were considered an "ambush" troubled me. If they were militants determined to ambush and kill as many ATF agents as possible, it seemed to me that given their firepower, the devastation would have been even worse. The agents were in a very vulnerable position from the moment they arrived. Yet, as ordered, they tried to gain entry into the compound in the face of the hail of fire. Although there is disagreement, a senior FBI tactical person and other experts confirmed my impression of this matter. The ATF agents brought to the compound in cattle cars could have been cattle going to slaughter if the Branch Davidians had taken full advantage of their tactical superiority. They apparently did not maximize the kill of ATF agents.[42] This comports with the state-of-mind evidence and suggests that the Branch Davidians were not cold-blooded killers; rather, they were desperate religious fanatics expecting an apocalyptic ending, in which they were destined to die defending their sacred ground and destined to achieve salvation.

The tactical arm of federal law enforcement may conventionally think of the other side as a band of criminals or as a military force or, generically, as the aggressor. But the Branch Davidians were an unconventional group in an exalted, disturbed, and desperate state of mind. They were devoted to David Koresh as the Lamb of God. They were willing to die defending themselves in an apocalyptic ending and, in the alternative, to kill themselves and their children. However, these were neither psychiatricaly depressed, suicidal people or cold-blooded killers. They were ready to risk death as a test of their faith. The psychology of such behavior—together with its religious significance for the Branch Davidians—was mistakenly evaluated, if not simply ignored, by those responsible for the FBI strategy of "tightening the noose." The overwhelming show of force was not working in the way the tacticians supposed. It did not provoke the Branch

42. This characterization is supported by two details from the Treasury Report: in the hail of bullets that followed the closing of the front door on the approaching ATF agents—so fierce that the door is said to have "bowed outward" (p. 96)—the total damage reported is that one agent was hit in the thumb! And in that and many of the other encounters during the initial shoot-out, the Branch Davidians fired through the walls or the roof of their compound rather than taking aim at visible targets, thus not being able to see whom they were shooting at—or whether they were shooting at any specific targets—but simply wanting to make the vicinity of the compound untenable for the invaders.

Davidians to surrender, but it may have provoked David Koresh to order the mass-suicide....

**The psychology of control**

The most salient feature of David Koresh's psychology was his need for control.... The tactic of tightening-the-noose around the compound was intended to convey to David Koresh the realization that he was losing control of his "territory," and that the FBI was taking control. The FBI apparently assumed that this tactic and the war of stress would establish that they were in control but would not convey hostile intent. They themselves truly believed these tactics were "not an assault," and because the Branch Davidians failed to respond with gunfire, the FBI considered their tactics effective and appropriate. The commander on the ground now acknowledges that they never really gained control of David Koresh. But, in fact, my analysis is that they pushed him to the ultimate act of control—destruction of himself and his group.

* * *

**Was tactical strategy appropriate with so many children in the compound?**

The pressure strategy as we now know it consisted of shutting off the compound's electricity, putting search lights on the compound at night, playing constant loud noise (including Tibetan prayer chants, the screaming sounds of rabbits being slaughtered, etc.), tightening the perimeter into a smaller and smaller circle in an overwhelming show of advancing armored force, and using CS gas. The constant stress overload is intended to lead to sleep-deprivation and psychological disorientation.... Presumably, the tactical intent was to cause disruption and emotional chaos within the compound. The FBI hoped to break Koresh's hold over his followers. However, it may have solidified this unconventional group's unity in their common misery, a phenomenon familiar to victimology and group psychology.

When asked, the Justice Department was unaware whether the FBI had even questioned whether these intentional stresses would be particularly harmful to the many infants and children in the compound. Apparently, no one asked whether such deleterious measures were appropriate, either as a matter of law enforcement ethics or as a matter of morality, when innocent children were involved. This is not to suggest that the FBI decision-makers were cold-blooded tacticians who took no account of the children; in fact, there are repeated examples showing the concern of the agents, including the commander on the ground. Nevertheless, my opinion is that regardless of their apparent concern the FBI agents did not adequately consider the effects of these tactical actions on the children.

Professor Stone was particularly concerned about the effects of use of the noxious CS.

**The plan to insert CS gas...**

> The potential effects of C.S. gas are easily explained. C.S. gas causes among other things, irritation and inflammation of mucus membrane. The lung is a sack full of membranes. The inhalation of C.S. gas would eventually cause inflammation, and fluid would move across the membranes and collect in the alveoli, the tiny air sacks in the lungs that are necessary for breathing. The result is like pneumonia and can be lethal. Animal studies are available to confirm that C.S. gas has this effect on lung tissue....
>
> The medical literature does contain a clinical case history of a situation that closely approximates the expected Waco conditions.... A normal four month-old infant male was in a house into which police officers, in order to subdue a disturbed adult, fired canisters of C.S. gas. The unprotected child's exposure lasted two to three hours. Thereafter, he was immediately taken to an emergency room. His symptoms during the first twenty-four hours were upper respiratory; but, within forty-eight hours his face showed evidence of first degree burns, and he was in severe respiratory distress typical of chemical pneumonia. The infant had cyanosis, required urgent positive pressure pulmonary care, and was hospitalized for twenty-eight days. Other signs of toxicity appeared, including an enlarged liver.... The infant's reactions reported in this case history were of a vastly different dimension than the information given the AG suggested.
>
> Of course, most people without gas masks would be driven by their instinct for survival from a C.S. gas-filled structure. But infants cannot run or even walk out of such an environment; and young children (many were toddlers) may be frightened or disoriented by this traumatic experience. The C.S. gas tactics planned by the FBI, and approved by the AG, would seem to give parents no choice. If they wanted to spare their inadequately protected children the intense and immediate suffering expectably caused by the C.S. gas, they would have to take them out of the compound. Ironically, while the most compelling factor used to justify the Waco plan was the safety of the children, the insertion of C.S. gas, in my opinion, actually threatened the safety of the children.... Whatever the actual effects may have been, I find it hard to accept a deliberate plan to insert C.S. gas for forty-eight hours in a building with so many children. It certainly makes it difficult to believe that the health and safety of the children was our primary concern....[43]

### 4. The Criminal Trial

Thus far this report of the Waco tragedy has been derived from the government's own accounts and comments by government-selected experts. The government's accounts asserted that the federal agencies had been simply seeking to enforce the law, but that the agents of the BATF had been "ambushed" in their efforts to do so. The report of the Treasury Department criticized some of the tactics used but

43. Stone Report, pp. 31-35.

defended the basic purpose of the raid. The Justice Department report did not vouchsafe any admissions of error or miscarriage of effort, but concluded that the FBI had made the best showing it could in a difficult situation.[44]

By and large, the press did not question the government's version of events. Its reporters were kept at a "safe" distance from the scene of combat during the fifty-one-day siege and were fed daily handouts by the FBI at press briefings in Waco, which they dutifully relayed to the public. They could not communicate with the residents of Mt. Carmel, so there was little information available to anyone outside the federal forces about what "the other side" of the dispute might be. Even the search and arrest warrants that provided the legal basis for the federal action were sealed under court order for weeks after the confrontation ended in flames on April 19, 1993. The few survivors were in federal custody for months and thus incommunicado. So the government's version of events had almost unchallenged sway for most of the ensuing year. (There were some critics of the government's actions, but they gained very little attention during that period.)

The first public testing under the aegis of law of the government's version of events occurred in the criminal trial that took place in San Antonio early in 1994. The government brought to trial ten men and one woman from among the twenty-five adult survivors. The principal charges against all eleven were conspiring to kill federal agents and aiding and abetting such killing. (One survivor, Kathryn Schroeder, pled guilty to a lesser charge and agreed to testify for the government, as excerpted below.) Several other counts were brought against various of the eleven defendants, such as using or carrying firearms in the commission of a violent crime. The trial, like the siege, went on for seven weeks.

**a. Charges and Countercharges About the Raid.** The evidence adduced at trial did not settle who fired the first shot on February 28, 1993, or who started the fire on April 19, but shed some new light on claims set forth in the government's version of events. And some light that should have been shed was lacking because of evidence strangely missing. One defense witness, Jack Zimmerman, an attorney, had entered Mt. Carmel during the siege with the FBI's consent to represent Steve Schneider, Koresh's chief lieutenant. He was given a tour of the premises by the Branch Davidians and shown what were claimed to be the results of incoming gunfire. A former colonel of the Marines, Zimmerman testified that he had seen a "spray pattern" of bullet holes entering the right half of the front door from outside and no bullet holes going outward. Somehow that door had disappeared, and Texas Ranger Fred Cummings, who reported on the search for evidence by the Rangers after the

44. A revealing insight into the significance of the two governmental reports was elicited by defense attorneys, who pointed out discrepancies between those reports and the prosecution's case; one of the prosecutors, U.S. Attorney Bill Johnston, replied that the reports were written for public and media consumption, implying that they were not binding on the government! Fawcett, Ken, *East Texan*, 1/29/94; a murkier version appears in the trial transcript, p. 2934.

fire, could not account for what became of it. It was steel and could not have melted in the fire any more than other steel doors in the place did. He admitted under oath that the ATF and FBI had had access to the area following the fire and before the Rangers took over the scene of the conflict on April 20.

Zimmerman also testified to having seen eight or nine bullet holes in the ceiling that "caused the building material to be pooched in or down" showing that "the rounds came from above... down into the room" [presumably from helicopters above]. Of course, this evidence, like much else, was consumed by the fire. When the Texas Rangers did take charge of the systematic search of the ruins after the fire, according to testimony by Captain David Byrnes, who was in command of the Rangers, all agents of the ATF were by mutual consent excluded from the site (that is, after they finished checking for unexpended explosives) to forestall charges that the ATF had had a chance to "salt the scene" (his term).[45] The FBI was not thus excluded, however, and continued to assist the Rangers in their search.

The first ATF agent to testify was Roland Balesteros, who was assigned to lead the way through the front door in the ATF's "dynamic entry" on February 28. He said he had come out of the cattle trailer in full SWAT gear and raced toward the front door carrying his shotgun across his chest. When he was on the way, David Koresh, unarmed, opened the door and asked, "What's going on?" The agent testified that he called out, "Police! Lay down! Search warrant!" (though he admitted under cross-examination that he had not mentioned those cries in earlier interviews with the Texas Rangers). He said that Koresh "smirked" at him and closed the door. A moment later, he said, bullets came out through the door; one hit his thumb, and he tumbled into the dog pen beside the porch and lay there during the remainder of the fight. He said he knew the bullets were coming outward because of holes appearing in the door with splinters of wood pointing outward. (He didn't say the door "bowed outward.") Cross-examination brought out that the door was steel, and there was no wood in it to splinter.

When asked who was assigned to announce their identity and the purpose of the raid, Balesteros replied that no one was so assigned. "We basically all announced," he said, which suggests the possibility of a tumult of indecipherable yelling. He admitted that in their rehearsals during the previous week they had not practiced what the ATF manual prescribed: "Officers are required to wait a reasonable period of time to

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45. This term apparently had reference to the illegal law-enforcement practice of bringing damaging evidence to the crime site to incriminate suspects. A retired police detective, writing about Waco, stated "On May 28, 1993, the FBI admitted in court that some of the photo evidence used in the 1992 Randy Weaver case in Idaho was staged. Will the evidence in the present case be staged? After the holocaust in Waco, a retired military officer, well known to federal agencies, stated that he was told by a disgruntled BATF agent that weapons, which he terms `throwaways,' confiscated in other raids were flown into a closed airport near Waco. Were these throwaways meant for the burned compound as planted evidence? It's happened before in other agencies." Oliver, Moorman, "Killed by Semantics," in Lewis, James R., *From the Ashes: Making Sense of Waco* (Lanham MD: Rowman & Littlefield, 1994), p. 83.

permit the occupants to respond before forcing entry." (An exception is possible when there is a "no-knock" warrant. There was no such warrant in this instance.) He was not assigned to knock and wait, he said, but to gain entry, and he was followed by other agents with a battering ram to break the doors open if necessary. He said they were expecting resistance, but not gunfire. Bullets from within thus upset their plans.

Later ATF agent Kenneth King testified that he had been on one of two teams that were assigned to put ladders up and gain entry to the second-floor "gun room" at the same time as the front-door entry. On cross-examination he admitted that they had not announced their intention when they got on the roof, but had proceeded to try to break through the windows. "Even if the people at the front door had been welcomed in by David Koresh, none of that would have made any difference..., the window would have been broken and the flash-bangs would have been thrown and you would have entered the window?" he was asked. "Yes sir, that was our job." Here again, it was the gunfire that stopped them. It became clear that the ATF had not planned a peaceful entry but expected to cow the residents with an overwhelming show of force. When that didn't work, the agents had no Plan B.

Furthermore, it seemed likely that some of the damage done to the federal force was done by "friendly fire." Some bullet holes in the ATF vehicles may have come from directions other than the Mt. Carmel buildings. And ATF agent Constantino admitted that in the "gun room" he and two other agents entered on the second floor, he may have hit agent Jordan in the arm. An FBI firearms specialist attested that the bullet recovered from agent Jordan was a 9mm. hydroshock round that only the ATF was using on February 28, and it may well have come from agent Constantino's gun, but that gun had been damaged in the fire and would not mark test bullets consistently. Some of the shots that Constantino and Jordan got off in the murk may also have hit agent King of the other team out on the roof trying to enter the adjacent room.

The government called numerous gun dealers from across the country as witnesses to the many orders for guns they had filled for Mt. Carmel. None of the purchases was illegal, and Mike DeGuerin, representing defendant Paul Fatta (who had been absent from Mt. Carmel during the entire fifty-one-day siege), demonstrated that the Davidians were buying firearms wholesale as a business enterprise for resale at gun shows. The prosecution introduced dozens of exhibits of charred firearms wrapped in thick plastic described as weapons found in the ashes of Mt. Carmel that had been converted from semiautomatic (legal) to fully automatic (illegal), and some of them were linked by serial numbers to sales made to Mt. Carmel by the testifying gun dealers. A few bullets were recovered from the dead ATF agents, and these were identified as emanating from weapons of the general type being fired from within Mt. Carmel, but no one-to-one ballistic identifications were made because the recovered weapons were said to be incapable of firing test bullets. None of the defendants was

linked directly to any of the firearms, let alone to any bullets that killed any of the four ATF agents.

