Catholic University Law Review

Volume 6 | Issue 1 Article 5

1956

Recent Cases

Frank Flannelly

Mario Melucci

Robert O. Tiernan

are good and being good they should be extended to every possible sphere. If the laws of the United States are being extended to these given spheres, there is no valid reason why the rights secured by the Constitution should not also be extended.

PAUL J. SIRWATKA

RECENT CASES

PERJURY—CONGRESSIONAL SUBCOMMITTEE INVESTIGATIVE POWERS—SPEEDY TRIAL—Major William V. Holohan was commanding officer of the Mangostine mission of the Office of Strategic Service which parachuted behind German lines in Italy on September 26, 1944. The purpose of the mission was to unify and assist various partisan groups behind the German lines. Members included Major Holohan, Lieutenant Icardi, Sergeant LoDolce and Captain Landy Tozzini and Manini were two Italian partisans who later joined and worked with the group. In December, 1944, Major Holohan disappeared. In June, 1950 Tozzini and Manini were trapped in a series contradictions and confessed, implicating themselves with Icardi and LoDolce in the murder of Major Holohan.

The body of Major Holohan was recovered June 16, 1950, from Lake Orta, Italy, exactly where Tozzini and Manini admitted in their confessions that they had deposited it. In August, 1950, in Rochester, New York, LoDolce admitted participation in the killing with Tozzini, Manini and Icardi. See inserted statement in *Hearings Before the Special Subcommittee of the Committee on Armed Services House of Representatives under authority of H. Res. 125,* 83rd Cong., 1st Sess. at 103 (1953).

Pursuant to the Italian law the Novara Court of Assizes, in August, 1950, indicted *in absentia* both Icardi and LoDolce. The Italian Government's request for extradition of LoDolce was refused. *In re LoDolce,* 106 F. Supp. 455 (W.D. N.Y. 1952).

In March, 1953, Icardi, who had been honorably discharged in 1946, testified *voluntarily* before the Special Subcommittee of the House Armed Services Committee regarding the disappearance of Major Holohan. On the testimony given before this committee, Icardi was indicted in eight counts for the crime of perjury. *United States v. Icardi,* Criminal No. 821-55, D. C., August 1955.

This case leads to an inquiry as to the legitimate function of the Special Subcommittee. H. Res. 125, 83rd Cong., 1st Sess. Until now only one objective of a House or Senate investigation has been recognized by the Federal Courts as being within their constitutional powers. The purpose of the investigation must be to gather information for the enactment of legislation. *McGrain v. Daugherty,* 173 U. S. 135 (1927).

Neither House possesses the general power of inquiring into the private affairs of citizens, *Kilbourn v. Thompson,* 103 U. S. 168, 190 (1880), nor can they "compel divulgence of information for the purpose of *ascertaining whether a crime has been committed* as a basis for a criminal prosecution." *United States v. Bryan,* 72 F. Supp. 58, 61 (1941). Yet the sub-committee in its own report, *Special Subcommittee of the Committee on Armed Services United States House of Representatives* H. Res. 125, 83rd Cong., 1st Sess. 1 (1953), admitted that it

was conducting its investigation for that very purpose, *Report, supra, conclusions* page 1, i.e., to ascertain whether the defendant had knowledge of facts and circumstances surrounding the disappearance and death of Major Holohan. Apparently this indictment, in form an indictment for perjury before a Congressional committee, is in practical effect an indictment for the crime of murder. In order to secure a conviction of the perjury charge, the Government must prove that the defendant is guilty of brutally killing his commanding officer.

Here it seems that the defendant could register a basic complaint, i.e., that the legislative investigating committee is guilty of usurping the function of a judicial agency and exercising a power not granted by the Constitution. This case could possibly be a *legislative trial* in its starkest form—chief prosecution witnesses were a newspaper man and a professional investigator—every word of their evidence were utter hearsay. The summary is completely devoid of the faintest suggestion of a legitimate legislative purpose.

The question whether Congressional committees can compel testimony to inform the public about some issues in which Congress is not specifically authorized to act, either because of a specific prohibition in the Constitution or because the power to deal with that issue has not been delegated to the national government and therefore remains with the states or the people, is still an unanswered Constitutional problem. In *Kilbourn v. Thompson, supra* at 168, Congressional power to inquire into "private affairs" was denied. But what is "private" can not be determined by abstract criteria; when Congress has jurisdiction to inquire into anything relevant to the inquiry, it is no longer private. *Sinclair v. United States,* 279 U. S. 263, (1929). Assuming that a limitation upon this power of Congress to inquire into these "private" matters is desirable, the legislator can almost always spell out some relationship to some *legislative purpose,* and the courts for understandable reasons are reluctant to interfere with such inquiries. It must be remembered that the determination of relevancy in ordinary litigation, where the issues are precisely delimited by the pleadings is far simpler than in legislative inquiry where legislative objects may be manifold and general.

