4 40M NYTimes PREP SEP 18 1974

Wounded Knee Defense Reviews The Winning of a Political Trial

'Errors' by Prosecution Are Conceded, but Victory Is Laid to a Strategy of Making Government the Defendant

By MARTIN WALDRON
Special to The New York Times

ST. PAUL, Sept. 17—In dismissing the charges in the Wounded Knee Indian trial here yesterday, United States District Judge Fred J. Nichol said, "I'm rather ashamed that the Government was not better represented in this case."

The judge went on to say that in addition to committing misconduct, the prosecution had made numerous "errors of judgment and errors of negligence."

While the team of defense attorneys agreed that the Government had been guilty of misconduct, they did not agree with the implication that the Government might have convicted Russell C. Means and Dennis J. Banks, leaders of the Indian uprising at Wounded Knee, S.D., last year, had it not been for these errors.

In private discussions, several of the defense attorneys said that almost no prosecutor in the United States knew how to try and to win political trials against an efficient defense.

Cause of 'Errors'

The "errors" that the chief prosecutor, R. D. Hurd, may have committed were viewed by the lawyers as having been prompted by his attempt to match wits with the experienced team of defense attorneys headed by one of the most effective political-trial lawyers in the United States—William M. Kunstler of New York City.

Mr. Hurd's competence as a prosecutor, as well as that of his associate, David Gienapp, was attested to last month by the Justice Department, which chose them as two of the outstanding young Assistant United States Attorneys in the nation. Both are from Sioux Falls, S.D., and are assistants to the United States Attorney for South Dakota, William Clayton.

Mr. Hurd, who is 33 years old, said somewhat bitterly after the trial, "I expect by the time I am 43 that I'll be a better trial lawyer than Bill Kunstler."

Defense attorneys were confident from the opening of the trial, in the first week of January, that they would win the freedom of Mr. Means, a 34-year-old Sioux, and Mr. Banks, a 42-year-old Chippewa.

The defense strategy was to try the Government, and this the lawyers did, probing relentlessly at Government witnesses to find contradictions in testimony and, failing this, trying to discredit the witnesses personally.

A Prosecution Problem

"One of the problems which Hurd faced was that the Government indicted Russ and Dennis first and then set out to get the evidence," said one of the defense attorneys, Kenneth E. Tilsen, whose St. Paul office was the nerve center of the Wounded Knee defense team.

Althiugh there were up to 300 Indians milling around in Wounded Knee at one time or another during the 71-day-long seige last year, the 140 or so who were closest to the action were all indicted by the Government, thus precluding them from being witnesses for the prosecution.

Two Government informers who infiltrated the Indian camp to gather evidence were not called as witnesses. One had told the Indians in Wounded Knee shortly after being sent there that he was a spy for the Federal Bureau of Investigation, and the other disappeared after the Government subpoenaed him.

While Mr. Kunstler and another defense attorney, Mark Lane, also of New York City, agreed that most prosecutors lacked the expertise to win convictions in political trials, Mr. Tilsen said he was not completely convinced.

"It is a seductive idea, but the Government does win political trials," Mr. Tilsen said. "It loses those where the offenses charged or the personalities involved are such as to attract the attention of the public or the media. This makes it possible for defense attorneys to get the financial resources necessary to put up an adequate defense."

Cost of Trial

Much of the cost of the Wounded Knee defense, estimated at more than $250,000, will be borne by the Government, since Judge Nichol ruled that the defendants qualified as paupers.

One reason for acquittals at political trials in recent years, Mr. Tilsen said, is that jurors seem willing to be convinced that the Government can and does violate the law itself in the investigation and prosecution of crime.

But the jurors in the Wounded Knee case said the reason that virtually the entire jury panel was unwilling to convict was that they did not consider the Government had proved its case.

As he was dismissing the charges — assault on Government officers, conspiracy and larceny—against Mr. Means and Mr. Banks, Judge Nichol remarked that it was certainly a fact that they had led the armed take-over on the night of Feb. 27, 1973.

Government witnesses had testified about various criminal actions, such as breaking and entering, that occurred during the siege. But the prosecution was not satisfied to prove that only crimes were committed. They wanted to establish the atmosphere, and they proved that these cromes occurred "in Indian territory" on the Pine Ridge reservation of the Oglala Sioux.

With this opening, the defense lawyers then showed that the reservation was created under an 1868 treaty and that many Indians on reservation, did not believe that the Govern ment had abided by it.

The Wounded Knee take-over, they testified, was a protest against the Government, and they aaid they did not believe it was subject to Federal prosecution because they Government had no jurisdiction over the land, having broken the 1868 treaty.

Judge nichol himself played an important role in the development of the trial.

Douglas Hall of Minneapolis, a member of the defense team, said that the judge's decision to allow the defense to develop the circumstances and the reasons for the 1973 Indian uprising had been essential to the victory.

The judge said that the defense could show motive, but that the jurors could not consider the motive as a legal defense, an interpretation of the law that Mr. Hurd said was "incredible" and that the jurors found confusing.

In addition to having to try to overcome the feelings of sympathy that defense attorneys had raised in jurors' minds by the recitation of the Government's broken promises to the Indians, Mr. Hurd and his associates had to contend with several serious mistakes by F.B.I. agents.

One agent testified that there was no wiretap on the telephone used by the Indians in Wounded Knee during the siege,. When the defense showed that the F.B.I. had installed a party line and that agents had monitored calls, the agent testified that he did not consider a party line a wiretap.

Also agents admitted on the witness stand they had gone "bar-hopping" with the Government's star witness on the same night that he was accused of raping a teen-age girl.

The judge said that he was shocked by the conduct of the F.B.I. agents as disclosed in testimony at the trial.

Saxbe Urges Study

WASHINGTON, Sept. 17 (UPI)—Attorney General William B. Saxbe has ordered a Justice Department study of the Wounded Knee trial and similar cases the Government has lost where defendants pleaded that they were being tried for political motives.

Deputy Attorney General Laurence Silberman said that Mr. Saxbe had ordered the study before yesterday's dismissal of the Justice Department's case against two leaders of the American Indian Movement.

Mr. Silberman said that Mr. Saxbe had earlier sent an official of the Office of Policy and Planning to St. Paul as a trial observer.

"We have had difficulty with this trial all along," Mr. Silberman said, noting the investigation was part of a larger study of so-called political trials.

"It is a study not designed to apportion blame but rather to teach us if there is a way to better handle these kinds of trials—I mean the kinds where defendants assert a political cause as part of their trial," Mr. Silberman said.

"If you look back over the years, the last four, five or six years, the Government records in those kinds of cases in terms of winning and losing is not so good."

"The Attorney General wants to do all that we can to make sure that we are as well prepared as we can be in trying such cases without implying fault on those trying such cases," Mr. Silberman said.