The prosecution introduced photographs of an engine lathe, a hydraulic press, and a milling machine found on the premises that could have been used to modify legal firearms to make them illegal, as well as silencers or "sound suppressors" (which are illegal) in various stages of manufacture. Some twenty firearms in evidence were described as having been converted from semiautomatic to full automatic, but they could not be examined closely because of the thick plastic in which they were wrapped. Cross-examination brought out that it was impossible to determine where or when such conversion occurred or whether the automatic weapons in evidence had ever been fired. Two heavy .50 caliber guns were introduced, as well as .50 ammunition. Cross-examination made clear that there was nothing illegal about owning such weapons or ammunition for them and no evidence that they had been fired.

**b. Testimony of Kathryn Schroeder.** One of the witnesses whose testimony was expected to be a turning point in the trial was a mother of four, aged 31, a member of the religious group who testified (reluctantly) for the government because she wanted to be released as soon as possible to be with her children. She was an Air Force veteran who came to Mt. Carmel with her husband, Michael Schroeder, who was shot and killed by ATF agents following the raid on February 28 as he was trying to return to his family from the "Mag Bag." During the early part of the siege she was given charge of distributing weapons and ammunition to the defenders until she went out on March 12. The prosecution relied on her testimony to "put a weapon in the hands of every defendant," but it also opened a window on life inside Mt. Carmel as seen by a believer.

She explained that the Davidians had expected to be "translated" to heaven as a result of the federal onslaught, either through dying in battle or directly "without seeing death." When that did not happen to them collectively, and David Koresh was seriously wounded and seemed likely to die, they made plans to carry his body out in a group and blow themselves up (and any Babylonians within range) with grenades or otherwise to bring about their deaths in a final cataclysm. When this plan was conceived, everyone met in the cafeteria and started praying.

> Q Can you describe the prayers? Were they joyful, sorrowful?
> A Oh, joyful. Everybody was ready to be translated.
> Q Okay. Were they silent, loud?
> A They got kind of loud. We were—we were not a group of people that usually prayed, so—and this prayer was very open and very wanting to die, wanting to get out of here, and we got very loud, [so] that Steve Schneider came down the stairs and told us to be quiet.... [He] told us to go back to our rooms and pray and study, because David was talking to God.
> Q And did you receive any additional messages after that?

A I don't remember exactly when, but we were frustrated that nothing had happened and nothing had happened, and then finally the message was that we had messed up and God told David to wait, that if we had all died then, we would all have gone to hell because of our sins, for the raid.
Q What sins are you talking about after the raid?
A People drinking liquor, smoking cigarettes, eating all kinds of junk food.

* * *

Q What was your reaction when you found out that [her husband] Mr. Schroeder [had been killed on February 28]?
A That he beat me to heaven.
Q Did you have any sorrow?
A Not for the flesh.

* * *

Q Was there a change in Mr. Koresh's teachings during the summer of 1991?....
A I believe that was... when he started teaching — the statement that was used a lot was, "If you can't kill for God, you can't die for God."
Q ...Did that have any correlation to the message that was being projected at that time?
A Just a deeper progression of the message we had known all along.
Q Okay. And what was that message?
A Daniel 11 and 12, the final confrontation with the king of the north, "the beast," that we would be part of....
Q Okay. During the course of these teachings, did Mr. Koresh ever make reference to an organization called the "ATF"?...
A He included them in as part of "the beast."...
Q And what was to happen with reference to the Members of the Message and "the beast"?
A There was to be a confrontation, a battle between the wave sheaf, the Members of the Message, and "the beast," and we knew we would lose....
Q How did the building you were building under the ground relate to the confrontation?
A If we needed a place to go to withstand some authority trying to burn down our building.
Q Okay. Did the building itself have anything to do with the Message?
A It was our fortress.
Q ...What do you mean by "your fortress"?
A Well, Nahum says, "Fortify thy loins mightily and keep the munitions and watch the way," and these were things that we were acting out by keeping everybody in one area, which was just better physically to prepare for the war.[46]

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46. This interpretation of an obscure verse in the prophet Nahum was apparently important to the Davidian understanding of their role. The words are indeed found in *Nahum* 2:1—"Keep the munition, watch the way, make thy loins strong, fortify thy powers mightily" (AV). But whether they are intended as divine commands to the faithful is another matter. They are part of a long poem describing the sack of Nineveh, the import of which was that even the mighty and tyrannical city is

Q Okay. Did you notice an increase in gun acquisitions during this period of time?
A I'm not exactly sure when, but, yes, there was an increase when we started going to gun shows....
Q How did that relate to the Message?
A "Keep the munitions." We were to have ammunition and weapons, and we were to know how to use them.

* * *

Q Were you aware of man's laws?....
A Yes.
Q Okay. What was your personal attitude toward man's laws?
A That...they weren't important. God's laws were important.

[Especially against eating junk food!]

* * *

Q What were your desires... in relation to Mount Carmel up until the day you came out?
A Biblically, doctrinally, my desires were to be translated to go to heaven.
Q Okay. Did you believe that was what—would be what happened to you if you stayed in Mount Carmel?
A Yes.
Q ...Did anyone hold you there against your will?
A Not physically.
Q Okay. Did anyone hold you there against your will spiritually?
A The entire three and a half years I was in the Message, there was the emotional knowledge that, yes, if you leave, you'll go to hell, and that held me there.
Q Okay, But other... than the fear of going to hell, was there any pressure placed upon you to stay inside the Message?
A Just David's speaking tactics to get you to change your mind and feel like you're being a strong person if you stay....
Q ...[D]uring the time you made the decision to stay inside..., was that your own choice to stay inside?
A Yes.
Q Okay. The decision to leave, was that your own choice?
A Yes.[47]

Her testimony was not viewed by the defense as greatly damaging, as she threaded her way through her answers, trying to be truthful but not to hurt the "Message." As

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subject to the judgment of God. But the words in question are a taunting and derisive mimicry of the futile effort of the Assyrians to rally their forces to defend their walls against the attacking Medes and Babylonians; they are calling to each other to "Man the ramparts; watch the road; gird your loins; collect all your strength!" (RSV) But their reliance on military strength avails them not against the judgment of God. So the message intended by the passage may be very different from the sense derived from it by the Branch Davidians. See *The Interpreter's Bible*, (1956) vol. 6, pp. 954-955, 962.

47. Trial transcript, pp. 4484-4537, *passim*.

she left the stand, one of the defendants gave her a smile and a thumbs-up gesture. Nevertheless, her testimony about who was given firearms was a link in the chain relied on by the prosecution.

**c. Testimony About the Final Act.** The Tarrant County Medical Examiner, Dr. Nizam Peerwani, offered lengthy, detailed and depressing testimony about the bodies found and autopsies conducted. Many adult decedents had been identified by dental records. Some adults, including David Koresh and Steve Schneider, had died of close-range gunshot wounds to the head. Several women's bodies were found in the hallways leading to the trapdoor access to the underground school bus at the north end of the building that had been constructed as a tornado shelter, but they could not reach it because the trapdoor had been buried beneath debris from the collapsing of the wall pushed in by a tank prior to the fire.

In the center of the buildings under the four-story tower was a room whose walls and ceiling were reinforced concrete. It was the strongest, safest place in the complex, furthest from the gas and the tanks. To it had fled many of the women and all of the children. It had one door, which faced toward the front of the building. Some thirty or more bodies were recovered from that room. Many were covered with blankets, sleeping bags, extra clothing, especially the small children, as their mothers apparently tried to protect them from the gas and the fire. And at some point a hole several feet across was blown in the ceiling,[48] and those within died of suffocation, blunt trauma from the impact of debris, close-range gunshot wounds, or the effects of fire.

FBI agent Craig, who drove the Combat Engineering Vehicle that began the process of spraying the CS gas into the building, testified that two CEVs had been "jerry-rigged" at Fort Hood with a boom that carried several cylinders of CS gas. When the boom penetrated the wall, a cylinder (which was about two feet long and eight inches in diameter) would empty in three seconds with a cone-shaped spray of mist reaching forty-five feet ahead. The mist was propelled by carbon dioxide under pressure and was composed of CS agent—a white crystalline powder dissolved in a liquid soluent (*sic*). That solution came ready-mixed in cylinders that were dispensed by agent Monte Jett from cardboard cartons in a blue rental van parked several hundred yards from Mt. Carmel. Sixteen of those large cylinders were discharged into the building by the first CEV (driven by Craig) and a few by the second (which could only carry two at a time and which "threw a track" and was disabled before it could do more; its crew started up a third CEV, which was not equipped to inject gas).

Smaller canisters of CS were fired into the windows of the building from grenade launchers in Bradley tracked vehicles, one on each side of the building. One agent

48. This hole can be seen in aerial photos of the ruins of Mt. Carmel, such as appeared on the front cover of *Newsweek* May 3, 1993, and was attributed to FBI action in the civil complaint filed in federal district court in Houston on February 27, 1995 against the government on behalf of survivors by Ramsey Clark, former U.S. attorney general.

testified that he fired seventy to seventy-five such canisters and supposed that the other three agents similarly occupied had done the same, making a total of some three hundred fired during the morning. Most of such projectiles—called "ferret rounds"—went in through the windows. Some were fired at the frame walls in the hope that they would penetrate, but most of those just bounced off.

Agent Craig testified that after he had "inserted" the first bottle of CS gas, he heard over his radio that the residents had begun to fire back, despite warnings not to do so blasted over loudspeakers by Byron Sage, the chief FBI negotiator. (Craig was not aware that his vehicle had been hit by gunfire because of its heavy armor, the loud noise of the motor, and the radio earphones he was wearing.) The FBI had planned to inject the gas gradually, but when the counterfire "compromised" that effort, Plan B came into effect, and it required that as much gas as possible be injected as rapidly as possible. Craig emptied his remaining three bottles into the building and then returned to the blue van to get four more. Each trip took about forty-five minutes, he said, because the cylinders had to be pressurized, installed and armed, and he made three more trips.

On the fourth trip he received new instructions. He was told to push into the front of the building, to open it up so the observers could see inside and to press on in toward the base of the tower. The other CEV was directed to do the same from the back, resulting in the collapse of the gymnasium. Agent Craig inched into the front door with the eleven-foot-wide bulldozer blade mounted on the front of his tank, pushing in the double doors, door frame and a window on each side. He went in about fifteen feet and released a bottle of gas. He did not go further because the turret of his tank had caught on the floor of the second story, and he was afraid of bringing the building down around his vehicle. So he withdrew and moved down to the corner of the building, pushed in the wall there, and released his last bottle. Although he did not call this change of strategy "Plan C," the directive to "make a deep penetration" into the structure and to press toward the center (where the women and children had taken refuge) was a distinct departure from the plans that had been discussed in the FBI meetings prior to April 19, he admitted. It represented a third strategy, apparently decided upon about 10:30 AM when it was apparent that Plans A and B were not working. It was communicated by oral orders from an unidentified source and probably brought on the final act of the tragedy.

Around noon the buildings of Mt. Carmel caught fire and in a high wind quickly burned to the ground. The government devoted much effort at trial to making the case that the residents themselves had started the fire. The defense countered with the contention of the survivors that the tanks had knocked over Coleman lanterns used for illumination (because the FBI had cut off the electricity weeks before), and that the fuel in them had spilled onto bales of hay stacked around the walls to stop incoming bullets, setting them afire. The prosecution introduced tapes and transcripts of recordings made from electronic listening devices sent in on the milk cartons supplied by the FBI. The quality of sound was very poor, even after having been

enhanced (at considerable expense) by a private sound-recording specialist. According to that authority, there seemed to be voices saying, "The fuel has to go all around to get started," and "Got to put enough fuel in there." Then a voice said, "So we only light 'em as they come in," or (a later version decoded by the same specialist after listening to the original tapes just before trial) "So, we only light 'em as soon as they tell me." (The prosecution helpfully distributed copies of the tape transcripts to the press to show that the Branch Davidians started the fire.) The defense contended that—at worst—preparations may have been made to ignite lantern fuel as a countermeasure against invading tanks. (Graeme Craddock, one of the defendants, had told a Texas Ranger that he was directed by Wayne Martin, one of Koresh's lieutenants, to pour lantern fuel on any tank that came in through the wall and to light it—a last-ditch tactic that might result in the defenders' death as well as the attackers'.)

There were claims that the FBI had notified the Burn Unit at Parkland Memorial Hospital early on the morning of the 19th to be prepared to receive burn victims and asked for directions for landing helicopters at the hospital. FBI agents wore fireproof suits that day. An aircraft with a Forward-Looking Infra-Red (FLIR) camera was circling over the complex ready to photograph any outbreak of fire, and did indeed take a number of pictures used by the government. All of this suggests that the FBI was expecting fire on the 19th, but not necessarily that the FBI intended to cause the fire. The defense attorneys concluded that the FBI had intelligence from some source that there was a likelihood of fire, whether from the two interlopers, Louis Alaniz and Jesse Alman, who "snuck" (FBI word) in during the siege and left before it ended (and were viewed by the attorneys as FBI "plants"), or from the "bugs" on the milk cartons. It is possible that the antitank plan Craddock later described was being talked about prior to the 19th, and the FBI got wind of it, though if so, it seems unlikely that they would send tanks into such a trap, since—as Craig testified—fire is the nightmare of tank drivers. But the FBI did not arrange for fire-fighting equipment to be at hand, nor did it deviate from its showdown plans, but in fact went on to Plan C when A and B didn't work.

The government called a member of the "independent" arson team it had recruited named William Cass, who testified that FLIR films taken at the time of the fire showed almost simultaneous outbreaks of flame at three widely separated locations at Mt. Carmel at 12:11 PM. Because of the strong wind and the holes poked in the walls by the CEVs, the fire engulfed the entire structure in about five minutes. Defense counsel displayed an earlier portion of the FLIR video showing a flash or flare of heat in the gymnasium area at 12:08. Cass said he had never seen that portion of the video! He was asked if he had seen the observers' logs that contained two reports of fire starting in the gymnasium area at 12:11, and he said those logs had been handled by Paul Gray, the chief of the arson investigating team, and he himself had never seen them.

