

CHAIRMAN McDONALD

In 1977, the case of United States v. Peter McDonald went to trial in Phoenix, Arizona. Peter was then the Chairman of the Navajo Indian Tribe, headquartered in Window Rock, Arizona, and by all accounts was one of the most active chairmen the tribe had ever known. He was credited for “getting out the Navajo vote” in Arizona’s 1976 Senatorial election which resulted in a triumph for Democratic Candidate Dennis DiConcini. It was said that this did not sit at all well with Arizona’s patriarchal Senator, Barry Goldwater, who was solidly in favor of denying residence in that state to all non-republicans. In what many viewed as a vengeance move, the United States Attorney in Arizona indicted McDonald for mail fraud. The essence of the charged offenses involved kickbacks from an airplane charter company, which allegedly happened this way:

The Navajo Council, its ruling body, had contracted with Tuscon Gas & Electric Company (TGE) to allow TGE to string power lines over Navajo land on a long-term lease basis. Tribesmen in remote areas somehow failed to learn of this agreement, and when TGE’s workers showed up with their poles, electrical wire, and other equipment the Navajos would open fire with their carbines.

TGE management complained to the Chairman, and he agreed to visit the various tribal leaders involved and allay their concerns, so that construction could proceed peacefully. In order to carry out this mission, however, he would need the use of an airplane, for the Navajo reservation is vast. TGE told Peter to hire an airplane, and to send them the bills. The charter pilot - who owned the aircraft - flew Peter from place to place, and the TGE contract was successfully implemented after its terms were satisfactorily explained to local leaders. Under considerable pressure from investigators, the charter pilot was later to say that not all of the billed flights were actually flown, and that Peter demanded and received a kickback as to each bill that was sent to and paid by TGE. The kickbacks were in cash, he swore, and thus there was no record of them. There was evidence that he had cashed some checks, thus making it plausible that Peter shared in the proceeds. The amounts involved were trivial by normal federal standards, and in most cases would not have triggered a mail fraud prosecution, but in this case an indictment was handed down. It was a case where all would depend on the credibility of the pilot, and that would depend on the efficacy of his cross-examination.

I had met Peter at the 200th birthday celebration of the U.S. Marine Corps. in Los Angeles in December, 1976. During World War II Peter had been one of the famous Navajo “Code-Talkers” in the Pacific Theater. Because the Navajo language has never been reduced to written form, and is passed on from one generation to the next orally, the Japanese were puzzled and confounded when they overheard radio messages in a language they could not identify. The Marine Corps was using Navajo Indian Marines to pass messages over the airwaves, and the security of these communications proved to be superb. The Japanese didn’t know it, but they badly needed some Navajos!

Peter was a qualified aeronautical engineer, and had worked for Hughes Aircraft in California before returning to Navajo headquarters in Window Rock, Arizona, to throw his hat in the political ring as a candidate for Chairman. By the time he was indicted, he was solidly entrenched as the leader of the Navajos, and enjoyed popular support. When we met in Los Angeles, he asked me to take over his case, and I agreed. No federal judge in Arizona wanted to preside over the case because it was perceived as a “hot potato”.

As a result, the Chief Federal District Judge brought in the Hon. Herbert Sorg, from Pittsburgh, Pennsylvania, marvelous judge who made lawyers wish they could have all of their cases in his court. As against the fact that Phoenix is not generally considered by defense lawyers to be a bastion of liberalism, and that conservative jurors are the norm, the appearance of a pleasant, intelligent trial judge with an ever-present twinkle in his eye was a nice balance. The circumstances were such that I did not wish to put the Chairman on the stand if I didn't have to. Everything depended on how well the pilot - whom I will call "Ken Smith" - stood by his story.

The prosecutor - I will call him Scott Wilson, to protect the guilty - had a good reputation as a sharp, aggressive, seasoned trial lawyer. Unbeknown to him, he did not have a level playing field, because aiding the defense there were the two most senior Navajo Medicine Men! They had been assigned to assist me and their leader in winning the case. Both were well over six feet tall, both were about seventy years old, and both wore tall stove-pipe hats.

