

error on his part. I think it deeply prejudiced the jury against him. It unnecessarily prolonged the trial. His belligerent and overly aggressive courtroom demeanor shocked, I think, even his own sympathetic audience. But, that being the case, what was the Government's strategy in the trial? It was twofold.

They had to blanket Garvey and surround him with so many accusations of fraudulent intent and fraudulent deeds that they could create a strong impression that fraud had been committed. And then the question became, on which of the nine counts was the jury going to pin the actual fraud on?

At the end of the trial, there was so much confusion in the courtroom among the prosecutor, the judge, and the jury, that we have, what I consider to be, a highly unusual state of affairs. In his charge to the jury, the trial judge informed the jury that the Government had withdrawn the third count of the first indictment. They were instructed to ignore that. At the end of the charge by the judge, the prosecutor told him, you misspoke, you told the jury that it was the fourth count when it should have been the third count that was withdrawn, but he did tell them that it was the third count, so the prosecutor reiterated that the third count of the first indictment had been withdrawn. Yet, when the jury returns its verdict, they find Garvey guilty on one count—the third count of the second indictment; but when they explained the evidence for the conviction, it turned out that it was based on the third count of the first indictment, which they had been told had been withdrawn.

When you examine the endorsements on both indictments, both indictments specifically state that Garvey was convicted on the third count of the second indictment, yet there was no evidence or testimony presented at the trial to support a conviction on the third count of the second indictment. My view is that the jury did not know what it was doing; the trial judge got confused; the conviction, therefore, not only did not square with the evidence but it was also outside of the trial testimony. The evidence which the jury had in its mind for the conviction of Garvey did not match the count on which the jury actually convicted him.

What is also an interesting point about the trial was that in the first indictment, two charges were made against Garvey—using the mails for the purpose of fraud and conspiring to do so. In the second indictment that came down one year later, however, only the single charge of using the mails to defraud was included and no conspiracy charge. That that was for a deliberate purpose, namely, to split Garvey off from his three co-defendants. But if, indeed, the evidence that the jury used to convict Garvey was really evidence borne out by the third count of the first indictment—mailing of a circular, without any circular being produced in the court, but just the evidence of the envelope; a circular, moreover produced jointly by all of the officers of the Black Star Line—how could they convict Garvey and Garvey alone, without also upholding the conspiracy charge against the three other co-defendants?

In other words, Mr. Chairman and members of the committee, the jury's verdict, on the face of it, makes absolutely no sense. After Garvey was convicted he filed an appeal and the Government responded almost immediately with in a new indictment, this time,

an indictment for income tax fraud. The Government was determined, at all costs, to have Garvey out of the way. This was political justice in my opinion.

Now, I would like to end by saying that it was the belief in the redemptive quality of the Black Star Line that was the motivating force for its subscribers. This is poignantly borne out in the song written by Hattie Edwards McVey entitled "Yo Fatherland" described by its author as the "only African mammy song written." The song highlighted the urge that motivated Black Star Line subscribers.

She says, "When the steamer 'Phyllis Wheatley' Made her first great African run. It landed a Southern mammy With her little dark brown skin son. With eyes uplifted to Heaven—she Thanked God for what Garvey had done; Then to her little son these words did say: Dis is yo Fatherland — Dis is yo Fatherland You can go any place dat yo wants to go, Be anything dat yo wants to be. Dis is yo Fatherland — so fertile, rich and grand. Don't mind wad de white chile used to do! Wid dat segregated country, honey, yo is thru!! Climb up and be president — its up to you — dis is you FATHERLAND."

Millions of black folk revered Garvey, and continue to revere him, as a redeemer, as a Black Moses. It is not an exaggeration to say that blacks regard Marcus Garvey today, with the same veneration that Americans reserve for George Washington. The purpose behind the Government's prosecution, however, was to discredit Garvey. In other words, to make him into a black Poozi. The verdict of history has vindicated Garvey, however, not his prosecutors.

