

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA  
(HOLDING A CRIMINAL TERM)

UNITED STATES

Plaintiff,

vs.

FRASER S. GARDNER,

Defendant.

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Criminal No. 64,681

BRIEF IN OPPOSITION TO DEMURRER.

The indictment herein charges the defendant with having committed perjury on August 23, 1939, before the Special Committee on Un-American Activities, commonly known as the Dies Committee. The main point in the defendant's demurrer is that on the date the perjury is alleged to have been committed the Dies Committee was not lawfully constituted and the Chairman of the Committee who swore in the defendant as a witness had no authority or right to administer the oath to him. In this connection, the defendant admits that the Special Committee was lawfully appointed under the authority of House Resolution 282 of the 75th Congress and that, with Congressman Martin Dies as Chairman, it held sessions, took testimony, and functioned properly under the authority of that resolution during that same Congress. The defendant contends, however, that the functions and powers of the Special Committee expired with the 75th Congress and that the Special Committee was never re-appointed or revived; that, while House Resolution 26 of the 76th Congress authorized the Special Committee to continue the investigation already begun under House Resolution 282, under Section 2 of Rule 10 of the House Rules, it was necessary for the Speaker to re-appoint the members of the Special Committee and, as this was not done, the Committee was not lawfully in session on August 23, 1939, the date on which the perjury is alleged to have been committed, and Chairman Dies had no authority to administer the oath to the defendant as a witness.

It is felt that the mere reading of House Resolution 282 of the 75th Congress, House Resolution 26 of the 76th Congress and the extract from the House Journal for the 76th Congress for February 3, 1939, covering the passage of House Resolution 26, will dispose of the defendant's contentions. House Resolution 282 of the 75th Congress provides as follows:

"In the House of Representatives, U. C.,  
May 26, 1938.

"Resolved That the Speaker of the House of Representatives be, and he is hereby, authorized to appoint a special committee to be composed of seven members for the purpose of conducting an investigation of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"That said special committee, or any subcommittee thereof, is hereby authorized to sit and act during the present Congress at such times and

places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers and documents, by subpoena or otherwise, and to take such testimony, as it deems necessary. Subpoenas shall be issued under the signature of the chairman and shall be served by any person designated by him. The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee, or any subcommittee thereof, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States (U.S.C., title 2, Sec. 192.).

"Sec. 2. The committee shall file its report to the House on January 3, 1939, or may file same earlier in the event the House is not in session, with the Speaker of the House for printing as a public document."

It is admitted that, pursuant to the provisions of House Resolution 282, the Special Committee provided for was appointed and Congressman Martin Dies of Texas named as Chairman of that Committee. It is also admitted that the Committee held a number of public hearings in Washington and other places throughout the United States during the 75th Congress and, as provided for in said Resolution, made a report of its investigation to the 75th Congress prior to its adjournment.

On February 3, 1939, the House Journal of the 76th Congress, First Session, pp. 191-2, discloses that the following occurred:

"Special Committee to Investigate Un-American Activities

"Mr. Cos, from the Committee on Rules, called up the following resolution (H. Res. 26):

"Resolved, That the Special Committee to Investigate Un-American Propaganda and Activities is authorized to continue the investigation begun under authority of House Resolution 282 of the Seventy-fifth Congress, and for such purposes said committee shall have the same power and authority as that conferred upon it by said House Resolution 282 of the Seventy-fifth Congress and shall report to the House as soon as practicable, but not later than January 3, 1941, the results of its investigation, together with its recommendations for necessary legislation.

"The following amendment was recommended by the Committee on Rules:

"Page 1, line 8, strike out "1941" and insert 1940.

"Mr. HOOK made the point of order that the resolution was not in order for consideration, for the reason that the Special Committee to Investigate Un-American Propaganda and Activities had made its report, and therefore was dissolved.

"After debate,

"The SPEAKER overruled the point of order and said: 'The Chair is ready to rule.'

"The gentleman from Michigan raises the point of order against the resolution on the grounds that the functions and authority conferred upon the select committee by the Seventy-fifth Congress have expired, and therefore that the Rules Committee has no authority to report a resolution reviving and continuing the activities of that committee.