Paul Gray was identified as a person who often testified regarding arson incidents for the ATF, and whose wife worked in the Houston office of the ATF. More significantly, Gray devoted a page of his arson report to the flammability potential of tear gas and concluded that neither the ferret rounds of CN tear gas nor the pressurized CN gas delivered by the CEVs would have augmented the fire, and indeed would have had a retardant effect. This was a curious conclusion, since all other sources and all testimony at the trial referred to the gas used at Mt. Carmel as CS, a very different substance. As Jack Zimmerman stated on the witness stand, "It's not tear gas."[49] An Army Field Manual states:

> Exposure to CS may make [victims] incapable of evacuating the area.... The dispersers should not be used to introduce a riot control agent directly into a closed structure except in extreme circumstances.... Do not use around hospitals or other places where innocent persons may be affected.... Do not use where fires may start or asphyxiation may occur.

Yet it was solely into "closed structures" that the FBI directed the CS gas at Mt. Carmel. One of the manufacturers of CS, the Aldrich Chemical Company of Milwaukee, warns purchasers about its use: "Emits toxic fumes under fire conditions:... carbon monoxide... hydrogen cyanide... hydrogen chloride gas." The United States is a party to the Chemical Weapons Convention of 1993 that outlaws use of CS in warfare, but the FBI averred that it was not aware of that treaty.

### 5. The Verdict and Sentences

After impassioned closing statements by both sides and a lengthy instruction from Judge Walter Smith, the jury retired to deliberate. They asked to hear again the tape of Wayne Martin's 911 call to the sheriff during the February 28 raid (in which he implored the county emergency switchboard: "There are seventy-five men around our building and they're shooting at us! Tell 'em there are children and women in here and to call it off!"). On February 26, 1994, the jury found all the defendants *not guilty* of the two most serious charges, conspiracy to murder federal agents and aiding and abetting such conspiracy. In so doing, the jury rejected the government's oft-repeated charge of "ambush." (Perhaps they had seen enough Western movies to know that when the settlers pull their wagons into a circle to fend off an Indian attack, they are not said to "ambush" the Indians.) The jury did convict five defendants of a lesser offense—voluntary manslaughter—defined by the judge as acting "in the sudden heat of passion caused by adequate provocation." The jury also convicted two defendants on firearms charges, but acquitted four of all charges.

Seven defendants were convicted on Count Three—that they "did knowingly use and carry a firearm during and in relation to a crime of violence." The judge had instructed the jury that to find a defendant guilty of that crime, they must be

49. Tear gas, CN, is Alphachloroacetenone; CS is Orthochlorobenzyladine Malononitrile.

convinced that the government had proved beyond a reasonable doubt that that defendant had committed the crime alleged in Count One (conspiracy to murder) and had used or carried a firearm in the commission of that crime. Since the jury determined that the defendants were not guilty of Count One, the judge set aside the conviction on Count Three because, he said, the jury had decided there was no conspiracy.

Almost four months later, on June 16, 1994, the same judge convened a hearing for sentencing. In the interim, presentencing reports had been prepared on each convicted defendant by the probation officers. But an odd thing had happened. The judge had reinstated the convictions on Count Three! Ruth Riddle, the one woman defendant, who had been acquitted of all other charges and was being deported to Canada for overstaying her visa, was retrieved from the immigration service and brought back for sentencing on that charge. The other six convicted on that charge faced additional years in prison.

Before sentencing, each of the nine convicted defendants had the opportunity to address an "allocution" to the court. One or two sought to retry the case, insisting that the court did not have jurisdiction and that Janet Reno and Bill Clinton should be called as witnesses. Others maintained that they had not been responsible for the deaths of ATF agents. None expressed contrition or remorse. Perhaps the best articulation of their view was that of Livingston Fagan, a Jamaican who had had some formal theological training.

> First of all, there is no doubt in our minds that we are innocent.... Never, at any point, have I sought to distance myself from David Koresh, his teachings, or from the actions of the residents of Mount Carmel.... The actions that we were forced to take were justified, given the circumstances that we were placed in by the actions of the agents of the government.
>
> We were pursuing realities pertaining to the spirit that this Court did not—does not recognize, as they did not recognize 2000 years ago. Right from the beginning, the spiritual aspect of this was totally and absolutely rejected. But it was the very core of why we were at Mt. Carmel, and essentially, why we acted the way that we acted....
>
> We don't particularly care what you want to do. You're going to do it anyway. But we also serve a God who sits on a throne like you, a judge. He's got a book in his hand, sealed with seven seals. Men don't know his judgment. Consequently, Mt. Carmel happened the way that it did. As you have judged, so, too, you will be judged.... And we do not accept this notion, this facade, that is being presented in this court, that somehow we have agreed with this judgment, with this sentencing, with anything that has taken place. We have not.... We are innocent. Absolutely, without any doubts whatsoever, we know we are innocent.

Someone in the audience cried "Amen." Others applauded. The judge gavelled for silence, saying, "That kind of outburst is not appropriate."[50]

Each of the defense attorneys argued for their clients in mitigation of sentence. Some lamented the reinstatement of the convictions on Count Three. Mike DeGuerin, counsel for Paul Fatta, disagreed with the contentions of the probation officer (which were largely adopted by the judge) that Mr. Fatta had conspired to kill federal agents. "I think the jury rejected those ideas," he said. Several counsel pointed out that these defendants were not leaders of the Branch Davidians and that the living were being made to answer for the actions of those beyond the reach of vengeance.

The jury had found all defendants innocent of conspiracy to kill federal agents on the highest standard of proof—beyond a reasonable doubt. Judge Smith stated that sentencing was based on a lesser standard—preponderance of the evidence. So he felt free to assert a view of the case that the jury had rejected. He acknowledged that mistakes may have been made by the federal agencies, but they were not before the court in this case, and their errors were not deemed relevant to the issues that were before it.

> The mistakes made by the Defendants now before this Court... were serious violations of federal criminal law, and resulted in the homicide of four young agents, the injury of numerous other agents, and the death of numerous residents of the building referred to during the trial as the "Compound."
>
> These Defendants, and other adult Branch Davidians, engaged in a conspiracy to cause the deaths of federal agents. It was part of the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a violent conflict with federal agents, thereby forcing the agents to use deadly force against them, and by dying in the ensuing battle to be "translated" immediately to Heaven.
>
> To this end, immense preparations were made. Huge sums were fraudulently charged to many credit cards in order to acquire an armory that would rival that of a National Guard unit's; ammunition in an unbelievable quantity was acquired; paramilitary uniforms and gear were purchased and created by Davidian seamstresses; firearms training and fortification of the Compound took place; the leader preached sermons to motivate his "army"; and finally preparations for the ambush of February 28 were completed.

The judge had entirely adopted the government's scenario of the case despite the jury's findings to the contrary. His characterization of the Davidians' beliefs was typical of the government's projection of what they wanted to find. Koresh did not preach that his followers must "bring about" a violent conflict with federal agents, but that the government would proceed against them, and they must be prepared to

50. Fagan has declined to appeal, saying the Lord will look after him. He also has refused to cooperate with his captors, and so spends much of his time in solitary confinement.

defend themselves. The arms, camouflage suits, and shooting vests were primarily their commercial stock in trade, which they sold at gun shows for a profit. Of course, when they found themselves embattled, those came in handy for guard duty, but they were not a sacred uniform for Holy War.

In sentencing, the judge turned the import of his jury instructions upside down. He had told the jury that they could not convict on Count Three (use of firearms) unless they had found a defendant guilty under Count One (conspiracy to murder). The jury made a mistake and convicted seven defendants on Count Three, but not on Count One. The judge then concluded—contrary to his instructions to the jury—that the jury *had* found a conspiracy after all, and "bootstrapped" Count One onto the lesser Count Three, holding that by convicting the defendants of the latter it had really convicted them of the former. Then he threw the book at them.

By reinstating conviction on the third count, the court brought on draconian sentencing requirements. To "use or carry" a firearm in the commission of a violent crime invokes a mandatory sentence in addition to the sentence imposed for the crime itself. Beyond that, courts have applied a "fortress" theory when firearms are found "readily available in strategic locations" on the premises, and any defendant also on the premises at the time can be convicted of using and carrying. The judge found that Mt. Carmel was "not only a figurative but a literal fortress, manned by each of the Defendants convicted on this count."

If the firearm is legal, the additional sentence is five years. If it is an illegally "enhanced" weapon, the sentence is enhanced to *thirty* years! In response to defense attorneys' contentions that the determination of whether the weapons involved were enhanced was a matter of fact to be determined by the jury, the court disagreed, announcing that "the type of weapon is not an element of the offense." What the jury was to determine was the *mens rea* or "guilty mind" of the defendant, not the means used to carry out the intended offense. On the basis of this reasoning, the judge felt free to conclude that all convicted of Count Three had access to enhanced weapons. "Based on this Court's review and analysis of all available authorities, it is determined that thirty-year sentences as to all Defendants convicted on Count Three is mandatory."

That conclusion added thirty years to the ten years for voluntary manslaughter for five of the defendants. Renos Avraam received a sentence of forty years, plus fine of $10,000; Brad Branch—forty years, plus fine of $2,000; Jaime Castillo— forty years, plus fine of $2,000; Livingston Fagan—forty years, plus fine of $5,000; Kevin Whitecliff—forty years, plus fine of $2,000. Paul Fatta, found guilty of two firearms offenses, was sentenced to five years on one count and ten years on the other, to run consecutively, plus a fine of $25,000 on each.

Somewhat surprisingly in view of his protestations about lack of discretion, the judge "departed downward" from the sentencing guidelines with respect to two defendants. Because of his forthcoming responses to the Rangers and the Grand Jury,

Graeme Craddock's sentence was ten years for voluntary manslaughter and ten years for Count Three, a total of twenty years, plus a fine of $2,000. Ruth Riddle was also give a reduced sentence. The judge commented,

> One would have to have been as closely involved with this tragedy from its first day until today, as I have been, and to have observed Ms. Riddle's demeanor and reactions throughout all of these proceedings, compared to all of the other Defendants, to fully understand all of the reasons I believe her culpability so much less than most of theirs. Therefore... the Court will depart downward in this case and sentence Ms. Riddle to a period of thirty—excuse me—five years incarceration... [and] a $2,500 fine.

The sentencing guidelines were apparently not so rigid that they could not be reduced by twenty-five years for a defendant whose (otherwise unspecified) "demeanor" seemed acceptable to the judge. Katherine Schroeder, who testified for the government, received a sentence of three years. Appeals to the Fifth Circuit were taken by most of the convicted defendants, the outcome of which will be discussed below.[51]

The person chosen by the jury as its presiding member was Sara L. Bain, a San Antonio schoolteacher. On May 11, 1994, after hearing of the reinstatement of Count Three, she wrote the judge that the jury had not intended to convict the defendants on serious gun charges. "Even five years is too severe a penalty for what we believed to be a minor charge," she wrote. The judge said he had never received her letter, that the jury is not to concern itself with sentencing, and that jurors cannot impeach their own verdict. She attended the sentencing hearing as a silent reminder to the judge of the jury's concerns, but without apparently affecting the sentencing.[52]

### 6. The Fifth Circuit's Decision on Appeal

Several defense attorneys assured their convicted and sentenced clients that their plight would be rectified on appeal, and indeed to the lay observer there seemed to be ample grounds for reversal in the defects of the trial and the jury's verdict of acquittal on the two most serious charges. In due course the appeals of six defendants[53] came on to be heard in the Fifth Circuit Court of Appeals, and on August 2, 1996, decision

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51. See § 6. The foregoing material with reference to the criminal trial and sentencing is based on the 7,500-page transcript of the trial and collateral sources. It is largely reproduced from Kelley, D.M., "Waco: A Massacre and Its Aftermath," *First Things*, May 1995, pp. 31-37, used by permission.

52. In an interview a few days later, Ms. Bain said about the sentences: "They certainly didn't reflect the jury's intentions at all. We had thought that the weapons charges would be a slap on the wrist.... I wish everyone had just been acquitted on all charges.... The federal government was absolutely out of control there. We spoke in the jury room about the fact that the wrong people were on trial, and that it should have been the ones that planned the raid and orchestrated it and insisted on carrying out this plan who should have been on trial."

53. Eight defendants had been convicted, but Ruth Riddle and Livingstone Fagan did not appeal.

was rendered by a panel composed of Judges Patrick Higginbotham, John M. Duhe, Jr., and William W. Schwarzer, with the opinion being written by Judge Higginbotham.

The opinion covered many pages of the *Federal Reporter*, dealing in detail with every argument of each defendant on each count being appealed, but the upshot was the same on all. The court accepted the government's version of events *in toto* and upheld the trial court's actions in all but one instance, in which the case law had changed since the trial court acted. The court accepted the idea that the Branch Davidians had "stockpiled weapons and ammunition... [and] turned Mount Carmel into a small fortress." It quoted several times the teaching attributed to Koresh, "If you can't kill for God, you can't die for God." And it recited the episode of the morning of February 28, 1993, in which Koresh was reported to have said to ATF undercover agent Rodriguez, "[N]either the ATF or National Guard will ever get me. They got me once, they'll never get me again," not once, but three times.

The court likewise accepted the testimony of ATF agent Ballesteros that he had announced to Koresh who the officers were and their authority and that the Branch Davidians had understood who they were, which was a point hotly contested at trial.The court described the uniforms worn by the ATF during the raid and concluded that the insignia clearly identified them as federal law enforcement officers. "This was not the garb of unidentified assailants. The notion that this was some alien and unidentified army is beyond the pale," said the court. (Photographs of agents taken at the time show their markings as "ATF POLICE" in large yellow letters *on their backs*; the badges and lettering on their chests and caps was by no means as visible, certainly not at a distance.) The court likewise concluded that "[t]he evidence does not permit any reasonable inference but that the Davidians fired the first shots that morning. Agent after agent testified that the first shots they heard... came from the compound." Davidian Castillo's testimony that Koresh came to the front door unarmed seeking to resolve the matter without bloodshed, but that gunfire immediately came in from outside, wounding him, was dismissed by the court as "self-serving," but the agents' testimony that they didn't fire first was no less self-serving. Nevertheless, the court concluded that any claim of "self-defense" by the defendants was not viable, given "the raging gunbattle that the defendants['] own actions provoked."