Garvey himself told the court this, when he was about to be sentenced, "I must state that I have absolutely no regret; I am satisfied to bear any punishment imposed upon me by the Court for the service I have rendered to the race, and which I intend to render in the future in any way I possibly can. And I feel that Negroes that will live hereafter and my children and [future] generations will be satisfied that I have made a sacrifice for them, so that they, too, may take a place in the Government in the great operations of the world."

Thank you, Mr. Chairman and members of the committee for the opportunity you have here extended to me to place this testimony before you.

[The statement of Professor Robert A. Hill follows:]

THE CASE OF MARCUS GARVEY

Testimony

by

Professor Robert A. Hill

Editor-in-Chief

The Marcus Garvey and Universal Negro Improvement AssociationPapers

The University of California, Los Angeles

presented before

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Subcommittee on Criminal Justice

Hearing

H. Con. Res. 84

Tuesday, July 28, 1987

THE CASE OF MARCUS GARVEY

Mr. Chairman, members of the Committee:

I feel it a special honor and privilege to be invited to testify before this Committee hearing testimony on House Concurrent Resolution 84, a non-binding resolution "Expressing the sense of the Congress that the mail fraud charges brought against Marcus Garvey by the Federal Government were not substantiated and that his conviction on those charges was unjust and unwarranted."

I wish to express to this Committee my full support for the resolution. Marcus Garvey was, in my view, innocent of the criminal charges of mail fraud by which he was wrongfully accused and unjustly convicted. As one who has spent almost every day for twenty years engaged in scholarly research of the Garvey phenomenon, and as editor-in-chief of the multi-volume edition of The Marcus Garvey and Universal Negro Improvement Association Papers (University of California Press, 1983-), I feel qualified to evaluate the record of the case, and to present to you, members of the Committee, reasons why I believe Garvey should be exonerated.

It is not only proper but also fitting that, in the year marking the centenary of his birth, the Congress, speaking for the people of the United States, should re-affirm the constitutional rights of the persecuted black leader in the face of accusations brought against him for one and only one purpose,

namely, that of politically ridding the United States of the leader of the largest mass movement of people of African descent ever organized, then and now. A careful perusal of the voluminous trial record running to over 2800 pages fails to reveal any substantial support for the government's conviction of Marcus Garvey. Furthermore, convicted of a single count of mail fraud, out of a possible nine counts, the harshest possible sentence permissible under law was meted out by the court to Garvey: five years in the Atlanta Federal Penitentiary with a fine of \$1,000, accompanied by a refusal of continuation of bail pending the filing of an appeal. Such punishment was nothing short of unusual.

The facts surrounding the case of Marcus Garvey break down conveniently into two broad stages. The first stage, which lasted from Fall 1918 until Fall 1921, was consumed by an extensive campaign of federal political surveillance of Garvey in search of possible evidence of sedition in order to secure his deportation from the United States under the wartime sedition law aimed at aliens. It was only when the goal of securing evidence of sedition against Garvey proved unattainable that other legal strategies were pursued against him. This was the context, after the failure of the straight-forward political route, for the government's resort to the expedient of pursuing charges against Garvey of commercial fraud in connection with the use of the mails. The second stage consists of the indictment, trial, and conviction of Garvey. This latter stage commences with the first

grand jury indictment in February 1922 and concludes with Garvey's conviction in June 1923 and subsequent affirmation of judgment by the U.S. Circuit Court of Appeals for the Second Circuit in February 1925.