"The Committee on Rules, of course, is a highly privileged committee. Under the rules of the House, it has authority to report on matters of this character. As the Chair understands the resolution, reading the letter and spirit of it, it provides not only for the continuance of the select committee appointed by virtue of the resolution of the Seventy-fifth Congress but also for a revival of said Committee. In other words, in the opinion of the Chair, the Committee on Rules had the authority, under the rules of the House, to breathe life into this select committee if they saw fit to do so, and the resolution was approved by the House.

"This is not a new matter. The Chair has not before it immediately the precedents, but in the Seventy-fourth Congress and in the Seventy-fifth Congress similar resolutions were presented. It has been held that the Committee on Rules has the power and jurisdiction to report resolutions similar in character and substance to this. As a matter of fact, the precedent cited by the gentleman from Michigan (Mr. Hook), section, 4403, Hinds' Precedents, sustains the position which the Chair feels impelled to take. The Chair will reread that:

"When a select committee reports in full on the subject committee, it is thereby dissolved; but it may be revived by a vote."

"As the Chair understands it, the purpose and object of this resolution is to revive this committee by a vote in the House. Therefore, the Chair overrules the point of order."

"The resolution was then considered.

"After debate,

"The committee amendment was agreed to.

"Mr. COX moved the previous question on the resolution to its adoption or rejection.

"The question being put,

"Will the House order the previous question?

"On a division there appeared--yeas 320, nays 27.

"So, the previous question was ordered.

"The question then being put,

"Will the House agree to said resolution?

(Yeas.....344"

"It was decided in the affirmative----- (Nays..... 35

(answering

(present..... 2

As the Speaker said, the motion which was passed provided, "not only for the continuance of the select committee appointed by virtue of the resolution of the Seventy-fifth Congress but also for a revival of said Committee." Both the Speaker and the House so understood it. The committee was not only continued but revived and proceeded to continue its investigation and to hold public hearings and take testimony as the committee did on August 23, 1939. How there can be any difficulty or confusion about anything so clear it is hard to understand. Defendant on page 3 of his brief states as follows: "With this ruling of the Speaker the defendant cannot quarrel. Of course, we concede that the House had the right to pass the resolution continuing the committee and the Speaker was perfectly correct in overruling the point of order." The defendant then continues and argues that, while the committee was continued by House Resolution 26, it was still necessary for the Speaker to re-appoint the committee, failing to realize, as did the Speaker and the House, that by the resolution not only was the Special Committee continued, but as well revived.

The Court will notice that by the provisions of House Resolution 282, the Speaker was authorized to appoint "a Special Committee." Congress could have authorized that another Special Committee be appointed, but in lieu of that, provided that "the Special Committee" be authorized to continue the investigation begun under House Resolution 282. The Court will take judicial notice of the personnel of the 75th Congress and the 76th Congress and will note that the same Speaker who appointed the Special Committee under House Resolution 282 made the ruling as to the meaning and propriety of House Resolution 26. The Court will also take judicial notice of the fact that, with one exception, all the members of the Special Committee appointed under House Resolution 282 of the 75th Congress were re-elected to membership in the 76th Congress, including the Chairman of the Special Committee, Martin Dies.

The Speaker in his ruling on the opposition made to House Resolution 26 quoted from Section 4403, Hinds' Precedents, and stated, "When a select committee reports in full on the subject committed, it is thereby dissolved, but it may be revived by a vote." The Speaker also stated, "This is not a new matter. The Chair has not before it immediately the precedents, but in the Seventy-Fourth Congress and in the Seventy-fifth Congress similar resolutions were presented."

In this connection, we have at random selected a number of committees of investigation which were continued through more than one Congress by a resolution of the House as was done in the case of the Dies Committee. As the Speaker well said, "This is not a new matter."

" HOUSE COMMITTEES OF INVESTIGATION CONTINUING THROUGH  
MORE THAN ONE CONGRESS SIMILARLY TO DIES COMMITTEE  
72nd Congress - 75th Congress

Committee to investigate expenditures in Post Office Department - P. O. Com.						
72nd Congress	H.Res. 226	6/21/32	vol. 75	Cong. Record	13621	
73rd Congress	H.Res. 59	4/11/33	77	" "	1494	
74th Congress	" "	33 1/7/35	79	" "	169	

Committee to investigate wild life conservation - Special						
73rd Congress	H.Res. 237	1/29/34	78	Cong. Record	1505	
74th	" "	44 1/10/35	79	" "	337	
75th	" "	11 1/29/37	81	" "	599	

