

# Judge Says F.B.I. Withheld Data on Indians

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Federal Judge Fred J. Nichol, who presided last year over the trial of two militant Indian leaders involved in the take-over of Wounded Knee, S.D., has accused the Federal Bureau of Investigation of withholding information from Federal prosecutors on the bureau's use of informers during the take-over.

He said in a recent telephone interview from his office in Sioux Falls, S.D., that his conclusions were reached following published accounts of the roles of two admitted F.B.I. informers during the take-over of the village and the subsequent trial of the two leaders.

The judge said that, after discussing the matter with lawyers for the Government and for the defendants in the case, he now wished to withdraw his earlier assertions that he had been deceived by the Department of Justice prosecutors during the trial.

"I don't have any prejudice against the Government or the F.B.I.," he said. "But I do think it true that the F.B.I. withheld stuff from the Government, and that I've been blaming the prosecution for matters they were innocent of."

### 'Deliberately Misled'

Last March 13, the day he removed himself from presiding over any future trials arising out of the Wounded Knee incident, the judge asserted that he had been "deliberately misled" by R. D. Hurd, an Assistant United States Attorney who directed the prosecution.

The judge's criticism followed an account, in that day's New York Times, in which Douglass Durham, who had served as security chief for the defense during the wounded Knee trial, disclosed that he acted as an F.B.I. informer at the time.

The trial ended last September when the judge dismissed charges against Dennis J. Banks and Russell C. Means, two leaders of the American Indian Movement, of assaulting Federal officers, larceny and conspiracy. A juror had become ill, and the Justice Department refused to let the 11 other jurors decide the case. The Justice Department is appealing the dismissal.

In the interview, Judge Nichol said that his criticism of Mr. Hurd and the other Government prosecutors was "no longer operative."

### Accusation Held Unjust

"I think I have unjustly accused them of misleading me," he said, "when it was the F.B.I. that didn't let them know" about Mr. Durham's dual role during the trial.

The judge said that after Mr. Durham's disclosure called Hurd in, and I accused him directly of refusing to come clean with me. He denied that he had any knowledge that this fellow was an informer."

Kenneth Tilsen, an A.I.M. lawyer, said in a telephone interview that Mr. Durham was the only individual besides Mr. Means, Mr. Banks and their attorneys who attended the defense's secret strategy sessions during the trial.

Mr. Tilsen said that Joseph Trimbach, a regional director of the F.B.I. based in Minneapolis, had testified at the trial that no F.B.I. informer had attended any strategy meetings at which Mr. Means or Mr. Banks were present.

The lawyer said that he intended to ask Judge Nichol for a contempt hearing over the F.B.I.'s alleged failure to make known to the prosecution and, through discovery proceedings to the defense, the roles played by Mr. Durham and Harry E. Schafer, a fellow F.B.I. informer.

Mr. Schafer told The Times

in a recent interview that he and his wife, also an F.B.I. informer, had set up an alternative fund-raising unit in Rapid City, S. D., that diverted money from the A.I.M. legal defense fund and reported regularly to the bureau on the activities of A.I.M. sympathizers there.

### Affidavit of Prejudice

Judge Nichol said that he believed that his decision to remove himself from future Wounded Knee prosecutions, a decision he made after the Government filed an affidavit of prejudice against him, would not necessarily preclude him from presiding over a contempt hearing involving the original case.

The affidavit of prejudice was filed against Judge Nichol by the Justice Department after several criticisms by him during the trial of the Government's conduct.

At one point, after it was established that two F.B.I. agents had given false testimony, the judge said from the bench that it was "hard for me to believe that the F.B.I., which I have revered for so long, has stooped so low."

The Justice Department has conducted an investigation of the Wounded Knee prosecution, for which it gave Mr. Hurd an award for "superior performance," but the completed study has not been made public.

The published accounts of Mr. Durham's and Mr. Schafer's activities have appeared only in the last several weeks.

During the trial, Judge Nichol issued an order that the Justice Department disclose to him any "arguably relevant" evidence that its informers had invaded or had had "contact with" the Means-Banks defense apparatus, including the legal defense office in Rapid City.

### Caused Him Concern

Mr. Durham told The Times that the judge's order, which initially called for F.B.I. agents to examine the bureau's informer reports for such evidence, caused him concern that his double role might be disclosed in court.

But he said that the F.B.I. agents to whom he reported told him, "Hurd doesn't actually see the stuff; one of our

men goes through the files. If it comes to you, we'll pass over it."

Mr. Schafer said that he had been provided similar assurances of protection by Mew Orleans F.B.I. agents who "handled" him.

Judge Nichol's order was later amended, however, to allow Mr. Hurd, David Gienapp, another Assistant United States Attorney, and Earl Kaplan, a lawyer from Justice Department headquarters, to examine the F.B.I.'s informer files themselves.

To aid them in their inquiry, the prosecutors were given a list of names by Judge Nichol of individuals who, as lawyers, consultants or legal workers, had been associated with the defense camp during Wounded Knee or at the trial.

The list, prepared by A.I.M. lawyers, was placed under seal by Judge Nichol, but several sources who have seen it said that it contained the names of both Mr. Durham and Mr. Schafer.

Mr. Tilsen submitted an affidavit of the trial in which he asserted that an unnamed man, whom he later identified as Mr. Schafer, had "attempted to frequent" the legal defense office in Rapid City between March and May of 1973. He said that he finally "evicted" the man when he "became convinced that the person involved was untrustworthy."

Following the examination of the F.B.I. informer files by the three prosecutors, Mr. Hurd replied to the court in an affidavit that the bureau's records had "contained no material which could arguably be considered as evidence of an invasion of the defense legal camp."

In the legal sense, "invasion" involves the reporting back to the bureau on the defense's evidence, its proposed courtroom tactics and the like.

When it was pointed out to one Justice Department official familiar with the case that the judge's order spoke of both "invasion" and "contact," while Mr. Hurd's affidavit mentioned only the former, he replied that none of the prosecutors had seen material in the F.B.I. files that resembled "contact by any interpretation."