On the basis of a careful examination of the facts surrounding the case, it is my submission that, in the words of House Concurrent Resolution 84, "the mail fraud charges brought against Marcus Garvey by the Federal Government were not substantiated and that his conviction on those charges was unjust and unwarranted." This belief, I submit, rests upon arguments supported by the weight of historical evidence, as follows:

AS TO THE GOVERNMENT SURVEILLANCE OF GARVEY

The facts upon the record show that Garvey was the victim of a systematic political witchhunt conducted by the Bureau of Investigation (forerunner of the Federal Bureau of Investigation), conducted by J. Edgar Hoover, at the time special assistant to Attorney General A. Mitchell Palmer, who assigned Hoover to the post of director of the newly created General Intelligence Division in the U.S. Department of Justice. This intelligence-gathering office was the primary instrument used in the 'Red Scare' deportation cases during the Palmer-Hoover raids in 1919-20.

Hoover was involved in organizing and superintending the surveillance of Garvey, with a view to finding violation of

federal law, from as early as April 1919.¹ Hoover was responsible for planting the first Negro informant to be used in investigating "the principal phases of the Negro movement," including Garvey and A. Philip Randolph and Chandler Owen of The Messenger magazine.² It was Hoover who determined, in August 1919, that the Bureau of Immigration should initiate an investigation of Garvey "with a view to the institution of warrant proceedings" against him.³

In October 1919, the Bureau of Investigation showed Hoover a letter it had received from the chief of the Panama Canal Office, Washington, D.C., which the Governor of the Panama Canal, Colonel Chester Harding, requested be sent. Harding felt extreme apprehension at the rumor of a pending visit by Garvey to Panama, given the state of near rebellion against labor conditions that was then being expressed among the West Indian canal workers. Hoover promptly transmitted to a special agent the communication from the Panama Canal Office accompanied by the following memorandum:

Garvey is a West Indian negro and in addition to his activities in endeavoring to establish the Black Star

¹National Archives, Washington, D.C., Record Group 65, File OG 185161, W.E. Allen to William M. Offley, Washington, D.C., April 7, 1919.

²National Archives, RG 65, File OG 258421, J. Edgar Hoover, special assistant to the Attorney General, to Frank Burke, director, Bureau of Investigation, Washington, D.C., August 12, 1919.

³National Archives, RG 65, File OG 329359, A. Caminetti, Commissioner-General of Immigration, to John W. Creighton, special assistant to the Attorney General, August 16, 1919.

Line Steamship Corporation he has also been particularly active among the radical elements in New York City in agitating the negro movement. Unfortunately, however, he has not as yet violated any federal law whereby he could be proceeded against on the grounds of being an undesirable alien, from the point of view of deportation. It occurs to me, however, from the attached clipping that there might be some proceeding against him for fraud in connection with his Black Star Line propaganda and for this reason I am transmitting the communication to you for your appropriate attention.⁴

Hoover was averring in his memorandum to the reference in Colonel Harding's original communication that "no subscriber [of Black Star Line stock] will ever see his money again, and it is unfortunate that means cannot be found to put a stop to such a palpable fraud."⁵

Hoover was promoted to assistant director of the Bureau of Investigation in June 1921. It was from this office, and coming after the eventual frustration of a prior campaign by him to have the U.S. Department of State exclude Garvey from returning in 1921 to the United States, in the course of which Garvey's applications for a re-entry visa were repeatedly denied, over a period of approximately five months, by a succession of American consular officials in the West Indies and Central America, that Hoover shifted the government campaign against Garvey away from his previous reliance on sedition and exclusion. But the change was not immediate. Before the mail fraud option came into play,

⁴National Archives, RG 65, File 198940, J. Edgar Hoover to Special Agent Ridgely, Washington, D.C., October 11, 1919.

⁵Washington National Records Center, RG 185, File 91/212, Col. Chester Harding to A.L. Flint, Balboa Heights, Canal Zone, September 27, 1919.

Hoover casted about for still another avenue of prosecution. In August 1921, he began pursuing the idea of prosecuting Garvey on charges of violating the Mann (White Slavery) Act.⁶ The only difficulty was that the presumed victim happened to be Garvey's personal secretary and soon-to-be-wife second wife, Amy Jacques.