> Finally, the Davidians argue that excessive force was inherent in the nature of the ATF raid.... [S]ending over seventy well-armed agents to arrest Koresh and execute a search warrant for a residence housing women and children was excessive. We disagree.
>
> The execution of search and arrest warrants necessarily involves some degree of force. [citations omitted] The ATF had cause to believe that the Davidians had amassed a large supply of weaponry, including grenades and fully automatic assault rifles. In light of this concern... the ATF

> concluded that a "dynamic entry" raid was the proper method.... This evidence will not support an inference of unreasonable force.
>
> Nor is there evidence that the agents possessed an excessive amount of firepower under the circumstances. [recitation of their armaments]... Indeed, as events bore out, the ATF possessed too little, not too much, firepower.
>
> Surely, a citizen may not initiate a firefight solely on the ground that the police sent too many well-armed officers to arrest him.... We reject this invitation for individuals to forcibly resist arrest and then put their arresters on trial for the reasonableness of their tactical decisions.

The idea that the ATF acted in light of their concern about potential Davidian firepower was belied by the statements of several agents at trial that they were completely surprised by the gunfire from the Davidians, but the court seems not to have read that portion of the record.

One of the glaring defects of the trial to the lay observer was the fact that the trial court first set aside the guilty verdict on Count 3 as inconsistent with the acquittal of all defendants on the "predicate" offense of Count 1 and then, at the impassioned urging of the government, reinstated it. The appellate court embraced the trial court's reasoning that "it is only the fact of the offense, not a conviction, that is needed to establish the required predicate."[54] Count 3 was "using or carrying a firearm during... a crime of violence, to wit Count 1." Count 1 was for "conspiracy to murder federal officers... engaged in the performance of their official duties." The jury, which is the determiner of the facts, acquitted all defendants on Count 1, meaning it didn't happen. So there was no predicate offense on which to hang Count 3. Resurrecting the actions charged in Count 1 as "fact," even if not "conviction," was in effect judicial usurping of the function and actual verdict of the jury. The fact that prior appellate decisions justify such a course only compounds the judicial usurpation. But the Higginbotham opinion upheld the trial court's action.

> The Davidians also claim that reinstating the guilty verdict denied them due process. [They] argue that they relied on the Judge's comments at the bench conference [prior to the announcement of the verdict] suggesting that he agreed that the guilty verdict on Count 3 had to be set aside and did not ask Judge Smith to instruct the jury to render a directed verdict of not guilty on Count 3 or, alternatively, to order the jury to resume deliberations to resolve the inconsistent verdicts. In essence, the Davidians contend that they were "sandbagged" by the district court.
>
> Neither the Constitution nor general principles of federal criminal law require a district court, when confronted with inconsistent jury verdicts,... to instruct the jury to return a verdict of not guilty [citations omitted]....
>
> Similarly, the district court was not obligated to return the jury for further deliberations, to resolve the inconsistent verdicts.... As a practical

54. Quoting *U.S. v. Munoz-Fabela*, 896 F.2d 908 (CA5).

> matter, pushing a jury to continue its work when it has a final verdict risks other difficulties [citations omitted]....
>
> The Davidians waived their right to have the jury polled by failing to make a timely request. After the clerk read the jury's verdict, Judge Smith asked whether anyone desired that the jury be polled, and seeing no response, remarked, "I take it not." He then discharged the jury. That the Davidians misapprehended the need to poll the jury on Count 3 due to their mistaken belief that Judge Smith had set aside the guilty verdict does not excuse their failure to request the poll....
>
> In short, the district court's decision to reinstate the jury's guilty verdict on Count 3 was correct.

The jury had convicted four of the defendants of a lesser included offense under Count 2: aiding and abetting the voluntary manslaughter of federal agents. Those defendants challenged the sufficiency of the evidence that each of them had aided or abetted that killing, contending that the government had failed to prove that each of them had participated in the gun battle or assisted those who killed the four ATF agents. The appellate court responded that "aiding and abetting" does not require such a showing; it is only necessary to show that the defendant "assisted the perpetrator of a crime while sharing the requisite criminal intent."

> The Government never claimed to be able to prove who fired the specific rounds that killed the four ATF agents. The inability to identify the actual gunmen, however, does not negate the evidence that someone in the compound killed the agents.
>
> Moreover, the defendant need not fire a weapon to aid and abet murder or manslaughter.... We find no difficulty in holding that actively participating in a gunbattle in which a gunman kills a federal officer can aid and abet that killing.

The court had earlier traced testimony by Kathryn Schroeder and other Branch Davidians that it held showed that each of the four defendants had used or carried a firearm during the gun battle.

The court disagreed with the defendants' contention that they were not part of a conspiracy to murder anyone; they were not privy to whatever Koresh and his inner circle were planning, if in fact they were planning any such thing. The court said a jury could conclude that the defendants were not innocent bystanders caught in the wrong place at the wrong time, but that they had for months been part of a consistent enterprise that had as its central theme resistance to "the beast" (of which the ATF was part), that they had participated in training in the use of firearms, and that they had not left the organization when Koresh preached about "killing for God." Instead, the jury could conclude that by their very presence they were part of a long-continuing conspiracy to war against the ATF. Of course, *the jury had found the opposite on the conspiracy count*, but with the reinstatement of the guilty verdict

on Count 3, new life seems to have been breathed into Count 1, conspiracy to murder federal agents.

As part of the evidence of an ongoing conspiracy, the court noted that "[t]he women sewed vests and black pants capable of holding multiple ammunition magazines for all of the men." At no point (not even in describing the occupation of Paul Fatta in buying guns wholesale and retailing them at gun shows) did the court recognize the obvious fact that the Davidians were heavily dependent upon the goods they were able to sell at gun shows to gun buffs, and among these were ammunition vests, combat garb, and guns of all kinds.

The appellate court found that whether the firearms used in the commission of a crime were "enhanced" weapons leading to an "enhanced" sentence was not a separate offense that need be mentioned in the indictment nor found by the jury as part of its verdict, thus upholding the trial court's ruling on that issue.

However, in the only instance in which it differed with the trial court, the appellate panel noted that the case law had changed since the trial court acted.

> [The statute (now)] requires more than "mere possession" of a firearm by the defendant. *Bailey v. U.S.* , 116 S.Ct. 501, 506, 509 (1995). The Government must show "active employment" of the firearm. Id. The district court did not have the benefit of Bailey and found only that each defendant had actual or constructive possession of an enhanced weapon. This finding does not meet the statutory requirement as read by Bailey.... With Bailey the district court must take another look.... Should the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence. We vacate the defendant's sentences on Count 3 and remand for resentencing....[55]

The statute prohibiting the possession or transfer of a machine gun did not require that the machine gun have been in interstate commerce. The full *en banc* court of the Fifth Circuit was to consider whether that part of the statute did not exceed Congress' power under the Commerce Clause, so the appellate panel suspended its mandate on Paul Fatta's convictions on Counts 9 and 10, involving that charge, until the full court acted on the underlying issue. That court divided evenly, leaving in effect the panel's decision that the statute was constitutional.[56]

**The Dissent**

William W. Schwarzer, a Senior District Judge of the Northern District of California, sitting on the panel by designation, dissented from the majority's view.

> From the outset it is necessary to recognize that this case is about the culpability of individual defendants. The crime of which each defendant

55. *United States v. Branch*, 91 F.3d 699, 740–41 (5th Cir. 1996).

56. *United States v. Kirk*, 78 F.3d 160 (5th Cir. 1996).

was convicted—aiding and abetting the manslaughter of federal agents—was allegedly committed by each defendant individually; it was not a group crime. Contrary to the opinion's general approach, each defendant is entitled to individual consideration of the charges against him and his defenses. Specifically, each is entitled to individual determination of his right to a self-defense instruction. The court acknowledges as much when it holds that Castillo is not entitled to an instruction because of the evidence reflecting his conduct on the day of the gun battle, but the court forsakes this approach in other respects. [Footnote: The factual basis for the court's conclusion [on Castillo] omits the undisputed evidence, erroneously excluded by the district court, that Castillo took cover during the gun battle and never fired a shot.]

The first issue is whether, treating each individual individually, there is evidence in the record showing that he was the aggressor in the gun battle. The defense of self-defense is available only to one who is "not the aggressor." If there were evidence that any of these defendants had provoked the shooting, that evidence might disqualify that defendant from claiming a self-defense instruction.... Here, there is no evidence that any of the individual defendants provoked the shooting. While there is conflicting evidence as to whether the first shot came from within the compound or outside the compound, no evidence identifies any of the individual defendants as firing the first shot....

The "first shot" evidence is, therefore, of limited significance. To the extent that evidence is relevant to whether any defendant was an aggressor, the court's treatment of it goes beyond the determination of its sufficiency and engages in impermissible weighing and evaluation of its credibility. The opinion rejects Ballesteros' [original] testimony because it was contradicted at trial and Castillo's post-arrest statement as a "self-serving..." statement contradicted by "overwhelming" testimony of agents and media representatives and physical facts. The evidence the opinion describes, however, portrays a scene of great complexity and confusion. Deciding who shot first based on that evidence requires a difficult factual determination that should not be made by a court of appeals, but should have been left to a jury.

The heart of the matter is whether there was sufficient evidence to raise a reasonable doubt as to whether the agents used excessive force. The defendants contend that the evidence shows that agents fired indiscriminately through the windows and walls of rooms from which no gunfire originated....

Finally, while we can all agree, as the opinion states, that a citizen may not initiate a firefight solely on the ground that the police sent too many well-armed officers to arrest him, it is too late in the day to argue that there are no limits on the amount of force the police may use in executing warrants. The Fourth Amendment protects individuals against "the use of excessive force by a law enforcement officer even when that officer is

making a lawful arrest."[57]... The opinion declares that a "dynamic entry" by 76 agents armed with 9 millimeter pistols and AR-15 semi-automatic rifles and accompanied by helicopters will not support an inference of unreasonable force. But under the court's sweeping rationale, it would have made no difference if the agents had been supported by armored personnel carriers, or by tanks, or by suppression fire from aircraft.

In conclusion, this appeal presents no mere "lawyer's sporting search for error" or for a "device for defendants to invoke the mercy-dispensing prerogative of the jury." The trial judge gave a self-defense instruction in connection with the principal offense; while obviously not determinative, that shows that the person in the best position to evaluate the evidence regarded it as sufficient to warrant such an instruction. These defendants had a serious claim that the ATF used excessive force. Therefore, they were entitled to a self-defense instruction in relation to the manslaughter charge, and the trial court's failure to give one was reversible error.

The dissent also had doubts about the sufficiency of evidence of conspiracy.

Defendants Branch, Whitecliff, Castillo, Avraam and Craddock were convicted under section 924(c)(1) and each was sentenced to 30 years. The predicate "crime of violence" on which this conviction was based was a conspiracy to murder federal officers. Because the jury acquitted the defendants on the conspiracy count, this court must determine whether there was sufficient evidence that each of the defendants joined the conspiracy with the requisite intent. [citations omitted]

Murder is "the unlawful killing of a human being with malice aforethought." [citations omitted]....

At the outset, it is useful to note that there are really two intents required for the crime of conspiracy. Every conspiracy involves an agreement, so it must be established that the several parties intended to agree. But such an intent is "without moral content," and thus it is also necessary to determine what objective the parties intended to achieve by their agreement. Only if there is a common purpose to attain an objective covered by the law of conspiracy is there liability.[58]

The court states that "the record is replete with evidence of a conspiracy to murder federal agents and each individual defendant's membership in that conspiracy." But the evidence as to these defendants relating to the events of February 28 reflects at most that each, as a member of the Branch Davidian sect, participated in some fashion in the gun battle. There is no evidence that any of them entered into an agreement to kill federal officers, much less that they did so with premeditation and malice aforethought. That these defendants were members of the sect led by David Koresh, whose teachings may well have been inflammatory, and that they were present in the compound during the battle and in various

57. Citing *U.S. v. Span*, 970 F.2d 573, 577 n. 3 (CA9 1992), citing *Graham v. Connor*, 490 U.S. 386, 394-96 (1989).

58. Citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.4(e) (1986).

> ways participated in it, does not support a finding that each of them conspired to murder federal officers.
>
> Each defendant is entitled to individual justice by means of a review of the evidence to determine whether the requisite elements of such a conspiracy have been established as to him. Failing that, their conviction of the predicate offense rests on nothing more than guilt by association.
>
> Accordingly, I would reverse the convictions and remand for a new trial.[59]

Thus did the Fifth Circuit Court of Appeals—despite the able dissent—slam the prison door on the Branch Davidian defendants, upholding the trial court in every meaningful respect, compounding the tragedy of 1993 by confirming the convictions and draconian maximum sentences imposed on the living defendants in lieu of those beyond the reach of human vengeance.

### 7. A Congressional Investigation and Report

The legislative branch also evinced interest in the much-controverted events of Waco. Among the factors eliciting the felt need for congressional inquiry was the following: "[M]any policymakers read an article published in *First Things*, written by Dean Kelly [*sic*] of the National Council of Churches, which stirred up considerable speculation about the ATF's conduct and the FBI's use of CS chemical agent."[60] Whatever part that article may have played, there was a much greater incentive impelling the new Republican majority in Congress, which was the possibility of pinning the tail on the Democratic donkey, hoping to find sufficient governmental misconduct to embarass the Clinton administration. That unannounced but obvious objective generated a comparable defensiveness on the part of the new minority party in Congress. The political struggle that ensued was from the start sure to produce more heat than light.

The House of Representatives took on the task of investigation, which was carried out jointly by two subcommittees, the Subcommittee on Crime of the Judiciary Committee and the Subcommittee on National Security, International Affairs and Criminal Justice of the Committee on Government Reform and Oversight, which labored from April 1995 to May 1996 on the matter, including ten days of public hearings at which over 100 witnesses testified, among them members of the Branch Davidian group and defense attorneys for defendants in the criminal trial. On July 25, 1996, the Committee on Government Reform and Oversight approved a 90-page

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59. *United States v. Branch*, 91 F.3d 699, 751 (5th Cir. 1996) (Schwarzer, J., dissenting).

