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

UNITED STATES, Plaintiff,	)	
vs.	)	CRIMINAL NO. 64681
FRASER S. GARDNER, Defendant.	)	

REPLY BRIEF OF DEFENDANT

The defendant in reply to the brief by the prosecution in the above entitled cause respectfully presents to the Court, that the Government's brief sustains the point maintained by this defendant.

We invite the Court's attention to the statement made by the prosecution that the House Rules "cannot be violated and must be complied with literally". The brief then states that no rule of the House was violated by House Resolution 26 of the Seventy-sixth Congress. The House Journal of the Seventy-sixth Congress will indicate that practically one of its first acts was to adopt the House Rules. Rule 10 provides that select and conference committees shall be appointed by the Speaker. The precedents heretofore submitted by the defendant proclaim the soundness of his contention. The precedents submitted by the Government are not in point. Rule 10 provides that the House shall elect its standing committees. The Parliamentary precedents submitted by the counsel for the Government are divided into seven groups and are set forth on page 5 of their brief. The first, third, fourth, and fifth groups deal only with standing committees. Of course, a standing committee can, by resolution of a succeeding Congress, continue an investigation begun in a previous Congress. It is only necessary for the House of Representatives to refer to that standing committee the matter then under investigation, and that the personnel of the standing committee be elected by the House of Representatives. There is a total distinction between standing and select or special committees. The personnel of standing committees must be elected by the House; the personnel of the latter must be appointed by the Speaker. (Rule 10). The House could have suspended its rules and passed the pertinent resolution, but it would have been required to follow Rule 27 to do so.

The resolutions set forth in the aforementioned groups on page 5 of the Government's brief, with the exception of the second and sixth groups, refer to standing committees. With this procedure, we cannot, and do not, complain. Each of the standing committees was elected by the House in each of the pertinent Congresses. Even though the House had referred the continuance of the investigation mentioned in the Government's brief to the said standing committees, the latter would have had no power to continue unless the House had elected the said standing committees.

The seventh precedent cited by counsel for the Government indicates that the Seventy-fourth Congress authorized an investigation of the American Retail Federation. This was a Special Committee. It expired upon the adjournment of the Seventy-fourth Congress. House Resolution 214 of the Seventy-fifth Congress did not continue the investigation as maintained by the prosecution, but only appropriated funds for the expenses theretofore incurred. The committee was dead. The House which authorized the committee was merely paying its bill.

Congress, during the entire term of its existence, has never, with the exception of the times mentioned in the second and sixth groups, attempted to continue a special committee. Be it remembered that no one challenged the conduct of the House on those resolutions. The matter was never passed upon by the Speaker, nor their conformance with the rules questioned. Until questioned, there is nothing for the Speaker to rule upon. Therefore, there is no precedent.

In the case of U. S. vs. Smith, 286 U.S. 6; 76 L. ED. 954, wherein this Court's ruling was affirmed, the Senate rules were construed for the simple reason that the rights of one not a member of either House of Congress were in issue. In this case, the defendant challenges the validity of the committee that continued an investigation when that committee was not appointed pursuant to the Rules of the House of Representatives. We are asking the Court to construe the Rules of the House, insofar as they affect Gardner, precisely as you were asked to construe the rules of the Senate, in the case of U. S. vs. Smith, supra. It is idle for counsel for the Government to say that the three Supreme Court cases are "obviously not in point".

In McGrain vs. Daugherty, 273 U. S. 178; 71 L. Ed. 593; 50 A.L.R. 20, the Court distinguished between the Senate and House and held that the Senate was a continuing body and definitely stated:

> "That the House of Representatives is not a continuing body and that its members are all elected for a single Congress."

If the House is not a continuing body, then the Seventy-sixth Congress was entirely new pursuant to the Twentieth Amendment and it was necessary for the House to elect its standing committees and the Speaker to appoint the select committees.

The case of United States vs. Ballin, 144 U. S. 1; 36 L. Ed. 321, also referred to the rules of the House of Representatives and interpreted them as set forth in the original brief of the defendant herein. We are requesting that herein.