An indication of the almost limitless bounds of relevancy is found in *United States v. Bryan, supra* at 58, where Judge Holtzoff held:

> "If the subject under scrutiny may have any possible relevancy and materiality, no matter how remote, to some possible legislation, it is within the power of Congress to investigate the matter. Moreover the relevancy and the materiality of the subject matters must be presumed. The burden is on the one who maintains the contrary to establish his contention".

The events forming the basis of the indictment took place on December 6, 1944. The defendant was interrogated on the events in 1947, and testified before the House Committee on March 26, 1953. At the time of the latter testimony it had been determined that extradition of Icardi to Italy had been barred by the Lo Dolce case. *In re Lo Dolce, supra.* It had also been determined that prosecution by a United States Court for the alleged murder was made impossible by the Hirshberg case. *United States ex rel. Hirshberg v. Cooke, Commanding Officer,* 336 U. S. 210, (1949).

The defendant was indicted for the perjury charges in August, 1955, approximately eleven years subsequent to the events of December 6, 1944, and two years after the Committee hearing. The indictment for perjury was brought within the statutory period, 18 U.S.C. § 3282 (1948), as limitations to the charge of perjury run from the date accused is alleged to have given the false testimony. *Waddle v. State,* 165 S. W. 591 (1914).

The question arises as to whether the defendant has been given a constitutional right—that of a right to a speedy trial as guaranteed by the Sixth Amendment of the Constitution. The recent case *United States v. Provoo* 17 F.R.D. 183 (1955), held "that the unnecessary delays in indicting the defendant and bringing him to trial, denied the defendant the right to a speedy trial as guaranteed by the Constitution." In *United States v. McWilliams,* 69 F. Supp. 812 (D. D. C. 1946), the court said:

> "as in long delayed cases, the witnesses are now scattered; some are not accessible, more particularly to the defendants who are without funds; the memories of witnesses as to events occurring many years ago are not clear. It is for these reasons among others that the Constitution of the United States requires a speedy trial and that the Congress of the United States has imposed statute of limitations to prevent long delayed prosecutions".

Today, there are cases in which perjury indictments have been used to prosecute individuals who have allegedly lied about acts barred from prosecution by the statute of limitations, *United States vs. Hiss,* 185 F. 2d 822 (2nd Cir. 1950) *cert. denied,* 340 U. S. 948 (1951), or as in the present case by lack of jurisdiction over the crime.

Legislative committees should be allowed wide access to facts, and an unlimited amount of time in which to investigate these facts, where the purpose of the investigation is valid legislation. However, where there seems to be no valid goal, but investigation aimed at a particular individual, the legislative power of investigation should be limited.

FRANK FLANNELLY
MARIO MELUCCI

COURTS-MARTIAL—UNLAWFUL EXCUSAL OF COURT MEMBERS BY STAFF JUDGE ADVOCATE—IS EXCUSAL OF COURT MEMBERS BEFORE ARRAIGNMENT A DELEGABLE DUTY?—A general court-martial sitting in Korea convicted appellant of sodomy. Intermediate reviewing authorities approved the finding. Nothing in the record indicated that the convening authority had delegated a power of excusal to the staff judge advocate, so on appeal the United States Court of Military Appeals ordered a rehearing on the ground that the unauthorized excusals by the staff judge advocate interfered with Article 22, Uniform Code of Military Justice, 50 U. S. C. § 586 (1952), which requires that the convening authority select and appoint personally the officers who are to sit on the court-martial. *United States v. Allen,* 5 U. S. C. M. A. 626, 18 C. M. R. 250 (1955).

The narrow basis of the decision is the fact that no delegation to the staff judge advocate appeared in the record. However, Judge Brosman, writing for the court, opined that the power of excusal for good cause could be delegated to the staff judge advocate, *before arraignment.* Perhaps the court will adopt this suggestion when a case with an actual delegation on the record comes up for review. But as indicated by the concurring and dissenting opinions, the other judges are not wholly in agreement.

It is clear that *after arraignment* the power cannot be delegated. Article 29 U. C. M. J., 50 U. S. C. § 593 (1952), is Congress' first expression on the subject:

Article 29. Absent and additional members.

> (a) No member of a general or special court-martial shall be absent or excused after the accused has been arraigned except for physical disability or

as a result of a challenge or by order of the convening authority for good cause. (Emphasis added)

This Article is further implemented by the Manual for Courts Martial (MCM) (1951) which is issued by the President of the United States:

> 41 d. *Effect of absence.*—(4) *After arraignment.*—If a member who was present at the arraignment of the accused is absent from a future session of the court in the same case, the court may proceed only if a quorum remains and the absence is the result of a challenge, or a physical disability, or the *order of the convening authority* for good cause. . . . To determine whether a member is absent by order of the convening authority, the court may accept the statement of the trial counsel that he has been advised by oral order, signal or despatch that the member has been *excused by the convening authority* from future attendance in the case (37c). (Emphasis added)

The meaning of these sections is obvious: after arraignment, except for physical disability (41c) or challenge (62f), the convening authority must excuse court members personally. They do not control here, however, because the staff judge advocate excused *before arraignment.*