60. House of Representatives, *Investigation into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians* (Washington, D.C.: U.S. Government Printing Office, 1966) (hereinafter "Cong. Report"), p. 7, citing Dean M. Kelley, *Waco: A Massacre and Its Aftermath*, First Things, May, 1995, at 22.

report summarizing the investigation and making recommendations, accompanied by twenty pages of additional and dissenting views by members of the committee.

The report noted that the Administration had been dilatory in responding to the subcommittees' requests, submitting thousands of pages of materials just before the hearings began and sending an index of those materials to the minority but not to the majority! Another lamentable performance by the Administration was recounted as follows:

> By prior agreement with the Justice Department, a potential witness at the hearings, Failure Analysis Associates, Inc., was to inspect some of the physical evidence in order to respond to tampering allegations. It was believed that the views of scientists from Failure Analysis, who had often performed scientific evaluations for the Federal Government,... would be beneficial given public suspicions about the firearms recovered from the site of the Davidian residence. The inspection would not have damaged the weapons and was to have been conducted in the presence of all parties. It was hoped that the inspection would determine whether the Davidians had attempted to alter legal, semi-automatic weapons by converting them into illegal, automatic weapons as the ATF had alleged, and whether any of this evidence had been altered after it was gathered from the destroyed Davidian residence. When the scientists arrived in Austin, the Department declined to make the firearms available to them. The Department agreed instead to conduct the tests itself and present its findings to the subcommittees. A short time later, the Department urged, for cost considerations, that the tests not be performed. As a result, no tests were performed on the firearms.[61]

The prospect of the Justice Department performing the tests itself does not inspire confidence, and it didn't even do that! Not to be outdone, the Treasury Department too was dilatory.

> Regrettably, the Treasury Department balked at making ATF agents available for interviews. The Department steadfastly refused to allow subcommittee staff to meet with ATF agents who participated in the raid. Only the threat of subpoenas secured the appearance of ATF agents at the hearings. The inability to interview these individuals before public hearings was a significant investigative roadblock.[62]

The report listed a dozen respects in which the affidavit prepared by Agent Aguilera as the basis for obtaining a search warrant and an arrest warrant contained "numerous misstatements of the facts, misstatements of the law, and misapplication of the law to the facts, and serves as a de facto record of a poorly developed and mismanaged investigation.... Nowhere in the affidavit is there evidence that the

61. Cong. Report, p. 9.
62. Ibid.

Davidians were manufacturing their own automatic sears, or modifying the lower receivers of semiautomatics, both of which would have been violations of firearms laws." Nevertheless, the report unaccountably concluded that "the affidavit appears to have contained sufficient evidence of violations of Federal firearms law to support the magistrate's decision to issue the warrants."[63] The report also noted that the ATF's "planning for a military style raid began more than 2 months before undercover and infiltration efforts even began." Thus the warrants were almost an afterthought obtained on the basis of a slapdash affidavit cobbled together over a few days in February 1993 by Aguilera. That is hardly a commendable approach to law enforcement and would seem to violate the spirit—if not the letter—of the Fourth Amendment.

Only a few aspects of the report can be treated here—the ones particularly pertinent to the concerns of this work—because most of the report, like most of the Executive Departments' reports, was devoted to administrative and procedural issues. For instance, many pages were devoted to whether the Posse Comitatus Act applied to the National Guard, and many more to whether the ATF tried to deceive the military authorities into thinking there was a "drug nexus" that would entitle the ATF to military assistance without having to pay for it.[64]

Numerous pages were also devoted to the question whether a fatal quantity of CS agent had been injected into the Davidian residence (the congressional report fortunately eschews use of the word "compound" when speaking of the Davidians' home). Using an estimate prepared by the U.S. military that the lethal concentration of CS for humans is 61,000 milligrams per cubic meter, the report concludes that if all of the CS utilized on April 19 was retained within the buildings it would not have reached 412 $mg/m^3$ and if an entire cylinder of CS had been injected into one of the smallest rooms at Mt. Carmel, it would not have reached a concentration of 1900 $mg/m^3$—far below the lethal level. Of course, it is not just lethality that is cause for concern. The same military estimate stated that "the concentrations which would be injurious to the health of approximately 50 percent of any human population range from between 10-20 $mg/m^3$." Thus the figures cited indicate that a lot of damage short of lethality could have been done to the humans in Mt. Carmel, particularly children, pregnant women, the elderly and those with respiratory conditions. A similar series of calculations exonerated the toxicity of methylene chloride, the dispersant used to

63. Ibid., pp. 12-13. See discussion of this subject at §8a below.

64. With respect to the latter issue, the report reveals that the ATF did not seem to believe its own allegations that a metamphetamine lab was in operation at Mt. Carmel; the commander of the Special Forces unit assigned to assist ATF at Waco had two of his medical specialists prepare a report warning of the severe hazards involved in attempting to "take down" a metamphetamine lab because of the possible presence of toxic and/or explosive chemicals, so that special precautions needed to be taken; when this report was presented to the ATF commanders, they were patently uninterested in it, leading the authors thereof to conclude that there was no such lab.

carry the CS, notwithstanding which it is considered a hazardous ingredient in paint remover, and painters are warned not to use it in enclosed areas.

In an earlier section of this work, reference has been made to a supposed "Plan C" in the April 19th action—the decision to break into and demolish the Davidian residence when Plans A and B did not compel the people to come out. That supposition was based on the testimony at the criminal trial by tank drivers and other FBI personnel that there had been no mention of any such tactic during the rehearsals preceding April 19th. But the congressional report stated that the plan submitted by the FBI to Attorney General Reno on April 12th concluded with a contingency provision in case the Davidians did not surrender following the gradual injection of CS agent, as follows: "if all subjects failed to surrender after 48 hours of tear gas, then a CEV with a modified blade will commence a systematic opening up/disassembly of the structure until all subjects are located."[65]

Thus it would seem that what this work has termed Plan C—the final stage of demolishing the Davidians' home—was a sort of footnote to Plans A and B all along, even if the tank drivers were not rehearsed in it. That means it was not an impulsive act of exasperation by the commanders on the ground but a calculated, premeditated final solution approved at the highest levels of the Justice Department to be used in rooting out the recalcitrants when lesser means had failed. The report also noted that not only the commander on the ground, Jeffrey Jamar, but the Attorney General expected the Davidians to fire on the CEVs when they began to inject the CS agent,[66] so Plan A was essentially a nullity.

In many instances, the subcommittees heard as witnesses the same experts who acted for the government and/or who testified for the government in the criminal trial. Paul Gray, who headed the arson inquiry team after the fire, testified that the explosion that occurred during the fire was from a hundred-pound propane cylinder with a piece blown out of the top of it located about where the explosion seemed to have happened.[67] (He did not explain, and probably was not asked, whether that was the explosion that blew a large hole in the roof of the concrete room—which was *not* where the propane tank was located. He also did not testify at the criminal trial, a matter discussed above.)

Professor James Quintiere, one of the two fire experts retained by the Justice Department to join the fire review team, was relied on to testify that the fire began when three separate fires were ignited within two minutes at widely separated spots within the residence (as shown on FLIR photography discussed earlier), and that this persuaded him the fires were "intentionally set from within the compound."[68] (He did not testify, and probably was not asked, about a fire appearing on the FLIR

65. Cong. report, p. 68
66. Ibid., n. 597.
67. Ibid., n. 616.
68. Ibid., p. 85.

photography in the area of the gymnasium a minute or two earlier than the three fires he described.) No other fire experts were called to give a second opinion—at least none is mentioned in the report.

**Findings and Recommendations**

Some of the findings and recommendations reached by the subcommittees pertinent to this work were as follows:

> • The ATF's investigation of the Branch Davidians was grossly incompetent. The failure to accept Koresh's offer to inspect the firearms held at the Branch Davidians residence... was a serious mistake... [as was] [t]he failure to recognize obvious breaches of surveillance security... [or to] analyze intelligence gathered during the undercover operation, including more than 900 photographs of activities around the Branch Davidian residence....
>
> • While the ATF had probable cause to obtain the... warrant[s]..., the affidavit filed in support of the warrants contained numerous false statements....
>
> • Whenever it is feasible to achieve its objectives, the ATF should use less confrontational tactics....
>
> • Federal law enforcement agencies should verify the credibility and the timeliness of the information on which they rely in obtaining warrants to arrest or search the property of an American citizen....
>
> • If the false statements in the affidavit... were made with knowledge of their falsity, criminal charges should be brought against the persons making the statements....
>
> • The ATF did not attempt to fully understand the subjects of the raid....
>
> • Chojnacki and Sarabyn [the ATF commanders on the ground] jointly share most of the responsibility for the failure of the ATF raid against the Davidians.... [The loss of secrecy or surprise], more than any other factor, led to the deaths of the four ATF agents killed on February 28....
>
> • The former Director and Deputy Director of the ATF bear a portion of the responsibility for the failure of the raid....
>
> • The planning of the raid was seriously flawed....
>
> • The ATF agents executing the raid were not required to knock and announce their intention to serve the arrest and search warrants [because the Davidians were known to possess high-powered weapons that might have been used against the agents]....
>
> • The evidence suggests that the Davidians fired the first shots on February 28.... The subcommittees believe that the question of who fired the first shot... cannot decisively be resolved given the limited testimony presented.... It appears more likely, however, that the Davidians fired first as the ATF agents began to enter the residence.
>
> • The evidence presented... generally supports the conclusion that no shots were fired from the helicopters at the Branch Davidian residence. The subcommittees believe, however, that there is insufficient evidence to

determine with certainty as to who fired the shots that made the bullet holes in the roof of the Davidian residence....[69]

• The subcommittees find no justification for the rehiring of Chojnacki and Sarabyn [after they had been fired for their attempts to cover up any derelictions].... It... begs the question whether there are facts not disclosed to the subcommittees that led administraion officials to agree to rehire these men....

• Congress should conduct further oversight of the [ATF], the oversight of the agency provided by the Treasury Department, and whether jurisdiction over the agency should be transferred to the Department of Justice....[70]

• Civilian law enforcement's increasing use of militaristic tactics is unacceptable....[71]

• The FBI allowed negotiators to remain in position at the Branch Davidian residence for too long, resulting in the physical and emotional fatigue, affecting the course of negotiations.... [I]t is clear from the transcripts that negotiators allowed their emotions to influence the discussions.

• The FBI did not take appropriate steps to understand the mindset of the subjects of the negotiations.... The subcommittees believe that the course of of the negotiations could have been better directed by an increased understanding of the Davidians' religious perspective....

• Federal law enforcement agencies should take steps to increase the willingness of its agents to consider the advice of outside experts... [and] to seek outside expert participation in negotiations when warranted by special and extenuating circumstances....

• The Attorney General's decision to end the standoff on day 51 was premature, wrong, and highly irresponsible.... The Attorney General knew or should have known that the plan to end the standoff would endanger the lives of the Davidians inside the residence, including the children. The Attorney General knew or should have known that there was little risk to the FBI agents, society as a whole, or to the Davidians from continuing this standoff and that the possibility of a peaceful resolution continued to exist.

• The "benefits" of avoiding problems were not properly evaluated.... [T]he FBI wrongly concluded and convinced the Attorney General that there was no alternative to going forward with the plan to end the standoff.... [H]aving lost patience with the negotiating process and facing an initially reluctant Attorney General, FBI officials manufactured or grossly exaggerated arguments for urgency.

There was never any overt act or even a statement made by Koresh to support the FBI's asserted fear that the Davidians might try a breakout.

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69. This conclusion was apparently based on the testimony of the raid commander, who was riding in one of the helicopters, and of the pilots of the helicopters. The subcommittees apparently did credit the testimony of Jack Zimmerman that there were such holes in the residence ceiling from incoming fire.

70. Ibid., pp. 13-29, *passim*.

71. Ibid., p. 53.

> Using the threat of a breakout as a reason to go forward with the CS assault plan sooner than continue the negotiations was wrong.... Also, there was no reason to go forward on April 19 out of concern that the HRT [Hostage Rescue Team] was exhausted and needed to step down for retraining. According to the HRT's own commander, the HRT could have remained on duty at the residence for at least 2 more weeks.... There was no evidence that sanitary and other living conditions inside the residence, stark at the beginning of the standoff, had deteriorated appreciably.... [T]here is no evidence that minors were being subjected to any greater risk of physical or sexual abuse during the standoff than prior to February 28....
>
> • The risks of ending the standoff were not fully appreciated.... The FBI's plan was based on the assumption that most reasonable people would flee the residence when CS agent was introduced. The FBI failed to fully appreciate that the Davidians could not be relied upon to act as other reasonable people might... [because of their] resolve, group cohesiveness, and loyalty to what they believed to be sacred ground....
>
> • FBI commanders in Waco prematurely ruled-out the possibility of a negotiated end to the stand-off.... [They] had effectively ruled out a negotiated end long before April 19 and had closed minds when presented with evidence of a possible negotiated end involving Koresh's work on interpreting the Seven Seals described in the Bible's Book of Revelation....
>
> • It is unlikely that the CS riot control agents used by the FBI reached toxic levels, however, in the manner in which the CS was used the FBI failed to demonstrate sufficient concern for the presence of young children, pregnant women, the elderly, and those with respiratory conditions.
>
> • There is no evidence that the FBI discharged firearms on April 19.
>
> • Following the FBI's April 19 assault on the Branch Davidian compound, Attorney General Reno offered her resignation. In the light of her ultimate responsibility for the disastrous assault and its resulting deaths the President should have accepted it.
>
> • The FBI should expand the size of the Hostage Rescue Team.[72]
>
> • The evidence indicates that some of the Davidians intentionally set the fires inside the Davidian residence [on April 19]....
>
> • The subcommittees conclude that Federal law enforcement agents did not intentionally... or unintentionally cause the fire....
>
> • The FBI should have made better preparations to fight the fire....
>
> • The Davidians could have escaped the residence even after the fire began.[73]

The report of the subcommittees was followed by several additional statements by various members of the Committee on Government Reform and Oversight, portions of which are reproduced here.

