Journal of Criminal Law and Criminology

Volume 45 | Issue 5 Article 9

1955

Indictment Sufficiency--The Lattimore Case

CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

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INDICTMENT SUFFICIENCY—THE LATTIMORE CASE

The District Court for the District of Columbia ruled in May, 1953, on the defendant's motion to dismiss in the much-publicized *Lattimore* case.[1] Owen Lattimore volunteered to testify before the Senate Internal Security Subcommittee concerning charges of Communism and Communist sympathies made against him in prior committee hearings.[2] As a result of his twelve days of testimony before the Committee, he was indicted on seven counts of perjury. The first and most significant charged perjury in the voluntary statement, "I am not and have never been a sympathizer, or any other kind of promoter of Communism or Communist interests. . . ."[3] The defendant challenged the first count on three principal grounds[4]: (1) That the indictment was insufficient under the Sixth Amendment and Rule 7(c) of the Federal Rules of Criminal Procedure; (2) That testimony so subjective in

[1] United States v. Lattimore, 112 F. Supp. 507 (D. DC. 1953).

[2] The Subcommittee acted by the authority of Senate Resolution 366 (81st Congress, 2nd Session) which authorized the Subcommittee to investigate the extent, nature and effects of subversive activities in the United States. 96 CONG. REC. 16872 (1950).

[3] *Hearings before Internal Securily Subcommittee on S.R. 366*, 81st Cong., 2nd Sess. 2947 (1952).

The full text of the statement by Lattimore, made on advice of counsel, is here set forth:

> "All kinds of attempts have been made to depict me as a Communist or a Soviet agent. I have in fact been falsely identified as a follower of the Communist line, or promoter of Communist interests. Now I want to make my position clear. I am not interested in fine or technical distinctions. I am not interested in graduations or degrees of disloyalty. I have no use for fancy legalistic distinctions. I am none of these things and never have been. I am not and have never been a Communist, a Soviet agent, sympathizer, or any other kind of promoter of Communism or Communist interests, and all of these are nonsense. I so testified long ago under oath before the Tydings subcommittee and I do so again." The remaining counts charged perjury in the following statements:
>
> (1) That, prior to 1950, Lattimore had not been told one Ch'ao Ting Chi was a Communist.
>
> (2) That in the late 1930's he did not know that one Asiaoicus was a Communist.
>
> (3) That he had not, when editor of "Pacific Affairs", published articles by persons, other than Russians, whom he knew to be Communists.
>
> (4) That a luncheon conference between him and the Soviet Ambassador in Washington was held after the Hitler invasion of the Soviet Union.
>
> (5) That he had not been requested to and did not in fact take care of the correspondence of Lauchlin Currie while Currie was on a trip.
>
> (6) That he had not made prearrangements with the Communist party to get into Yenan.

[4] A preliminary ground urged for dismissal that the testimony was immaterial, was properly rejected. Materiality, while vital in a prosceution for perjury, need only be alleged in the indictment, and proof may be postponed until trial. Sinclair v. United States, 279 U.S. 263 (1929); United States v. Fields, 6 F.R.D. 203 (D. DC. 1946); 2 WIGMORE, EVIDENCE §§2549, 2550 (3d ed. 1940); see 80 A.L.R. 1443 for additional cases.

nature could never be the basis of an indictment or conviction for perjury; and (3) That the inquiry upon which the charges were based violated the First Amendment.[5] The court held that the first count must be dismissed as violating both the First and Sixth Amendments.

The first contention of the defendant, that the indictment was insufficient under the Sixth Amendment, was accepted by the court as a partial basis for dismissal. The test of sufficiency has been stated to be threefold: (1) The indictment must be detailed enough to inform the defendant of the charge with such specificity that he may adequately prepare his defense; (2) It must be so specific that the defendant, after a conviction or acquittal on it, could successfully plead double jeopardy; and (3) It must inform the court of the facts alleged so that it may determine if they can support a conviction.[6] Unless an indictment does this, it will violate the Sixth Amendment right "... to be informed of the nature and cause of the accusation."[7] A complaint so inadequate would also violate Rule 7(c) of the Federal Rules of Criminal Procedure[8] which provides "The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

Viewing the facts of the case, the court must determine whether this indictment, charging perjury in the statement that one did not sympathize with or promote Communism or Communist interests, is sufficient to allow the defendant to prepare his defense. In this case, the Government's proof of sympathies or promotion could extend back to the defendant's birth; and, from the scope of the investigation, it seems certain that most, if not all charges, would concern affairs taking place ten to fifteen years before trial. It would seem impossible from a practical standpoint for one to prepare adequately a defense with absolutely no knowledge of what the prosecution might introduce to prove his sympathies.