Prosecutor Wilson demanded that the hats be removed when court was in session, but Judge Sorg determined that medicine men always wear their hats, and refused to order them doffed. Their names were Buck Austin, the medicine man of evil, and Nezcheatness (phonetic) Tracy, the medicine man of good. They were said to have wondrous powers to both heal and curse. I learned that they had obtained a lock of Wilson's hair from his barber shop, had placed it in a small leather sack, buried the sack in the desert, and performed a ceremonial dance over the burial site. Wilson had been "hexed", it seems.

I place little stock in voodoo or other black arts, but it was clear early on in the case that these rascals had some clout. Wilson was indeed a talented lawyer, who nonetheless progressively eroded his case by making one classic mistake after another. It became clear that the FBI agent working with him on the case was mystified at the tactic of his counsel. Pilot Smith was overtly hostile to Wilson, who did not treat him well. Smith had received immunity from prosecution, and came off as a sniveling man who had traded his testimony for his own protection. On cross-examination, he contradicted himself, perspired noticeably in a cool courtroom, looked at the floor, and did most of the things that cross-examiners love to have happen. I did not think the jury was buying him, and did not call the Chairman to testify. In closing argument, I could not resist taking the bull by the horns, and arguing to the jury that the only crime of which Chairman McDonald had been shown to be guilty was that of opposing Barry Goldwater, in those days said to be a felony in Arizona. All but one of the jurors gave me that little grin that warms the cockles of any defense lawyers heart. Wilson was visibly shaken by this attack on Arizona's most prominent citizen, and in his final argument, went out of control. "If McDonald were innocent," he roared at the jury, "he would have taken the witness stand and told you so!"

For a split second I was in shock, unable to believe that an experienced prosecutor - even one laboring under a severe spiritual curse - could make so fundamental and egregious a mistake. There is no stronger rule than that the silence of a defendant in a criminal case - who has a constitutional right not to testify - must never be used against him. Indeed, trial judges are required to instruct jurors in precisely those terms upon a request from the defense. That Wilson had trashed this sacred ground was beyond comprehension. I popped to my feet like a jack-in-the-box. "Mistrial!" I hissed. "Not now," said Judge Sorg, holding up a hand. For a moment my mouth was agape, and then I remembered an important case on point, and sat down with a smile. Wilson - who knew he had blown it - stumbled through the balance of his closing without saying anything very persuasive.

When the jury went out to deliberate, the U.S. Marshals had to restrain a loyal Navajo who was attempting to carve the sign of the sun on the jury-room door with his hunting knife, in order to lead the jurors within “along the right path”. After a few hours we learned that the jury was hung on a couple of counts in the indictment, and had voted “not guilty” on others. Judge Sorg brought them in, thanked them, and dismissed them. He then addressed the prosecutor.

“Mr. Wilson,” he intoned, “this court is at a loss to understand why you chose to comment on the defendant’s election not to testify, but your reasons - if you had any - no longer matter. The *only* cure for a transgression of this dimension - and the cases are clear on this - is for the trial judge to interrupt and reprimand the prosecutor, and to instruct the jury in the most unequivocal terms that the defendant’s silence is sacrosanct. You will note that I did not do that. As to those counts on which the jury was unable to agree, a mistrial is declared, and the indictment is dismissed.” He did not bang his gavel with this dramatic ruling, but shook his head sadly. He died a few years thereafter, and I mourn him still . I note with regret that if Judge Sorg were to be nominated today, his views might prevent the necessary approvals for taking office as a federal judge. Needless to say, there was good cheer in the Navajo camp, and the Chairman hosted a celebration party at a nearby hotel. I attended with my then protege - now a well-known lawyer in his own right - Tony Cardinale, who had done much of the preparation of the case.

The medicine men were present, downing a modicum of firewater, and Tony and I were pondering their professed inability to comprehend the English language. I expounded in the simplest terms upon their great contribution to the case, and the thought that I would like to have them on my side in every trial, to “hex” the prosecution. There was no reaction. Then, on a hunch, and mindful of the fact that these septuagenarians were reputed to be most virile, I said to Tony: “Tony, these men have been so great for us that we owe them. I think we should arrange to get them laid!” Without a nanosecond’s hesitation, both Austin and Tracy turned to us, nodding and grunting affirmatively, in a most animated fashion. Clearly, they knew at least some English.