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72. Ibid., pp. 81-84.
73. Ibid., pp. 88-89.

Rep. William H. Zeliff, Jr., (R-NH) chair of the Subcommittee on National Security, International Affairs and Criminal Justice, added a page expressing the view that, despite charges by the minority, which—with the Administration—was involved in several dilatory and obstructive tactics, the investigation, hearings and preparation of the report had been conducted with unprecedented fairness.

Rep. Tom Lantos (D-CA) countered with a page complaining about the majority's involving various experts and staffers of the National Rifle Association in the investigations that preceded the hearings, which he felt violated the integrity of the entire process.

**Barr Statement**

Rep. Steven Schiff (R-NM), member of both subcommittees, submitted a statement prepared by Rep. Bob Barr (R-GA) of the Subcommittee on Crime of the Judiciary Committee and a former U.S. Attorney, which was the most critical of the government of anything in the report.

> It would not be a significant overstatement to describe the Waco operation from the Government's standpoint, as one in which if something could go wrong, it did. The true tragedy is, virtually all of those mistakes could have been avoided....
>
> ...[W]ith the phenomenal growth in the power of the Federal Government... there has developed a mentality on the part of law enforcement that they can do anything and not be held accountable for it. Along with this we have witnessed the development of a militaristic approach to domestic law enforcement, in everything from dress (black military uniforms and helmets), to equipment (armored vehicles and military surplus helicopters), to outlook, to execution....
>
> Unfortunately, we saw in the Waco tragedy one logical result of the blurring of lines between domestic law enforcement and military operations: an operation carried out pursuant to a strategy designed to demolish an "enemy," utilizing tactics designed to cut off avenues of escape, drive an enemy out, and run roughshod over the "niceties" of caring for the rights of those involved.... I believe very firm steps must be taken to "demilitarize" Federal domestic law enforcement, through substantive legislation and funding restrictions....
>
> The report [recommends] that HRT's [Hostage Rescue Teams] should be expanded. I disagree. In my view, based on the Waco incident (and others), part of the problem is the HRT's themselves; they are relied on too heavily, and are used in situations in which no hostages are present, or which do not lend themselves to HRT tactics. Rather than expanding the size and use of HRT's, I believe they ought to be more carefully circumscribed, controlled and scaled back....
>
> Portions of the FLIR [Forward Looking Infrared Radar] tapes were shown at the hearings; these were under the control of the Government. Of course, the Government used the tapes to buttress its arguments that no shots were fired on April 19... from outside... into the compound, and that

the fire that destroyed the compound was not started from the outside or by the Government vehicles.

Given the severe limitations on questioning by subcommittee members, and the inability to truly review and analyze the Government's evidence, I do not agree with the conclusions in the report that the evidence clearly establishes the Government's position on these issues.

On further examination of FLIR tapes, after the hearings, and in discussions with private parties who have reviewed the tapes, I believe sufficient questions have been raised to warrant further study of these two issues: were there shots fired from outside the compound into the compound on April 19th, and were the fires started—intentionally or unintentionally—by the armored military vehicles or personnel therein?

Unlike the report, I do not dismiss out of hand the civilian analyses of these tapes and other evidence. (On a related issue, I also believe further study ought to be made, and additional evidence examined, concerning the cause of the explosion that occurred during the fire on April 19.)

The Government's use of CS gas in the manner it did, that is, clearly designed to incapacitate men, women and children in a confined, unventilated space, after avenues of escape had been deliberately cut off, was unconscionable; as was the cursory manner in which the Government, and especially Attorney General Reno "bought into" the conclusory and simplistic analyses that the use of CS gas posed an "acceptable" level of risk.

The fact is, while experts may—and did—differ over the precise effects of CS gas on children..., no rational person can conclude that the use of CS gas under any circumstances against children, would do anything other than cause extreme physical problems and possibly death.

For the Government of this country to consciously use CS gas in the way it did on April 19, 1993 in Waco is utterly indefensible and should never be allowed to be repeated. I believe the deaths of dozens of men, women and children can be directly or indirectly attributable to the use of this gas in the way it was injected by the FBI.

I would go further than the report and call for a prohibition on the use of CS gas in situations in which children or the elderly are present or are the targets....

[With respect to the fire on April 19,] I think that the most that can be said is that the fire may have been started inside, and even if it did, the evidence that it was deliberately set is inconclusive. I believe there is the possibility that the fire, or at least some of the fires, may have been caused as a result of the demolishing efforts of the armored military vehicles....

The report concludes that there was opportunity for the Davidians to escape. While obviously this is true—a handful did escape the maelstrom—I conclude there was no opportunity for the vast majority of the Davidians to have any hope of escape, because of the Government's tactics the morning of the 19th of April.

Essentially, the use of the armored vehicles, methodically smashing down portions of the building, cutting off avenues of escape (for example,

> smashing the walls down over the "escape" hatch to the tunnel out of the main building), intimidated the inhabitants into seeking "safety" in the one secure part of the structure (the concrete "bunker" in the center). With massive quantities of CS gas pumped into this area, it virtually guaranteed that most inhabitants would be incapacitated; which they were, and they died in the ensuing fire because of the incapacitating effects of the CS gas and the cutting off of escape routes....
>
> These hearings in June 1995 should be viewed not as the conclusion of the efforts by Congress to get to the bottom of the Waco tragedy, but the beginning of that process.

**Dissent by the Minority**

Of the twenty-four minority members of the House Committee on Government Reform and Oversight (twenty-three Democrats and one Independent), seventeen signed a twelve-page statement of dissenting views, the main burden of which was that the majority had produced nothing new by its extensive labors, but instead had wound up agreeing on many key points with the views of the government (unfortunately an accurate observation).

> The text of the report agrees with recommendations and positions taken as a result of the 1993 Department of Justice and the 1993 Department of the Treasury investigations of the Waco incident. The report agrees that the tragedy at Waco would not have occurred but for the criminal conduct and abberational behavior of David Koresh...[;] that there was probable cause to issue warrants to search the premises and arrest David Koresh; that the military assistance received by ATF did not violate Posse Comitatus; that planning and intelligence operations prior to the raid were inadequate; that the Branch Davidians started the fire on April 19, 1993; that Koresh and his followers had ample time to leave the compound after the fire started; and that the amount of tear gas the FBI used was far below the quantities that would have been required to cause injury or death. These are not new discoveries revealed as a result of the majority's investigation, but previously known findings which the majority has finally accepted....
>
> [But] we reject the false assumptions and unfounded allegations raised by the majority's report.... Additionally, we wish to express strong disagreement with the majority's unfair criticism of Treasury Secretary Bentsen and their call for the resignation of Attorney General Reno.
>
> The majority report suffers from several deficiencies. First, the findings reached are not supported by the hearing record or other evidence. The text of the report states that the Davidians started the fire, however the findings conclude that the evidence is not dispositive on the question of who started the fire.
>
> Second, The report is internally inconsistent. For example, while critical of the FBI for failing to consult those outside of its control during the negotiations, it then commends the FBI for allowing lawyers representing

> the Davidians to enter the compound and conduct several hours of discussions with their clients....
>
> Third, the report omits important evidence from the hearings. At no point does the report discuss the allegations of child physical and sexual abuse perpetrated by David Koresh. Additionally, the report fails to mention the riveting testimony of Kiri Jewell who testified at the hearings concerning Koresh's sexual molestation of her when she was 10 years old. Instead the report dismisses the criminal conduct of David Koresh by summarily stating the [that?] Koresh was not subject to congressional oversight.[74]
>
> Fourth, the report reflects a willingness to believe Koresh over Federal law enforcement officers and personnel. For instance, the report asserts that Koresh's lawyers negotiated a credible surrender agreement. However, Federal law enforcement personnel on the advice of psychiatric and linguistic experts determined that the "agreement" was a continuation of prior manipulative stalling tactics. The report ignores no fewer than four prior instances in which Koresh reneged on promises that he and his followers would leave the compound.[75]
>
> * * *
>
> We disagree with the majority's assertion that the FBI should have developed a thorough understanding of the religious tenets of the Davidians. During the course of the negotiations, the FBI attempted this approach and abandoned it because it became clear that the tenets were based on Koresh's personal thoughts and rapidly changed to suit the occasion....
>
> We disagree with the majority assertion that the FBI negotiators did not appear to recognize the potential benefit of using religious experts in working with Koresh. We refer the majority to the Department of Justice report which listed the opinions of independent religious experts and FBI behavioral experts consulted during the siege....[listing eight religious experts].... [T]he majority of those experts concluded that Koresh was manipulative and likely to deceive. All the experts agreed that Koresh would not leave the compound voluntarily. Therefore the FBI negotiators[']tactics which focused on Koresh as a manipulative and deceitful individual were precisely in accord with the viewpoint of the religious experts... and with the experience of those negotiators who had spent over 400 hours talking to Koresh and his followers.[76]

The religious experts "consulted" by the FBI were a very miscellaneous group. Phil Arnold volunteered his expertise on the Seven Seals of Revelation and found it

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74. Several observers have thought that the sensationalistic testimony of Kiri Jewell early in the hearings and broadcast to a huge public audience was not only "riveting" but irrelevant to federal law-enforcement jurisdiction and was a huge red herring designed to skew the public's (and Congress's) understanding of what was at issue, and may indeed have done so.

75. Ibid., minority dissent, pp. 98-99.

76. Ibid., p. 106.

difficult to get the FBI to listen to him, though it did finally send in an audiotape he made. Koresh heard Arnold and Professor James Tabor of the University of North Carolina on a radio program directed to the Branch Davidians and responded by undertaking to write his interpretation of the Seven Seals, after which, he said, he would come out. Arnold did not consider Koresh manipulative and likely to deceive, nor did he conclude that Koresh would not leave the residence voluntarily; in fact his counsel was exactly the opposite.

Bill Austin, chaplain of Baylor University, and Dr. Glenn Hilburn, dean of its religions department, were listed as religious consultants, but not Prof. Bill Pitts of the Baylor religion faculty, who had studied the history of the Davidians. About these experts, Nancy Ammerman, one of the independent experts who were asked to comment on the two federal reports on Waco, and who is an expert on marginal religious movements, wrote as follows:

> [The FBI] failed to consult a single person who might be recognized by the social science community as an expert on the Branch Davidians or on other marginal religious movements.... While [Dr.] Hilburn is a reputable scholar in church history, he would never claim to be an expert on the Davidians or on other marginal religious movements. He often offered to help the Bureau get in touch with others who might offer such expertise, but he was never asked to do so.[77]

Several of the other "experts" listed were leaders in other branches of the Davidian or Seventh-day Adventist movements, the chief rivals of the Branch Davidians, and thus hardly likely to have an objective view of the situation. Some of the other religious experts seem almost to have been picked at random, since they had little expertise pertinent to the problems the FBI faced.

The notion that the religious tenets of the Branch Davidians were merely the ideas that tumbled out of Koresh's mind from moment to moment was a counsel of futility arising from the FBI's frustration with trying to understand an elaborate and complex belief system, which Koresh inherited from his predecessor "prophets" in the Davidian Adventist stream, and whose main lines he could not change on whim without alienating his following. How he applied that stable teaching to current questions and changing conditions was another matter. One of the functions of a "prophet" was to do exactly that, and Koresh was adept at relating his insights to the Bible and the teaching he had been elaborating from it.

That is not the same as sheer idiosyncracy, and Drs. Arnold and Tabor showed that in their successful effort to meet him on his own ground, speak his own language (which the FBI never did), and appeal to him on the basis of his own presuppositions.[78] As a result, Koresh seems to have been caught up in the prospect

77. U.S. Department of Justice, "Recommendations of Experts...," Ammerman Comments, p. 2.

78. See Tabor, J.D. and Eugene Gallagher, *Why Waco* (Berkeley: Univ. of Calif. Press, 1995), chapter 1.

of setting forth his views on the Seven Seals and had begun to do so when the conflagration brought his efforts to a halt. The proof of his seriousness in that endeavor is contained in the writing he completed before his death, which was brought out by Ruth Riddle on a computer disk and published in 1995.[79] Of course, if he had lived to finish it, he still might have found reason not to come out, but then the situation would have been no worse than it was before the fire.

The minority dissent reviewed the recommendations of the majority and commented on them to the effect that (a) the government has already adopted them (as in doubling the size of the Hostage Rescue Team); or (b) they are not needed (audits by the General Accounting Office do not need congressional action; any member of Congress can request GAO audits at any time); or (c) they may lack administrative or operational feasibility (applying Posse Comitatus Act to the National Guard). The minority concluded by (rightly) pointing out that the FBI had subsequently carried out negotiations with the Freemen in Montana and the Viper Militia in Arizona and brought them to a successful conclusion without violence or bloodshed, "testament to the determination of these agencies to learn from previous mistakes."[80]

Having reviewed the record from many perspectives, it is time to weigh some of the contradictory assertions and reach some conclusions with respect to religious liberty.

### 8. Some Reflections on the Waco Tragedy

As a historical appendix to the Treasury Department report made clear, the United States has a history of attempting to suppress organized, armed rebellions and private militias.[81] No government worthy of the name would do otherwise, for the very definition of government is an overarching authority that seeks to maintain a monopoly of the use of violence within its borders. For a government not to be able to do so results in anarchy of the kind seen in Beirut or Belfast—or some of the inner cities of the United States. If it be granted that governments normally seek to suppress or control private militias, at least two questions remain. (1) Was Mt. Carmel a major threat to that concern? (2) If so, was a "dynamic entry" by over seventy heavily armed federal agents the least intrusive, the best, the necessary, or even an appropriate way to eliminate that threat? Concerning the first issue, a threshold inquiry needs to be addressed.

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79. Ibid., pp. 191-203.

80. Cong. report, p. 110. The minority dissent was signed by Reps. Cardiss Collins, Karen L. Thurman, Henry A. Waxman, Tom Lantos, Robert E. Wise, Jr., Major R. Owens, Edolphus Towns, Louise M. Slaughter, Paul E. Kanjorski, Carolyn B. Maloney, Thomas M. Barrett, Barbara-Rose Collins, Eleanor Holmes Norton, James P. Moran, Carrie P. Meek, Chaka Fattah, and Elijah E. Cummings.