The cases arising on a motion to dismiss for vagueness also offer light on the problem. *United States v. Hautau*[9] treats an indictment very similar to the present one. There the defendant was charged with perjury under the False Claims Acts when he swore in an affidavit that he was not a Communist. The indictment set forth everything in detail except that it used the word "Communist." The charge was held too vague, since "Communist" had different meanings to different people, and the court could not know what the defendant meant by the word, nor could the court itself define the word in all-inclusive terms. By analogy, it is clear that an indictment charging sympathy or promotion of Communism or Communist interests is even less sufficient.[10] In *United States v. Cruickshank*,[11] an indictment charging the defendants with conspiring to deny two Negroes the "several rights and privileges of the Constitution" was held to violate the requirement of sufficiency. The indictment in *United States v. Ferranti*,[12] charging price violation "on or about" a certain day was held unconstitutionally vague where the act violated had been amended very near the same date. The court also reaffirmed an old[13] formula

[5] This paper deals primarily with points one and two. For a more detailed treatment of the case including First Amendment objections see; Comment: *The Lattimore Case: Congressional Investigations and the Constitution*, 49 Nw L. Rev 77 (1954).

[6] Harper v. United States, 143 F.2d 795 (8th Cir. 1944); United States v. Winnicki, 151 F.2d 56 (7th Cir. 1945); United States v. Krepper, 159 F.2d 958 (3d Cir. 1946), *cert. denied* 330 U.S. 824 (1947).

[7] U.S. CONST. AMEND. VI.

[8] FED. R. CRIM. P. 7 (c).

[9] 43 F. Supp. 507 (D.N.J. 1942).

[10] Subsequent to the original preparation of this paper the Circuit Court of Appeals for the District of Columbia held that in this case the word "communist" was not in itself inherently vague because: 1) Lattimore himself had demonstrated an understanding of the word in his testimony; and 2) the word has attained an accepted meaning and an understanding of this meaning was disclosed in the record of the hearing. United States v. Lattimore, 215 F.2d 847, 853 (D.C. Cir. 1954).

[11] 92 U.S. 542 (1875).

[12] 59 F. Supp. 1003 (D.N.J. 1944).

[13] United States v. Potter, 56 Fed. 83 (1st Cir. 1892).

providing that: "The accused must receive sufficient information to enable him reasonably to understand, not only the nature of the offense but the particular act or acts touching which he must be prepared with his proof." This indictment would seem less objectionable than the first count in the *Lattimore* case, since only two price formulas were involved, and it would certainly be easier for one to prepare a defense to meet either formula than to prove his sympathies throughout his career.

From a review of the cases in which an indictment was held sufficient against a charge of vagueness, it readily becomes apparent that much more was set forth than here.[14] Viewed in the perspective of common sense and case law, Lattimore at best knew little of the charge made against him and certainly not enough to prepare an adequate defense. It would seem, therefore, that the court properly ruled that the indictment violates both the Sixth Amendment and Rule 7(c).

The second objection, that testimony so subjective in nature may never be made the basis of a perjury indictment, also merits approval. While closely related to the Sixth Amendment issue, this appears to be primarily an evidentiary question, and, as such, must be approached from the standpoint of what evidence will be admissible to prove the facts in issue.[15] To secure a conviction for false swearing in the statement, "I am not and have never been a sympathizer, or any other kind of promoter of Communism or Communist interests," the Government must show: (1) What Communism is and what Communist interests are; (2) What constitutes sympathy or promotion of these.[16] (3) What the defendant said on the stand; (4) What the defendant believed he was doing at the time he supposedly sympathized or promoted,[17] and (5) What the defendant believed he had done at the time he testified. The last two items point up the complexities inherent in a perjury indictment based on allegedly false testimony concerning past "sympathy." It must be remembered that Lattimore is not charged with having sympathized with Communism; he is charged, rather, with perjury in having *denied* that he had at any time sympathized with Communism. It is therefore not enough for the Government to present evidence warranting the conclusion that Lattimore had sympathized with Communism. The gist of the indictment is that *at the time he testified*, he knew that he had sympathized with Communism. The reasonable inferences to be drawn from his earlier conduct are significant only to

[14] Typical of the indictments held good against a charge of vagueness are: Walker v. United States, 93 F.2d 792 (8th Cir. 1938); Claiborne v. United States, 77 F.2d 682 (8th Cir. 1935); United States v. Drivers, Chauffeurs, Etc., 32 F. Supp. 594 (D.D.C. 1940); Beard v. United States, 82 F.2d 837 (D.C. Cir. 1936). In Koa Gora v. Territory of Hawaii, 152 F.2d 933 (9th Cir. 1946), *cert denied*, 328 U.S. 862 (1946), the court found sufficient an indictment charging defendant with "lewd and lascivious conduct" on a certain day and at a particular place. Francis H. Heller termed this the most uncertain indictment that could be found sufficient. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 103–4 (1951). Even then, it was found sufficient only because added details would have offended the dignity of the court.

[15] 2 WIGMORE, EVIDENCE §§244–267 (3d ed. 1940).