The idea for pursuing Garvey for potential mail fraud approached center stage, finally, on September 23, 1921, after all other attempts at deposing the black leader had been tried and had come to naught. At that time, Hoover's law school classmate and special agent of the Bureau of Investigation, George F. Ruch, notified the Bureau of a communication received by him from the Confidential Informant "B00". Ruch reported:

The Negro Factories Corporation, one of Garvey's enterprises, will close its last business running establishment this week. B00 advised me that in all probability they will continue to sell stock in the Negro Factories Corporation, after their last factory has closed. He was instructed to secure the names and addresses of persons to whom stock was sold through the mails, after this last so-called factory had closed, and to secure such evidence as would assist the Government in their prosecution of Garvey for violation of the postal regulations.⁷

The focus of official attention soon changed, however, from concentration on the Negro Factories Corporation to Garvey's Black Star Line steamship corporation. The change came about as

⁶See Robert A. Hill, ed., The Marcus Garvey and UNIA Papers, Volume 3 (Berkeley and Los Angeles: The University of California Press, 1984), pp. 644, 715-18, 720-21, 722, 723-25, 728-29.

⁷U.S. Department of Justice, Federal Bureau of Investigation, Washington, D.C., File 61-826, George F. Ruch to W.W. Grimes, Bureau of Investigation, Washington, D.C., September 23, 1921. The records in this file were released under provisions of the Freedom of Information-Privacy Act.

a result of the endeavor of one of Garvey's principal black opponents, Cyril Briggs, editor of The Crusader magazine, "to get the Post Office Department to take action against Marcus Garvey and the Black Star Line for having used the United States mails to defraud its shareholders."⁸ Briggs was head of the African Blood Brotherhood, the black auxiliary of the American Communist party, and his effort to have the government institute an investigation of Garvey for mail fraud was the result of his failure to win over Garvey and thereby bring the UNIA under the direction of the ABB. The previously intense struggle between the two leaders turned especially bitter in October, i.e., the month prior to Briggs's request to the Post Office Department, when Garvey published a denunciation of Briggs in the UNIA's official Negro World as a "White Man [and] Negro For Convenience."⁹

The initiative sponsored by Cyril Briggs was the prelude to the federal government's decision to pursue Garvey for mail fraud. On December 9, 1921, the Department of Justice made arrangements with the Chief Post Office inspector to undertake a review of the evidence "in order that the Post Office angles may

⁸U.S. Department of Justice, Federal Bureau of Investigation, Washington, D.C., File 61, Report by Special Agent Mortimer J. Davis, New York City, November 18, 1921.

⁹Hill, ed., The Marcus Garvey and UNIA Papers, Vol. IV (Berkeley and Los Angeles: The University of California Press, 1985), p. 107.

be incorporated when the case is framed."¹⁰

Garvey and three other officers of the Black Star Line corporation (Orlando Thompson, Eli Garcia, and George Tobias) were indicted by federal grand jury on February 17, 1922, on four counts of "using the mails in furtherance of a scheme to defraud and conspiring to do so" (U.S. Criminal Code Sections 215 and 37).

AS TO THE FIRST INDICTMENT

The Black Star Line was a corporation organized under the laws of the State of Delaware with headquarters in New York City. The capital stock at the beginning was \$500,000 divided into 100,000 shares of the value of \$5 each. The capital stock was increased, on December 22, 1919, to \$10,000,000 divided into 2,000,000 shares at the par value of \$5 each. Over the period of its operation, it was estimated that the Black Star Line raised approximately three-quarters of a million dollars from sales of 153,000 shares. It purchased three boats, two of which, the S.S. Yarmouth (re-christened the S.S. Frederick Douglass) and the S.S. Kanawha (re-christened the S.S. Antonio Maceo) made a total of four trips to the West Indies and Central America. The third ship, the S.S. Shadyside, a Hudson river excursion boat, was used for the entertainment of delegates attending the UNIA's "First International Convention of Negro Peoples of the World," held in

¹⁰U.S. Department of Justice, Federal Bureau of Investigation, Washington, D.C., File 61, Memorandum for the Files by W.W. Grimes, Washington, D.C., December 9, 1921.