81. See Appendix G of the Treasury Report.

**a. Was There "Probable Cause" for the Warrants?** The Mt. Carmel catastrophe was touched off by an attempt of the Bureau of Alcohol, Tobacco and Firearms to serve search and arrest warrants on David Koresh. To obtain those warrants, the BATF had to convince a federal magistrate that there was probable cause to believe that a crime was being committed or was about to be committed. On February 25, 1992, three days before the raid, a hastily assembled affidavit was submitted to a magistrate purporting to show probable cause, and the warrants were issued. Many flaws have been found in that affidavit, such as that there was no information in it less than eight months old.[82] Its main reliance was not on the stale weapons information but on allegations of child abuse—which were not within the jurisdiction of the BATF and which had been investigated repeatedly by state and local authorities that did have jurisdiction and found baseless[83] (a fact the affidavit conveniently did not mention). But these ominous and sweeping allegations apparently impressed the magistrate with a sense of urgency, and the warrants were signed forthwith.

Was there probable cause—pertaining to federal firearms violations—for the issuance of those warrants? Thanks to the political cross-pressures, the federal law on this subject is so convoluted that it is almost impossible to decipher—or to obey—and is consequently widely disregarded, especially in Texas, where one native said its violation was considered to be on a par with jaywalking. As the Treasury report struggled to explain, it is legal under federal law to own a semiautomatic weapon, but not an automatic one (a machine gun), the difference being that the trigger must be pulled each time to fire a round on a semiautomatic, but a stream of bullets can be fired by simply holding down the trigger on an automatic. The legal weapon can be converted into an illegal one by the use of a device called a "sear." The BATF's research into United Parcel Service invoices of the previous year showed no sears, but did show "upper receivers"—which are legal, and conversion kits, which are legal because they can be used on machine guns that are legal if purchased before the federal firearms law came into effect and registered or handled by a licensed gun dealer. The Treasury report included the assessments of two firearms experts, both of whom arduously, but not surprisingly, eventually reached the conclusion that the warrants were justified by "probable cause."[84]

In so doing, they relied on a concatenation of conjectures: *if* the Branch Davidians had the necessary milling machine and metal lathe, and *if* they had "appropriate tooling" for them, and *if* there was someone able and willing to use them, and *if* they had a sample sear to clone, then it was "highly probable" that they *could* convert the legal semiautomatic weapons they were known to have had into illegal automatic

82. Wattenberg, *supra*, pp. 31 ff.

83. In fact, a state agency reissued its report to this effect following the initial raid, according to Prof. James Wood of Baylor University in Waco.

84. See Treasury Report, Appendix B, pp. 182-183,

weapons, and it was "possible" they had done so. Therefore, concluded the experts, the warrants were valid and sufficient. That conclusion has been strongly criticized. A retired FBI agent commented:

> There is not even one fact in the probable cause affidavit... stating that a violation had or was taking place at Mt. Carmel. The rationale of the ATF was that if two or more legitimate objects exist in one location, then at some unknown time they might be used to produce an illegal object, and that would be reason to obtain a search warrant. For example, probably half the homes in America contain a long-barreled gun and hacksaw. The hacksaw, at some time or other, might be used to saw off enough of the barrel to make it illegal. Based on this rationale, the ATF could search half the homes in the United States.[85]

Others have concluded that the affidavit submitted by ATF agent Aguillera to obtain the warrant was based on information obtained from former members of the Branch Davidians who knew little about firearms and who had left the group many months earlier. Agent Aguillera also seemed unfamiliar with the firearms and conversion kits in question as well as ignorant of the particulars of the federal firearms act he was purporting to enforce.[86]

At trial the prosecution produced numerous charred and plastic-wrapped firearms claimed to have been found in the ruins after the fire. But that does not settle the question whether there was probable cause to obtain the search and arrest warrants *before* the raid.[87] At least one legal scholar—not otherwise sympathetic to the government's cause—concluded that the warrants were valid.[88]

**b. The Charges of Child Abuse.** A principal element in Aguillera's affidavit was the allegation of "child abuse" and sexual abuse of minors. One of the outside evaluators of both reports, Prof. Lawrence Sullivan, Director of the Harvard University Center for the Study of World Religions, referred to the "soteriology[89] of procreation" that "apparently motivated wives to leave their husbands' marital bed for Koresh's, those husbands to embrace celibacy, and parents to allow Koresh sexual

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85. Maynard, Ken, Special Agent, F.B.I., Retired, Dallas County, TX, "Analysis of Mount Carmel Search Warrant," n.d., Documents Submitted to Senate Judiciary Committee by David G. Hall, General Mgr., KPOC-TV. Ponca City, Okla.

86. See Kopel, David B. and Paul H. Blackman, "The God Who Answers by Fire: The Waco Disaster and the Necessity of Federal Criminal Justice Reform," Paper presented at American Society of Criminology, Miami, November 1994, esp. Chapter 1, "The Unwarranted Warrant," pp. 11-25.

87. Another consideration that not much was made of in the affidavit, the reports of Treasury and Justice Department, or the trial of survivors was the materials for making practice grenades into explosive grenades, which were clearly illegal. Perhaps that element was neglected because no explosive grenades were found or because none was used in the standoff.

88. See Gaffney, Edward M., "The Waco Tragedy," in Wright, Stuart A., ed., *Armageddon in Waco: Critical Perspectives on the Branch Davidian Conflict* (Chicago: Univ. of Chicago Press, 1995), pp. 337-338.

89. "Soteriology" is the study of or belief in saviorhood or salvation.

relations with their minor children."[90] In this passage Sullivan alluded to a central problem of perspective that afflicts most accounts of the Branch Davidians. Some of the most sympathetic and least judgmental commentators imply that Koresh's sexual exploits were self-indulgences engineered by the dominating, charismatic leader and tolerated by overawed and subservient followers, for which theological dispensations served as a cover and rationalization. That characterization typifies the basic misconception about such groups. While Koresh no doubt found such liaisons no hardship, the "soteriology of procreation"—like most that went on at Mt. Carmel—was a *collective project*. That is, the religious community as a whole was enlisted in the undertaking to treasure, husband, maximize and disseminate the uniquely "pure seed" of the "prophet" as a precious resource for raising up the heirs to the new Kingdom. *Newsweek* gave this account of the procreational project:

> To many girls being chosen by Koresh was an honor they eagerly sought. Koresh "wouldn't do it unless you wanted it," says Jeannine Bunds, 51.... "It wasn't about sex, but he was a very appealing, sexual person.... He just loved the idea of womanhood... and he made you feel special...." A union with Koresh was spiritual, says Robyn Bunds, who met with Koresh when she was 14 and slept with him when she was 17.... "He's perfect, and he's going to father your children. What more can you ask for?"[91]

That quotation presents a perspective different from the voyeuristic viewing-with-alarm by the media, which seem able to tolerate any sexual perversion—so long as it is recreational, but let them suspect any irregular sexual conduct in the area of religion and they fall into a flurry of clucking of tongues and wagging of heads! Many new religious movements have unconventional domestic arrangements that excite the alarm of outsiders, such as the "celestial [plural] marriage" of the Mormons and the "complex marriage" of the Oneida Community (where all of the men were married to all of the women, but couldn't consummate that relationship without the approval of the founder, John Humphrey Noyes), but which are often carefully regulated within the group and accompanied by a highly structured, extended-family type of nurture of the children.[92]

**c. Responsibility for Tragedy**. It seems of secondary importance whether the FBI actually, physically kindled the conflagration by rupturing propane tanks or knocking over lighted Coleman lanterns onto bales of hay, as some survivors claim, or whether the FBI only drove the Davidians in desperation to seek their only alternative to ignominious surrender, an alternative that offered theological vindication in the hereafter or in an apocalyptic ending of the present age. To claim, as President Clinton and others have done, that David Koresh was reponsible for the deaths of his

90. "Recommendations of Experts," Sullivan Comments, p. 6, discussed at § 3c above.

91. Quoted in Wattenberg, *supra*.

92. See Noyes, J. Pierrepont, *In My Father's House: An Oneida Boyhood* (London: John Murray, 1937).

followers is to oversimplify the nature of causation. Certainly Koresh was one of the causes. He set the stage by his teachings and example, but the Mt. Carmel colony could have gone on for a long time without its tragic end in fire if the federal government had not seen fit to intervene in the excessive way it did. The federal government cannot avoid coresponsibility for what happened, whether intentionally or not. That is why it is a true tragedy, in that neither of the protagonists seems to have intended the fateful outcome, but together they did not seem able to avoid it.

That is what was meant when James Dunn, director of the Baptist Joint Committee on Public Affairs, and this author wrote President Clinton on March 11, 1993, urging him to demilitarize the standoff at Waco:

> [The officers do not] seem to have any real understanding of what is involved in a high-energy religious movement, where the members are drawn into a tight circle of devotion and commitment to a charismatic leader whose spiritual insight and guidance they value more than life itself.... Threats of vengeance and the mustering of troops and tanks are but proof to the "faithful" that the powers of the world are arrayed against them, evidence of their importance in the cosmic struggle—confirmation of their worst fears and validation of their fondest prophecies. Their level of commitment to their faith is higher than most people give to anything and is therefore very threatening to others. To invade a center of energy of that kind is like sticking a finger in a dynamo. *Whether it explodes or implodes, the result will be tragic for all....*[93]

The governments of the United States and Texas expended millions of dollars to enforce the firearms laws against the Branch Davidians. When one considers the investigations beginning a year prior to the assault, the innumerable high-level planning meetings in Washington and Texas, the assembling of a strike force, the assault itself, the fifty-one-day siege, during which there were "never fewer than 719 law enforcement personnel committed on-site round the clock"[94]—and, presumably, often more—the post mortem investigations, autopsies, analyses, the imprisonment and prosecution of survivors, etc., how much have the taxpayers had to pay for this huge and arguably unnecessary debacle? On any sensible scale of law-enforcement priorities, the Branch Davidians should fall quite low compared to drug-running gangs shooting innocent passersby with assault weapons and "street-sweeper" shotguns on the streets of major cities. On the other hand, it was precisely this immense outflow of governmental resources that served as a heavy incentive to law-enforcement agencies not to let the siege go on indefinitely.

Nothing in what has been written here is intended to suggest that the government's role and responsibility in this kind of situation is easy or clear. Presumably, the

93. Letter from James Dunn and Dean Kelley to President Clinton, March 11, 1993, emphasis added.

94. Justice Report, p. 10.

federal officials were honestly trying to do what they thought should be done, according to their lights. The FBI had a "tiger by the tail" that they didn't want to kill, couldn't hold onto indefinitely (at immense expense) and couldn't let go without incurring the charge of having wasted four agents' lives and millions of dollars as well as leaving the government vulnerable to liability for huge damages. That they should have done otherwise or better is easy for outside observers to say in hindsight. That they have learned from their errors is less clear. As one defense attorney, Douglas Tinker, remarked in San Antonio, "They'll be kicking down doors tomorrow just like they did at the Mount Carmel center."[95] In any event, are there not many more imminent problems for law enforcement than suppressing at immense cost in money, time and human lives an obscure little band of believers pursuing their relatively innocuous ways in relative isolation on the Texas prairie?

The gravest error on the part of the federal agencies was that they seriously misjudged what they were dealing with. They thought of Koresh—at best—as a small-time con-man who had manipulated and exploited a group of credulous persons of "low self-esteem"[96] who would welcome rescue from their subjugation to him. That was not remotely the case.

**d. Was Religious Liberty Violated at Waco?** After reviewing the immense panorama of the Waco tragedy, and questioning the justification of the government's actions, a further inquiry presents itself: even if the government was at fault in one way or another, was religious liberty itself violated? That may seem like a superfluous question from either of two standpoints. When David Koresh and most of his followers perished on April 19, 1993, they were precluded from exercising *any* liberties. On the other hand, if they were the victims of the results of their own ill-advised resistance to legitimate law-enforcement actions, or if they committed suicide, it could be argued that any harm they suffered was brought upon themselves and was not the result of state action.[97] So how can it be said that religious liberty was peculiarly violated at Waco? Even if the government was seriously at fault, might it not arguably be just another instance of all-too-frequent law-enforcement overkill, having no specific connection with religion? The federal agencies, in their reports, predictably took the view that they acted toward the Branch Davidian sect as they would have toward any other group that was (allegedly) stock-piling illegal weapons, neither targeting them because of their religion nor exonerating them

95. *N.Y. Times*, Feb. 28, 1994, p. A14. However, the FBI seems to have shown much greater circumspection in its proceedings against the Freemen in Montana in 1996.

96. A characterization asserted in the Justice Department Report, p. 206, without any substantiating evidence beyond the fact that they were followers of Koresh. Persons who knew and respected Wayne Martin and Perry Jones and other Branch Davidians before the debacle did not think of them as "persons of low self-esteem." Prof. James Wood of Baylor University.

97. That appeared to be the view of the President and the Attorney General of the United States. Cf. editorial in *N.Y. Times*, April 21, 1993.

because of it, thus eliminating the factor of religious liberty from the equation. But was it really eliminated?

Many pages have been devoted to this tragedy precisely because it is a culminating incident in the narrative of the fate of the autonomy of religious bodies in the United States. A careful analysis, using a broad understanding of the significance of religion and the right of its free exercise under the Religion Clauses of the United States Constitution, suggests that *the most central and important element in the right to religious freedom and autonomy was grossly and specifically annihilated by government action at Waco in 1993: the right to be let alone.* That right has fallen into some neglect in an age of ever-more-intrusive government, but perhaps the tragic events of Waco can help to give it new meaning.

The place to start in such an analysis is the first parsing of the Religion Clause(s) by the Supreme Court, which took place in 1879 as the court started to grapple with the problems posed by another high-energy religious movement, the Mormons. In trying to sort out the proper relation between religion and government, between Church and State, the court looked to the intention of the Founders.

> Mr. [James] Madison prepared a "Memorial and Remonstrance,"... in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government.... [Following this, the Virginia colonial legislature adopted Thomas Jefferson's Bill for Establishing Religious Freedom.] In the preamble of this Act, religious freedom is defined; and after a recital "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on the supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the Church and what to the State.[98]

Although many think that the court misapplied that distinction in deciding against the legality of the practice of plural marriage by Mormons, and although that decision has spawned a line of simplistic distinctions between belief and action such that prosecutors contend that any religious behavior that is overt and observable falls within their purview, the distinction drawn in *Reynolds*, properly understood, remains central to the American concept of religious liberty.

