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Constitutional Law - Grand Jury Under the Fifth Amendment Indictments Not Subject to Attack on Evidentiary Ground

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CONSTITUTIONAL LAW—GRAND JURY UNDER THE FIFTH AMENDMENT—INDICTMENTS NOT SUBJECT TO ATTACK ON EVIDENTIARY GROUNDS—Defendant was indicted by a grand jury on four counts of willfully evading federal income taxes due for the years 1946, 1947, 1948 and 1949.[1] His motion

[1] The indictment was based on I.R.C. (1939), §145(b).

before trial to dismiss the indictment on the ground that he was firmly convinced that there could have been no legal or competent evidence before the grand jury was denied by the trial court. At the conclusion of the government's case, and again just before the case went to the jury, counsel for the defendant moved to dismiss the indictment on the ground that only hearsay evidence offered by three revenue agents had been presented to the grand jury.[2] The court denied the motions, and defendant was convicted on three of the four counts of the indictment. On appeal the Second Circuit affirmed on two of the counts, holding that hearsay evidence alone is enough to support a grand jury indictment.[3] The Supreme Court granted certiorari to answer the single question: "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?"[4] *Held,* an indictment returned by a legally constituted and unbiased grand jury is not open to challenge on the ground that it is not supported by adequate or competent evidence. *Costello v. United States,* 350 U.S. 359 (1956).

Historically, the grand jury has never been restricted in its proceedings by the rules of evidence which prevail during the trial of a criminal case.[5] Proof that hearsay or other incompetent testimony was presented to the grand jury has not generally been considered sufficient grounds for quashing an indictment.[6] The holding in the principal case carries this principle to its logical extreme, for if incompetent evidence is to be admitted at all, it follows that it should suffice of itself to sustain an indictment, since no one but the grand jurors themselves could ever know what evidence convinced them of the probable

[2] At the trial the government employed the "net worth" method as a means of proving that the defendant had received more income during the years in question than he reported. This method of proof involves the establishment of a figure which represents the taxpayer's net worth at the beginning of the period in question. Evidence of purchases and business transactions of the taxpayer during the period is then offered with a view toward fixing the amount of the taxpayer's expenditures during the period. Finally, the net worth of the taxpayer at the end of the period is determined. The difference between the opening net worth figure and the sum of the proven expenditures plus the closing net worth figure is assumed to approximate the income of the taxpayer during the period. See Holland v. United States, 348 U.S. 121 (1954). Each government witness was asked by defendant's counsel if he had appeared before the grand jury. Only the three revenue agents gave affirmative replies. They were allowed to summarize at the end of the government's case the evidence already presented, and to introduce computations showing that if the evidence presented was correct, defendant had received far more income than he reported. Such summaries and computations are a type of hearsay evidence permitted in "net worth" cases once the jury has heard the direct evidence which forms the basis of the computations.

[3] United States v. Costello, (2d Cir. 1955) 221 F. (2d) 668, noted in 65 YALE L. J. 390 (1956).

[4] Costello v. United States, 350 U.S. 819 (1955).

[5] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 3d ed., 323 (1922); 1 WIGMORE, EVIDENCE, 3d ed., 19 (1940).

[6] Holt v. United States, 218 U.S. 245 (1910); McGregor v. United States, (4th Cir. 1904) 134 F. 187; Chadwick v. United States, (6th Cir. 1905) 141 F. 225.

guilt of the accused.[7] Granting that it is desirable to free grand juries generally from the technical rules of evidence, the present holding raises some basic questions of policy. The provision of the Fifth Amendment which guarantees that no one shall be required to answer, in the federal courts, for a "capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,"[8] was inserted in the Bill of Rights as a safeguard against malicious and unfounded prosecutions.[9] If the proceedings of grand juries were not subject to judicial review at all, the provision would be of little value in this regard. By confining the scope of such review to questions of bias and irregular impaneling, the court has significantly reduced the amount of protection against unjustified prosecutions which the Fifth Amendment was designed to provide. A grand jury which returned an indictment without having heard any evidence of probative value "would have in substance abdicated,"[10] but under the rule announced in the principal case no motion to quash could be heard unless accompanied by evidence that the grand jury was biased or illegally constituted. The reason for the extreme position taken by the court lies in the delay incident to granting motions to review the minutes of the grand jury proceedings.[11] When such a motion is granted, the trial judge must, prior to the actual trial of the case, re-do the work of the grand jury by reviewing all the evidence which appeared before it.[12] The court's determination that the good to be gained by the elimination of this administrative problem outweighed the evil involved in forcing an occasional person to stand trial on an indictment unsupported by any evidence having probative value seems open to question.

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[7] But see Nanfito v. United States, (8th Cir. 1927) 20 F. (2d) 376; Brady v. United States, (8th Cir. 1928) 24 F. (2d) 405, holding that an indictment should be quashed if no competent evidence tending to establish guilt was heard by the grand jury.

[8] U.S. CONST., Amend. V.

[9] Ex parte Wilson, 114 U.S. 417 at 426 (1885); United States v. Moreland, 258 U.S. 433 (1922).

[10] Judge Learned Hand, in United States v. Costello, (2d Cir. 1955) 221 F. (2d) 668 at 677.

[11] Principal case at 363.

[12] United States v. Fitzgerald, (E.D. Pa. 1928) 29 F. (2d) 573 at 576. See also 62 HARV. L. REV. 111 at 115 (1948).