August 1920 in New York. The indictment alleged that the Black Star Line was devised from the outset as a fraud scheme. This was patently false and ridiculous. The efforts made by Garvey and his co-defendants to secure ships through lease and purchase for the Black Star Line, and their success in placing those ships in operation, belie any such claim. Indeed, surveillance records in the possession of the Department of Justice and the Bureau of Investigation proved conclusively the falsity of the allegation. To the contrary, these records contained abundant evidence that the Black Star Line was not a scheme to defraud but a plan by which Garvey hoped to achieve the economic emancipation of the black race. The view expressed in the indictment was against the weight of the evidence, and this evidence the Department of Justice had in its possession at the time the indictment was drawn.

The indictment made five allegations about the intentions of Garvey and the other defendants as part of their scheme of fraud. In furthering their scheme of fraud. The following were the allegations, to wit:

(1) that it was the intention of Garvey et al to secure one or more ships and to purchase an excursion boat for the purpose of making fraudulent representations "in literature circulated by mail," leading purchasers to believe that their stock was worth the price at which it was being sold;

(2) that it was the original intention of Garvey et al to promise that a ship "to be known as the Phyllis Wheatley" would

be taken over by the Black Star Line and sail to Africa, "when in truth and in fact, no such steamship existed;"

(3) that it was the intention of Garvey et al to publish and circulate a fraudulent financial statement purporting to show that the Black Star Line had "an organization expense of \$289,066.27," which the defendants allegedly knew to be false, in order to deceive the public that a great corporation had been built up and encourage investment;

(4) that statements made by Garvey to the effect that the activities of the Black Star Line were in the interest of the black race, for the building up of Africa/Liberia and the strengthening of black commercial enterprise worldwide, including the statement that the interests of the Black Star Line were being administered by "trained business men and specialty service help, unquestionably equal to their responsible tasks," were false and known by him to have been false;

(5) that the said defendants improperly appropriated part of Black Star Line money to their own uses "in the form or guise of salary, drawing account, expenses, commissions and profits."

Having thus devised and intended the Black Star Line as a scheme to defraud its victims, according to the indictment, the defendants were alleged to have executed the scheme by using the Post Office of the United States. The indictment gave four instances where the mails were alleged to have been thus used in pursuance of fraud. The fourth count of the indictment contained allegation of the crime of conspiracy against all four

defendants.

AS TO THE SECOND INDICTMENT

On January 22, 1923, a second indictment was drawn up by the government against Garvey and his three Black Star Line associates.

The new indictment, which contained eight counts of mail fraud, was a sign indicative of the weakness of the first indictment. Most noticeably, the second indictment dropped the charge of conspiracy, so that the single charge of "Using the mails in a scheme to defraud" (Section 215 U.S.C.) was alleged.

The decision on the part of the government to drop the conspiracy charge would appear to have resulted from strategic considerations. It was probably sending a signal by dropping conspiracy from the second indictment that it would not be trying to win a conviction of Garvey's three co-defendants. In return for this concession, the other co-defendants might well have availed the government of testimony that could be used against the principal defendant, Garvey. Perhaps in the hope that they would lend their testimony against Garvey during the trial in return for the concession of dropping the conspiracy charge. Indeed, the actual conduct of the trial showed that the government prosecutor had practically no evidence whatever against Garvey's three co-defendants, who functioned simply as a sort of window-dressing to the main focus of the trial which was Garvey. Furthermore, it could be argued that from the outset the

inclusion of the three co-defendants in the first indictment served to prop up the government's case by enabling it to seek a conspiracy conviction in the event that the other substantive charge of fraud failed; additionally, their inclusion in the indictment served the political purpose of enabling the government deny that Garvey was the sole and substantial target behind the prosecution in the first place.