Committee to investigate profiteering in Military Aircraft - Military Affairs Com.						
73rd Congress	H.Res. 275	3/2/34	78	Cong. Record	3622	
74th	" "	59 1/18/35	79	" "	653	

Committee to investigate dependence of U.S. on Foreign tin - For. Aff. Comm.						
73rd Congress	H.Res. 404	6/15/34	78	Cong. Record	11755	
74th	" "	71 1/25/35	79	" "	1000	

Committee to investigate Incompetent veterans - Vet. Aff. Com.						
73rd Congress	H.Res. 409	6/4/34	78	Cong. Record	10442	
74th	" "	29 1/4/33	79	" "	119	

Committee to investigate bond holders reorganizations - Special					
73rd Congress	H.Res. 412	6/15/34		78th Cong. Record	11777
74th "	" " 39	1/8/35		79 Cong. Record	184
75th "	" " 259	8/9/37		81 " "	8564

Committee to investigate the American Retail Federation - Special					
74th Congress	H.Res. 203	4/24/35		79 Cong. Record	6338
75th "	" " 214	5/14/37		81 " "	4575

The defendant's whole case proceeds on a false premise, namely, that one or more rules of the House of Representatives were violated. The defendant first of all contends that Section 2 of Rule 10 was violated when the Speaker did not re-appoint the members of the Special Committee subsequent to the passage of House Resolution 26. Section 2 of Rule 10 provides as follows:

"The Speaker shall appoint all select and conference committees which shall be ordered by the House from time to time." (Rules and Manual, United States House of Representatives, 1939, pages 303-306).

An examination of the facts discloses that there was no violation of this rule, but that it was complied with by the Speaker who appointed the membership of the committee during the 75th Congress. By the provisions of House Resolution 26 of the 76th Congress, it was unnecessary to re-appoint the membership of the Special Committee.

Counsel for the defendant, on page 5 of their brief, set forth the provisions of Rule 27 of the House of Representatives providing that under certain circumstances the rules of the House may be suspended. Counsel argue that, as no attempt was made to suspend the rules under the provisions of Rule 27, Section 2 of Rule 10 was violated because the Speaker did not re-appoint the Committee. As we have already stated, there was no violation of Section 2 of Rule 10 and there was no necessity to follow out the provisions of Rule 27 in whole or in part. By House Resolution 26 the Special Committee was both continued and revived.

Counsel for the defendant, in their brief, set forth a number of parliamentary precedents to the effect that rules of Congress cannot be violated and must be complied with literally. We agree with these cases and with the contention of counsel in that respect but again call to the attention of the Court that no rule of the House was violated by House Resolution 26.

On page 7 of the brief filed in support of the demurrer, it is stated that on February 3, 1939, Mr. Allen of Illinois quoted in the Record "A statement purported to have been made by Speaker Bankhead to the following effect: 'Speaker William Bankhead announced that, if the investigation was continued, the present members would be re-appointed.'" Obviously this statement, if it was made, must have been made prior to the passage of House Resolution 26 which not only continued the investigation but revived the committee. As we have already stated, Congress did not have to proceed by continuing the reviving the committee, but could have authorized the Speaker to appoint an entirely new committee of as many members as they saw fit.

Defense counsel, in their brief, cite and quote from three Supreme Court cases. An examination of these cases and the facts involved there show that they

have nothing whatsoever to do with the question now before the Court.

McGrain v. Daugherty, 273 U. S. 135, held that a resolution of the Senate investigating the office of former Attorney General Daugherty had not died as the Senate was a continuing body and could continue its committees through the recess following the expiration of a Congress.

In United States v. Ballin, 144 U. S. 1, the validity of an Act of Congress was challenged, it being contended that there was no quorum present when the Act was passed. The court held that the rules as to a quorum had been complied with and that a quorum was present and the Act properly passed.

In the case of United States v. Smith, 286 U. S. 6, the Court held that, where the Senate had confirmed a nomination and the President commissioned the nominee and he had taken his oath and entered upon his official duties, the Senate had lost control over the nomination.

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Obviously these cases, /well as the parliamentary precedent cited by counsel, are not in point.

It is therefore respectfully submitted that the demurrer should be overruled.

David A. Pine,  
United States Attorney.

John W. Fihelly,  
Assistant United States Attorney.

Copy of Government's brief in opposition to demurrer received this  
\_\_\_\_\_ day of November, 1939.

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Counsel for the Defendant.