The second precedent advanced by the Government was a special committee. But it was composed of chairmen of certain standing committees therein named, plus additional members to be appointed by the Speaker. After the adjournment of the Seventy-third Congress and the convention of the Seventy-fourth Congress, House Resolution 44 was passed, continuing the committee.

House Resolution 11 of the Seventy-fifth Congress again continuing the Wild Life Conservation Committee is in the same category of House Resolution 44 of the Seventy-fourth Congress. We again reiterate that even if this be precedent, which we deny, it is contrary to all previous precedents and plainly contrary to the rules of the House. It is not a precedent because it was never questioned by any member of the House of Representatives or any citizen affected by the committee. No opportunity was ever presented to attack its validity. A precedent is established when some point of order is raised and the Speaker makes his ruling.

The sixth group advanced by the prosecution are subject to the same criticisms. The Seventy-third Congress authorized the Speaker to appoint a special committee, which was done. The Seventy-fourth Congress attempted to continue the committee and our search has not indicated that the Speaker did reappoint the members thereof. However, the action of the Seventy-fourth Congress was never challenged, either on the floor of the House or in a judicial body. House Resolution

259 of the Seventy-fifth Congress only paid the bill and made no provision for the continuance of the committee. In neither of the two groups advanced by the prosecution to sustain its point, was the Speaker ever called upon to determine whether the resolution violated the rules of the House. If the House chose to violate its own rules in either or in both of those instances and that resolution was never complained of, either by point of order or in Court by some one adversely affected by it, it is hard to see the reasoning of the District Attorney that a precedent has been established. It is not comparable in strength to obiter in a judicial decision, which we all know is not binding. In fact, it is nothing at all, except an indication of a violation, never challenged. In those cases cited by the defendant, it will be noticed that the point of order was made alleging a departure from rules and the Speaker in each instance sustained the contention. In the cases cited by the prosecution, the Speaker did not rule, for the simple reason that no point of order was made. In all the history of the House of Representatives, not a single precedent, wherein the Speaker ruled, has been advanced contrary to the contentions made by the defendant Gardner. He shows precedents wherein the very point herein raised was ruled favorably to his contention by the Speaker.

Let us take an analagous situation. The House rules provide that all standing committees shall be elected by the House of Representatives. Rule 10 of the House of Representatives provides that the Judiciary Committee is a standing committee of the House. Let us assume further that a matter has been referred to the Judiciary Committee for report. Could it possibly be maintained that until the House had elected the members of the Judiciary Committee, that such a committee could function? In the instant case, the Dies Committee was continued. Until the Speaker of the Seventy-sixth Congress followed the rule and appointed the personnel of that committee, nothing could be done by it. It is comparable to the creation of an additional judge for this Court. Until the President appoints, and the appointee qualifies, no one could act.

The powers and duties of the Speaker of the Seventy-fifth Congress ceased upon the expiration of the Seventy-fifth Congress. The alleged Dies Committee in the Seventy-sixth Congress could not draw sustenance from the exercise of the appointive power of the Speaker of the Seventy-fifth Congress. Rule 10mprovides the methods of birth and authority to House committees. Standing Committees, by direct election of the House. Select committees, by appointment of the Speaker. It is just as vital and necessary for the Speaker to appoint the select committees as it is for the House to elect the standing committees.

Much is made by the District Attorney on the ruling of the Speaker of the House on the instant resolution at the time a point of order was made by Mr. Cox (Government's brief 2, 3 and 4). We reiterate that which we said in our original brief, that it was perfectly proper for the House to continue the Committee. The Speaker was correct in overruling the point of order. However, he never ruled and nothing in the Journal will indicate that either the House or the Speaker understood that the personnel of the committee so continued, or revivified, (as maintained by the District Attorney) could function until the personnel had been appointed by the Speaker of the Seventy-sixth Congress.

Again we refer to the statement made in the House of Representatives as reported in the Congressional Record of February 3, 1939, Volume 84, No. 24, Page 1565, wherein Mr. Allen of Illinois quoted the statement purported to have been made by Mr. Bankhead, which was not denied, to the effect that he, Speaker Bankhead, had announced that if the investigation was continued, the present

members would be reappointed.

We believe that the demurrer is well taken and should be sustained.

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