To properly understand that distinction, it is necessary to realize that its authors, especially Thomas Jefferson, imbued with the outlook of the Enlightenment, had an intellectualist European notion of religion as a credal, word-focused enterprise of "beliefs," "opinions," "principles," "tenets" and "doctrines," whereas in actuality

98. *Reynolds v. U.S.*, 98 U.S. 145, 163 (1878), discussed at IVA2a.

religion is first and foremost a matter of shared experiences, relationships, attitudes, visions, rites and expectations. The *words* come later, as beliefs, scriptures, creeds and theologies are formulated to regularize and rationalize and communicate the inchoate experiences that precede them.[99] Thus *actions* are as central to religion as *beliefs*, and both are to be protected from state interference unless and until they "break out in overt acts against peace and good order."

Of course, that is part of the quandary. Some will say that the Branch Davidians had done nothing to disturb the peace and good order of Texas and should have been left alone. Others (particularly law-enforcement officers) will say that gathering an arsenal of automatic weapons and hand grenades was exactly an "overt act[ ] against peace and good order" that had to be stopped. (That leaves to be weighed the questions *how* it should have been stopped, and whether the means used were the least intrusive alternative for stopping it.) It is the argument of this analysis that in weighing these counter-contentions, the benefit of the doubt should always be given to the religious group, for reasons to be discussed below.

**e. Are Religious Groups "Above the Law"?** Such an argument will invariably evoke the response that religious groups should not be "above the law." Just because some people claim to be religious, it is said, they are not entitled to disobey laws that everyone else has to obey. That is true in the abstract. All are bound by the law. But not all laws are equally enforced; in fact, *few* laws are *fully* enforced. Police and prosecutors (rightfully) enjoy considerable discretion in selecting the targets for enforcement because they could not possibly enforce all laws fully all the time.[100] Since the laws are thus inevitably underenforced or differentially enforced, the decisions of enforcement are necessarily related to questions of priorities. Which of the many threats to peace and good order should be the targets of limited law-enforcement energies and the burdens of an overburdened criminal justice system and overcrowded prisons?

Presumably a rational law-enforcement decision would be to go after the most serious threats to peace and good order first, and leave the lesser for later (or not at all). On this scale, most religious groups would normally not be in the top range of priorities for any sensible agency of law enforcement. That is not to deny that there may be genuinely religious groups that are genuinely dangerous to others, but they ordinarily would not prove very attractive to converts and thus would have a self-limiting prospect. However, if they do exist and are really a threat and actually

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99. Cf. Justice Robert Jackson: "William James... reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. `If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support....'" *U.S. v. Ballard*, 322 U.S. 78, 93 (1944)(dissenting).

100. When police undertake a job action, one of their ways of showing displeasure with their working conditions is to enforce all laws aggressively on everyone, virtually bringing the workings of society to a halt.

violate important laws,[101] they should be proceeded against by law enforcement (using the least intrusive means) for the protection of the public. The Branch Davidians were not remotely such a group.

But suppose a religious group is marginally suspect of posing a potential threat to "peace and good order"; should they be proceeded against, or should they be left alone until any threat "breaks out in overt acts?" A better response to the query with which this section began is that religious groups are not "*above* the law," they are *in* it. Religion is a clearly identified entity expressly recognized and protected in the fundamental law of the United States: "Congress shall make no law... prohibiting the free exercise [of *religion*]."[102] What that means, or should mean, for a group like the Branch Davidians is a subject of vast proportions based on a huge literature of case law and commentary. It is the theme of this entire treatise, and the crux of it is illuminated by the Waco tragedy. But there is an underlying intention in it that, whenever possible, religious groups (specifically) should be let alone by government. Why should that be?

**f. Why Religious Groups Should be Let Alone.** One of the monumental achievements of the Founders was to try to spare believers the civil burdens that had befallen them in earlier times and places and to make the pursuit of religious visions by every person as free as possible of governmental regulation or imposition. That consideration has even been extended—though somewhat grudgingly—to *groups* of religious believers, whose autonomy is to a considerable degree recognized and respected by the law. That is a basic right for which all should be forever grateful and should sedulously maintain and defend for everyone. It is more than justified for its own sake, as one of the highest provisions for one of the most precious of human rights. But some people tend to think that, while laudable, it is essentially an indulgence of individual idiosyncracy that may need to be abrogated in the interest of more pressing public needs. They fail to realize that the key covenant on which the ratification of the Constitution turned[103]—the First Amendment—*defines* the free exercise of religion as *preeminent among all pressing public needs*. But a sociological analysis may help to understand why that is the case.

Two nonintellectualist observations are necessary to that understanding. One is that *the fulfillment of the function of religion is essential to any human society.* That

101 . The Islamic fundamentalists operating out of a mosque in Jersey City, four of whose members were convicted of the terrorist bombing of the World Trade Center on February 26, 1993, may be such a group, as may the Japanese sect known as Aum Shinrikyo accused of releasing poison gas in the Tokyo subway.

102 . U.S. Constitution, First Amendment.

103 . Several states refused to ratify the Constitution until promised a Bill of Rights containing a guarantee of freedom of conscience.

function has been described as explaining the meaning of life in its ultimate sense.[104] Any society that does not have one or more ways of fulfilling that deep human need for those who need it is in danger of dissolution and decay. That does not mean that everyone needs an assurance of ultimate meaning all the time, or that the same explanation will satisfy all, but when an individual does seek an understanding of human destiny and his or her own place in it, the need can be intense. For those who hunger and thirst for a faith that gives meaning to life, no price is too high. When they find it—*if* they do—they may invest their lives in it, not to mention their fortunes, for in this market money is cheap.

The second observation flows from the first. On the most meaningful scale of human affairs, *the important measure is the degree of investment of personal energy*—not just money, but time, effort, emotional anguish, the commitment of the whole self. Few people invest themselves fully in anything, even the achievement of their personal ambitions. But new religious movements can often attract and enlist higher levels of energy for longer periods of time in commitment to their spiritual vision than any other form of human endeavor. They seek to harness every waking thought and action of their adherents for the advancement and enhancement of their cause. This can be very threatening to their neighbors, who call them "enthusiasts,"[105] "fanatics," "obsessed," "overintense" and other terms of opprobrium. But this highly structured high-energy phenomenon can be very attractive to people with intense needs for ultimate meaning.[106] As the religious movement grows and ages, its energy level subsides until several generations later it has reached the relaxed, avocational level of the large, "respectable" religious bodies to which we are more generally accustomed and therefore think of as the norm for religious behavior. But the most pure and intense form of the religious enterprise is that seen at its high-energy beginning.[107]

All major historic religions began in this way, and it is the main way in which new impartations of ultimate meaning come into the world. As one looks back across the centuries, the peaks of human investment of energy are the inceptions of the great religions, when a handful of unprepossessing followers of a charismatic guru or revelator were lifted up by their shared commitment to their vision until the rest of society sloped down from them. They had profound effects upon their times, reshaping old cultures, revitalizing tired economies, raising the level of people's moral

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104. See extended discussion in Kelley, D.M., *Why Conservative Churches Are Growing* (New York: Harper & Row, 1972, 1977; Macon, Ga.: Mercer Univ. Press, 1984), pp. 36-55, and in the concluding portion of this treatise at VF5.

105. A term used in England to characterize the Wesleyan movement, progenitor of Methodism.

106. Perhaps that suggests why several individuals tried to make their way in through the federal perimeter to join the Branch Davidians during the siege, and two of them—Louis Alaniz and Jesse Amen (or Alman)—succeeded, for which they were later arrested (Justice Dept. Report, chronology for March 24, 27, 28).

107. This high-energy quality was the factor pointed to by reference to a "dynamo" in the letter to President Clinton quoted earlier.

expectations of one another. Not all new religious movements reached these heights; some failed along the way; others were suppressed by their predecessors, for the way of the religious innovator is hard.[108] One of the mysteries of human affairs is how these infusions of high energy are injected into the ordinary stream of life. Whether it be attributed to divine or human inspiration, the head of power attained is remarkable, energizing succeeding generations of the movement and even, by a sort of induction, the rest of society. No one could *pay* people to put in the kind to time and energy that these devotees give their faith. Science cannot predict when or where these eruptions will occur, or what form they will take,[109] but they can have a formative and reformative effect on whole societies.[110] They are a rare and valuable resource for the society in which they occur, however uncongenial and dissonant they may seem at the time. Precisely because they offer a critique and corrective to old and accepted ways, they run great risk at the hands of those who benefit from and embrace those ways. These high-energy movements are the forms of religious behavior at the same time most in need of legal protection and least likely to receive it. If any form of religion is entitled to the guarantees of Free Exercise, it is these discordant, dynamic and elemental movements of the type that was so vigorously suppressed at Waco.

But what if they violate the law? That question was addressed above, but a further word can now be added. It can be argued that normally such movements lack the *mens rea* or criminal intent that is an essential element of an offense punishable by the criminal law. They are not *outlaws*, in the sense of trying to rip off the rest of society for their own aggrandizement, like a drug-running gang or a racketeering mob. They are at most "*nonlaws*," in the sense of being preoccupied with the safeguarding and promulgation of their own spiritual vision to the exclusion of everything else.[111] That obsession may need to be reined in for the sake of others in society, but only if others are actually and immediately at risk. Does that mean they think they are not bound by the laws that bind others? Certainly, if they come in conflict. But they are not purposely designing to break the law. They may indeed often endorse the validity of the law and the importance of obeying it, so long as it does not interfere with what they feel is their religious duty. If it does, they will regretfully take the stance characteristic of religious "rebels" and reformers and endure the consequences. As Peter and the apostles said to the legal authorities of their time, "We must obey

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108. Many religious innovators have been exiled, imprisoned, tortured, crucified, drowned, hanged, burned at the stake or otherwise subjected to their offended contemporaries' displeasure.

109. See Kelley, D.M., "Religion and Justice: The Volcano and the Terrace," The 1983 H. Paul Douglas Memorial Lecture, *Review of Religious Research*, Vol 26, No. 1, Sept. 1984, pp. 3-14.

110. Eric Hoffer considered the fanatical mass movement (of which the religious movement is the preeminent form) "a miraculous instrument for raising societies and nations from the dead—an instrument of resurrection." *The True Believer* (New York: Harper & Brothers, 1951), p. 166.

111. Cf. the statement by Kathryn Schroeder in her testimony at the criminal trial in San Antonio: "[Man's laws] weren't important. God's laws were important." § 4b above.

God rather than men,"[112] or, as Luther said to the Holy Roman Emperor, Charles V, who demanded his submission and recantation, "Here I stand, God help me, I can do no other."[113] If those are "outlaws," the world needs more of them!

The law of the United States, at its best, has tried to avoid such confrontations with religious duty by exempting persons acting out of conscience from the full rigors of the law, as in the statutory provision for conscientious objectors to military service—a provision that may cost someone else's life in place of the objector's![114] Certainly many lesser accommodations can and should be made that do not displace such costs on others. If Branch Davidians are not sent to jail for trafficking in illegal firearms, no one else has to go to jail in their place. And if such confrontations cannot be avoided, a second principle of American law is that *they should be minimized as much as possible*. That is not a principle unique to the free exercise of religion, but applies to governmental impingement upon other guarantees of the First Amendment. Any governmental burden upon, or curtailment of, such protected freedoms, must be not only justified by a compelling state interest, but must be approached in the least intrusive way, using means "narrowly tailored" to the governmental interest. "The state must justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[115]

In the best of all possible worlds, it might have been possible to allay Koresh's fears of federal annihilation while telling him he couldn't build up an arsenal of machine guns and hand grenades and really wouldn't need them. That might not have worked, because he had invested much money and credibility in that scenario, and paranoiacs are notoriously hard to persuade out of their paranoia. But it certainly would have been worth a try, and would not have precipitated anything like the kind of tragedy that did occur.[116] Anything, short of outright massacre (which either side could have carried out if they really tried), would have been better than that. Again, the principle should be to use the least intrusive means to curtail threats to peace and good order, and to use more intrusive means only to the extent necessary, not to use the last resort first.

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112. Acts 5:29.

113. —Or words to that effect. Cf. Walker, W., *A History of the Christian Church* (New York: Scribners, 1945), p. 348.

114. See discussion of the standard mode of meeting religious objections in the Founders' era—by exempting the objectors—in McConnell, M.W., "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harv. L. Rev.*, 1410 (May 1990).

115. *Thomas v. Review Board*, 450 U.S. 707 (1981). This standard was slighted in *Oregon v. Smith*, 494 U.S. 872 (1990), but reinstated by Congress in the Religious Freedom Restoration Act, P.L. 103-141, 42 USC 2000bb.

116. After all, David Koresh did come to the front door of the residence *unarmed* to ask the ATF raiders, "What's going on here?" Survivors claimed that he intended to try to discuss any problems with law enforcement in a civilized way. But the raiders were not programmed for discussion.

Whether Koresh really received and rightly interpreted communications of God's will no one else can judge. But religious liberty includes some leeway to find and follow the leadings of the spirit without having to prove their authenticity to others.[117] Men and women are to be permitted to "march to a different drummer," even if they do so collectively, amidst a climate of misunderstanding and disdain. Religious innovators—despite the posthumous hagiography that forms around them—are not always model personalities. They are often driven by their vision to statements and actions that may seem impolitic or impulsive to outsiders. "Marching to a different drummer" than the "world" marches is the source of their promise and their peril. And when peril overtook one of them in Texas in 1993, the government's treatment of him (and most of his followers) did not seem to be a great improvement over the treatment meted out to an obscure Galilean nearly twenty centuries ago. In either case, the eclipse of autonomy—as far as the government officials were concerned—was as nearly total as they could make it. That is the opposite of religious liberty.

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117 . See *U.S. v. Ballard*, 322 U.S. 78 (1944), discussed at IIB5a (defendant cannot be required to prove truth of his religious beliefs in court).