AS TO THE TRIAL

The trial began before Judge Julian W. Mock, on May 18, 1923, in the United States District Court for the Southern District of New York. At the outset of the trial, Garvey petitioned unsuccessfully for the removal of the trial judge, alleging that he was a contributor to the rival National Association for the Advancement of Colored People (NAACP). Garvey also fired his defense attorney, Cornelius W. McDougald, on the second day and assumed the trial of his own case. This was an extremely ill-advised decision on Garvey's part for obvious reasons, especially in the areas of admissibility of evidence and cross-examination of witnesses. By conducting his own defense, the trial was prolonged, so that instead of the anticipated two weeks, the trial lasted for one month, ending on June 18, 1923. Furthermore, it was unlikely that Garvey's generally aggressive courtroom demeanor endeared him to the all white jury.

At the start of the trial, the first and second indictments

(C. 31/37 and C. 33-688 respectively) were consolidated. The strategy of the government prosecutor was to build a general picture of fraudulent misrepresentation and misuse of funds against Garvey. However, in my opinion, none of the actual evidence presented in the trial substantiated the allegations of fraudulent intent set out in the first indictment (and repeated in the second indictment). As an example, I wish to cite the testimony given by Thomas P. Merrilees, the government's expert bank accountant who had responsibility of analyzing the financial records of the Black Star Line. The first indictment alleged that the figure of \$289,066.27 for organizational expense in the financial statement of the Black Star Line published in the Negro World was further evidence of fraud. The testimony of the government's expert financial witness on this important allegation was as follows:

Prosecutor: Mr. Merrilees, among the assets in the Negro World of Saturday, August 14, 1920, there is an item, "Organization Expense, \$289,066.27."

Merrilees: Yes, Sir.

Prosecutor: That differs from your organization expense to what extent?

Merrilees: I haven't got an organization expense.¹¹

Regarding the allegation contained in the indictment that the defendants appropriated and converted to their own use revenue from sales of Black Star Line stock, the government's case rested on financial mismanagement, such as the diversion of

¹¹Marcus Garvey v. United States, no. 8317, Ct. App., 2d Cir., February 2, 1925, pp. 1047-1048.

funds to the running of a restaurant and Garvey's drawing two checks in favor of his secretary, than upon any evidence of deliberate and substantive fraud. What the prosecutor took to be representative of fraud in this connection was the fact that the expenses of the Black Star Line corporation and the personal expenses of its stock salesmen and officers were "intermingled promiscuously" and its accounts badly kept; that large sums of money were used for support of travelling salesmen engaged in marketing stock, or for the personal expenses of Garvey; and that these expenses were continued simultaneously with appeals for further stock subscriptions.

It was also the government's contention that the proposed fourth ship (the S.S. Phyllis Wheatley) never existed save on paper, even though Garvey and the officers of the Black Star Line made strenuous efforts to secure such a ship. At the trial, for example, Orlando Thompson, vice-president of the Black Star Line, testified that negotiations for a British vessel, the S.S. Tennyson, were begun in January 1921. The Lamport and Holt Line owned the ship, and the Oceanic Freighting Co. served as brokers. The Black Star Line's overtures ended abruptly, however, when Thompson received a letter from the owners breaking off negotiations.¹² In the view of the government, publication of a picture of the ship, advertisements of its sailings to Africa, and bookings of passengers and freight for its voyages was evidence of fraudulent intent on the part of Garvey and his co-

¹²Ibid., p. 1201.

defendants.

None of the other three allegations specifically cited in the indictments as constituting deliberate fraudulent intent on the part of Garvey and the three co-defendants were proven, in my opinion, on the evidence submitted in the trial. What the government did succeed in doing, through the testimony of various witnesses, was ultimately to spread over Garvey a kind of blanket cover of exaggerated claims, mismanagement, and negligence in his running of the affairs of the Black Star Line. Garvey's penchant for hyperbole, however, must be judged in the context of the dominant climate of boosterism in commercial affairs that prevailed in American commercial affairs during the twenties.