Before arraignment, the code is silent; but the relevant provisions of the MCM, [41 (c), (d)], have been construed insofar as they apply to trial counsel and the president of the court. In *United States v. Holt,* 8 C. M. R. 360, review denied 2 U. S. C. M. A. 688, 8 C. M. R. 178 (1952), the record did not contain any explanation for the absence of court members. So the board of review presumed that the convening authority had in fact excused them. And where the record showed that the trial counsel, acting on his own, failed to notify the members of the court to appear for court duty, a board of review said that, in effect, the trial counsel had exercised additional challenges which would prejudice the accused. *United States v. Moses,* 11 C. M. R. 281 (1953). Yet in *United States v. Marion,* 14 C. M. R. 347 (1953), where the power of excusal was in fact delegated to the president of the court, it was held that the delegation did not prejudice the accused in any way. The board of review said, ". . . we know no authority which places that function in the category of those duties of the convening authority that are nondelegable."

These decisions by the boards of review leave unanswered the possibility of delegating to a staff judge advocate the power of excusal for good cause. Here the court did likewise by disposing of the case without actually *deciding* that issue. As already mentioned, without referring to the *Marion* case, *supra,* Judge Brosman took the position that the power can be so delegated for good cause, *before arraignment.* (p. 639) And Judge Latimer agrees. He ". . . finds no reason to hold that this is a nondelegable power." (p. 645) Nor does he restrict it to good cause, as does Judge Brosman. But their position seems to conflict with paragraphs 41 (c) and (d) MCM (1951), which require that the convening authority be notified of all absences *before arraignment.*

> 41 c. Absence of members.—. . . If, before the assembly of the court for the trial of a case, it appears to a member that he should not sit on the court, either at all or in a particular case, for reasons enumerated in 62f (Challenges for cause—grounds for) or for any other reason except physical disability, he will take appropriate steps to *bring the matter to the attention of the convening authority.*
>
> d. Effect of absence—(3) *Before arraignment.*—The unauthorized absence of a member of a general or special court-martial from a session of the

> court may be a military offense, but his absence prior to the arraignment of the accused will not prevent the court from proceeding with the trial if a quorum is present. However, the trial counsel will *report* any unauthorized absence of a member *to the convening authority.* (Emphasis added)

Inasmuch as the requirement for the personal participation of the convening authority is mandatory, it seems evident that the power to excuse *before arraignment* is nondelegable. As Judge Quinn stated in his concurring opinion, the power to excuse is "part and parcel" of the power to convene; consequently it cannot be exercised by anyone other than the convening authority personally. (p. 640) Judge Lattimer, dissenting, relies on a presumption of the regularity of the proceedings—despite the holding in *United States v. Andress, infra*—and declares that the staff judge advocate did not deny the accused any of his statutory rights—thus he was not materially prejudiced. (p. 641) It should be noted, however, that in *United States v. Andress,* 11 C. M. R. 229 (1953), it was decided that where the acts of the staff judge advocate alter the basic composition of the court, the accused could be prejudiced. [And see Article 25 (d) (2) U. C. M. J., 50 U. S. C. § 589 (1952), which requires that the convening authority select members by evaluating their qualifications based on their age, experience, and judicial temperament.] To presume regularity would attribute to the convening authority an awareness that the staff judge advocate was acting in a manner declared reprehensible by a board of review. *United States v. Andress, supra.*

It is apparent that the convening authorities in our Armed Forces appoint oversize courts to avoid the continual attention which a smaller court requires. Article 29 U. C. M. J., 50 U. S. C. § 593 (1952); see *United States v. Moses, supra.* In order to reduce effectively the administrative burdens of the convening authority, a complete break with the military tradition is necessary. The power of convening courts-martial should be vested in an independent department of the military (see the various departments recommended by the American Bar Association, *Report of the Special Committee on Legal Services and Procedure to the 1956 Midyear Meeting of the House of Delegates,* Resolution 6, p. 56), or the board members can be selected by lot. See Keeffe, *JAG Justice in Korea,* P. 16, *supra.*

A moderate solution would be to allow a delegation of the power of excusal for good cause to an impartial officer (staff judge advocate or president of the board) by amending paragraphs 41 (b) and (c) MCM (1951). However, before permitting a delegation, a maximum number of officers must be fixed. Otherwise the practice of appointing large courts could not be curbed. See *United States v. Andress, supra.*

A desirable maximum for a general court-martial would be seven to nine officers; and for a special court-martial, from five to seven officers. (Paragraph 4(b) MCM (1951) and Article 16, U. C. M. J., 50 U. S. C. § 576 (1952) should be amended accordingly.) With so small a margin between the maximum and the minimum, excessive absences will probably reduce, below a quorum of five, the number of officers present when the court assembles. Still the basic composition of the court would be intact because the convening authority has to make additional appointments personally. Article 29 (b) U. C. M. J., 50 U. S. C. § 593 (1952).

ROBERT O. TIERNAN