[16] The first two elements are not essential to the Government's case if it can be shown that Lattimore thought he "sympathized or promoted" Communism or Communist interests, since the perjury statute requires only a falsification of one's belief. However, since direct proof of Lattimore's actual state of mind while testifying would be difficult, if not impossible to adduce, the Government probably would rely on an "objective" test, necessitating definition of these terms.

[17] This assumes that sympathy and promotion are conscious attitudes. Certainly "sympathy," as commonly understood, implies consciousness. While it might be argued that one could be a "promoter" without knowing it, it seems doubtful that Lattimore used the term in this sense, for he said he was not "a sympathizer, or *any other kind* of promoter" thereby relating a promoter to a sympathizer.

If Lattimore was not aware of his sympathy or promotion, he may not be held even though he did in fact sympathize with and promote Communism, since the applicable perjury statute requires that the statement be wilfully false. D.C. CODE tit. 22, §2501 (1951).

the extent that they might constitute some evidence as to his probable belief at the time he testified. The basic inquiry is twofold and almost entirely subjective, *viz.*, what did the defendant consider to be sympathy with Communism, and did he consider himself to have embraced such a sympathy. The Committee itself pointed up the difficulty of defining Communism and Communist sympathies, for although they spent the better part of their time investigating Lattimore's "Communist sympathies," they did not reach a definition of the word "Communist" acceptable to themselves until the hearing was almost over.[18] Would it be possible to say that the United States Congress sympathized with Communism when they rose as a body and cheered the Soviet victory at Stalingrad; or that the Government is in sympathy with Communism by virtue of its support to Communist Yugoslavia; and could it not be said that this is actual and active promotion of Communism?[19]

It is true that evidence is often accepted to prove one's state of mind,[20] and from the common law we have the proposition that one testifying to his belief may be indicted for perjury.[21] However, in all such cases where an indictment arose out of a statement of one's belief, the issue was the belief or disbelief of a clearly ascertainable fact. Lattimore is charged with falsifying his belief as to his sympathy, and sympathy is not a clearly ascertainable fact, but rather a state of mind. In view of this distinction, it would seem that authority for a perjury indictment based upon one's belief of a fact is not authority for an indictment based upon one's belief concerning his mental state. The Government must prove to the jury what Lattimore's state of mind was at two widely separated times—his belief at the time he testified and his sympathy at the time he supposedly sympathized or promoted. The court appears to be justified in rejecting such a radical extension of the proof of belief doctrine. This result also seems proper in view of the high degree of proof that must support a perjury indictment. The federal courts require clear and convincing evidence establishing the guilt of the defendant to a moral certainty and beyond a reasonable doubt.[22] Direct evidence is required, and circumstantial evidence, no matter how convincing, will not in itself support a conviction.[23]

Since the defendant asked in the alternative for a bill of particulars, the court must decide whether specificity would remedy the indictment. There is both statutory[24] and case[25] authority for granting such a bill where the indictment is too vague to allow preparation of defense. It is possible that with added information the indictment in the *Lattimore* case might have survived the Sixth Amendment challenge,[26] but if, as the defendant charges, it violates the First Amendment, it must fail altogether. The opinion of the district court does not state explicitly the relationship between the perjury indictment and the First

[18] *Hearings*, *supra* note 3, at 3526, 3527.

[19] Brief for Defendant, p. 24, United States v. Lattimore, 112 F. Supp. 507 (D.D.C. 1953).

[20] Edgington v. Fitzmaurice, 29 Ch. D. 459 (1885) ("The state of a man's mind is as much a fact as the state of his digestion"); 2 WIGMORE, EVIDENCE §§244, 266 (3d ed. 1940).

[21] Rex. v. Pedley, 1 Leach 325 (1784); Regina v. Schlesinger, 10 Q.B. 670, 116 Eng. Rep. 255 (1847).

[22] Hart v. United States, 131 F.2d 59 (9th Cir. 1942); Allen v. United States, 194 Fed. 664 (4th Cir. 1912).

[23] Radomsky v. United States, 180 F.2d 781 (9th Cir. 1950).

[24] FED. R. CRIM. P. 7(f).

[25] United States v. Remington, 191 F.2d 246 (2d Cir. 1951); McMullen v. United States, 96 F.2d 574 (D.C. Cir. 1938). See 5 A.L.R.2d 444 for additional cases.

[26] It would appear to be possible to make the indictment specific enough for the defendant to prepare his defense if, for instance, the bill of particulars could allege that in the corridor, just prior to his testimony, he had said, "I know I've sympathized with Communism all my life, but I intend to tell the Committee that I have not."

On appeal however the circuit court held since the grand jury must have had in mind a specific meaning which it ascribed to the charge, it is now too late for the prosecution to speculate by way of added details just what the meaning was, and so a bill of particulars should not be allowed. United States v. Lattimore, 215 F.2d 847, 850 (D.C. Cir. 1954).