What did make Garvey and the Black Star Line different from the rest was their objectives which, in the opinion of the government, could have had no other basis than fraudulently induce sales of stock. Accordingly, the first indictment in the case cites as evidence of fraudulent intent statements issued by Garvey to the effect

that the Black Star Line afforded a grand opportunity to every Negro to insure himself against misfortune; that there would be a monster demonstration at Madison Square Garden October 30, 1919, to celebrate the launching of the Black Star Line steamship, S.S. "Frederick Douglass;" that the S.S. "Frederick Douglass," the first ship of the Black Star Line, has been launched on the 31st day of October, 1919, and made history for the Negro; that three ships were afloat and that we must float one every three months until we build up a great merchant marine, second to none; that amidst great difficulties we are able to bring into real existence a corporation that now holds a high place among the great business institutions of the day; that we have placed the Race 100 per cent among the great commercial institutions of the world;

that we now have under our control three ships and we are making a desperate effort to acquire the greatest ship of all, and one that is to convey to Africa our workmen and materials, for the building up of the great Republic of Liberia for the Race; that the Black Star Line S.S. Corporation has startled the world; that we are making special efforts to add ships of large tonnage to the ships now under and controlled by this concern; that the proceeds of the dollar drive will be used to donate our mother ship, all necessary equipment and make it specially and conveniently fitted for the African trade; that all our time, all our energy, all our ability, will be centered in building up of Africa as the greatest nation in the world; that between these three agencies, The African Redemption Fund, the Black Star Line S.S. Corporation and the loaning to the Universal Negro Improvement Association's Construction Loan, you (referring to the victims) will enable us to cement the finances of our race as to make it possible for us through this organization not only to build a nation, but to bind ourselves as one industrial power among the other races and nations of the world, and that whatever might have been the errors of the past, the present administration of the Black Star Line is composed of trained business men and specialty service help, unquestionably equal to their responsible tasks[.]¹³

Such rhetoric as this, in the eyes of White American opinion, was certain to have been interpreted as the height of dishonesty and irrationality.

The consequence of the prosecuting attorney's successful blenketing of Garvey with culpability for the failure of the Black Star Line venture was that the specific counts of the two indictments were lost sight of and became hopelessly confused in the minds of trial judge, prosecutor, and jury alike. At the close of the case, with the jury absent, the government prosecutor informed the trial judge that he withdraw the fourth count of the first indictment (the conspiracy count) and counts

¹³Ibid., First Indictment, pp. 5-5.

one and two of the second indictment.¹⁴ From his description of the content of the first of the withdrawn counts, however, it turns out that the prosecutor had confused the second with the first indictment. In his charge to the jury, Judge Mack declared:

In the first indictment the third count has been withdrawn, and in the second indictment the first and the second counts have been withdrawn.¹⁵

At the close of the charge of the jury, the trial records records an exchange between the government prosecutor and the trial judge regarding this question of what counts the government had withdrawn. The prosecutor offered the following correction:

Mr. Mattuck: Your honor mentioned the fourth count to the first indictment instead of the third.

The Court: Yes, that was my mistake in looking at this paper. I should have said the third count. It is not the fourth count in the first indictment.¹⁶

And there the matter of the withdrawn counts remained. From this exchange between prosecutor and trial judge conducted in the presence of the jury it will be seen that the court affirmed that the third count of the first indictment was withdrawn.

After a lengthy deliberation, the jury returned with a verdict of acquittal of Garvey's three co-defendants (Thompson, Garcia, and Tobias), and found Garvey "guilty as charged under

¹⁴Ibid., Motions, p. 2384.

¹⁵Ibid., Charge, p. 2406.

¹⁶Ibid., Charge, p. 2414.