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AMERICAN CIVIL LIBERTIES UNION aclu

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M E M O R A N D U M

RE: Recent Hearings of the House Committee on Un-American Activities and Related Events

Because of the publicity and interest generated by the recent hearings of the House Committee on Un-American Activities and the role of the American Civil Liberties Union in those hearings, we have prepared the following memorandum detailing the relevant events, the latest legal challenge in the ACLU's long-standing fight against HUAC, and the issues at stake.

1. The Facts of the Case and the Position of the ACLU

On Monday, August 15, the American Civil Liberties Union and the New York Civil Liberties Union filed a complaint against the House Committee on Un-American Activities to test the constitutionality of its mandate to investigate "propaganda" activities. The Union moved for an order certifying that the constitutional issues raised in the pleadings required the convening of a statutory three-judge District Court (from which any appeal would go directly to the U. S. Supreme Court) and for a temporary restraining order prohibiting HUAC from proceeding with

its hearings scheduled for the next morning. Judge Corcoran, of the federal District Court in Washington, D. C., granted both motions. The next day the three-judge court dissolved the temporary restraining order on the grounds that our showing of "irreparable injury" had been inadequate, but retained jurisdiction over the constitutional issue raised by ACLU. A hearing on this issue was scheduled for 2:30 on Wednesday.

On Wednesday morning the Government filed a motion to dismiss the complaint which is still pending. At the same time the three-judge court on its own motion postponed the Wednesday afternoon hearing until further order and requested both parties to file memoranda of law on August 22 as to whether the three-judge court should dissolve itself and remand the case to the original single-judge court. The August 22 deadline was later extended to August 26.

Upon the dissolution of the temporary restraining order the House Committee commenced its hearings. The opening witness was Phillip Luce, a friendly witness to the Committee, who had been a past member of the Progressive Labor Movement. During the course of the testimony several persons in the audience interrupted the hearings to shout their disapproval. These persons were physically removed by marshalls and charged with disorderly conduct while others were similarly arrested and charged on mistakes as to identity for applauding at the wrong time (persons applauding statements by the chairman or by friendly witnesses were not arrested) or for other improper reasons.

During the balance of the afternoon, witnesses not represented by ACLU were called to testify. They answered some questions concerning their political beliefs, but refused to answer others concerning naming names, financial matters and some organizational activities.

On Wednesday, during the morning session of the HUAC hearings, Arthur Kinoy, ACLU Cooperating Attorney, member of the Supreme Court Bar, Professor of Constitutional Law at Rutgers University, and one of the victorious attorneys in

Dombrowski v. Pfister [380 US 479 (1965)], was engaged in colloquy with a member of the Committee. The colloquy concerned Kinoy's objections on behalf of his client, Walter Teague, regarding the testimony being given by a Government informant concerning Teague. When Chairman Pool over-ruled Kinoy's objection, Kinoy insisted on his right to make the record show the nature of his objections, inasmuch as his client was being implicated by a witness without the benefit of cross-examination. At this point Pool interrupted and ordered him to sit down; and as Kinoy then sought to make the record show that he had not been permitted to state fully the reasons for his objections, marshalls grabbed him, the chairman ordered him removed, and the marshalls roughly dragged him from the hearing room. Kinoy was arrested and taken to the station house and booked with "disorderly conduct," mugged and fingerprinted. Not knowing of the arrest the Chairman subsequently ordered his return. Meanwhile, each of the counsel made a separate statement to the Committee concerning the treatment received by Kinoy and requested an adjournment on the grounds that any chance they had to represent their clients adequately had been destroyed. The request was denied and all counsel left the hearing room. Thereafter two of the clients also left the hearing room after making statements that they would not remain if they did not have counsel of their own choice, while others offered to testify without counsel only under protest and their subpoenas were continued to November 15.

Contrary to the impression that may have been created by press accounts, photographs and even television broadcasts, the arrest of Arthur Kinoy grew out of his advocacy of procedures for which ACLU has consistently battled. He was protesting that the ACLU client was being maligned and that any testimony concerning him should be given in executive session. This is substantiated by the copy of the transcript of the hearings at this point and the account in The New Republic of August 27 (see Appendix A), which show that Kinoy was attempting to secure the most elemental due process for ACLU's client. His conduct was, as a New York Congressman stated to Jack Pemberton, nothing more

than the normal colloquy expected in a House hearing. Jack Pemberton was quoted in the New York Times of August 18 as saying "that in all my years as an attorney I have never experienced the shock I did this morning" at the forcible removal of Mr. Kinoy. (Needless to say, the ACLU did not support the intemperate behavior exhibited by some of the spectators, though the National Capital Area CLU is representing those believed by it to have been wrongfully arrested.)

Although the rules of HUAC do not provide for it, the ACLU feels that

> Counsel for witnesses should have the right to make and to explain briefly non-repetitious objections to the relevancy or propriety of committee questions or to other committee procedures which violate his client's rights. Counsel should also be permitted to subject his client to reasonably direct examination in order to explain or justify answers given to the committee.
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> Before airing defamatory, prejudicial, or adverse information, a committee should screen such material in executive session to determine whether or not it is reliable. The individual whom the information tends to prejudice should be properly notified and given an opportunity to appear before the committee in executive session with other witnesses if he so requests, or with other evidence rebutting the information. The same requirement of fair notice pertaining to witnesses at public hearings should apply here, and should include a ban on disclosure of the names of witnesses in advance of their appearance. There should be an absolute prohibition on the publication of information discussed at the session, prior to a determination of whether to hold a public session at which the defamatory information will be presented....
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> If adverse testimony is given in public session after the committee has determined in executive session that it is appropriate to the investigation, any person about whom such testimony is offered should be afforded an opportunity to:
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> a. testify or offer sworn statements in his behalf;
> b. subject the witness offering prejudicial testimony to cross-examination;
> c. obtain the assistance of the investigation committee in compelling the attendance of witnesses and the production of documents reasonably necessary to rebut the charges against him.
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> Though cross-examination has not generally been recognized as a right or even a privilege by congressional investigating committees, it is absolutely necessary to prevent or expose unfounded charges which may ruin an individual's reputation forever. The little time consumed by cross-examination is a fair price to pay for the assurance that such injustice will be avoided. (Board minutes, 8-9-65 and 9-13-65; ACLU Statement on Fair Procedure for Legislative Investigations, 9-23-65.)

Arthur Kinoy was tried that afternoon and Friday morning on the charge of disorderly conduct and was found guilty by the judge who fined him $50. The conviction will be appealed.

[The point hardly need be made that in its representation of clients subpoenaed to appear before HUAC, the ACLU, as in every such case, disassociates itself from the political or other views of its clients and concerns itself only with the constitutional and civil liberties issues involved.]

2. ACLU's Legal Challenge of HUAC

The basic theory of the complaint filed by the ACLU on August 15 is that the mandate of the House Un-American Activities Committee (which is incorporated into a Federal statute) is unconstitutional on its face. We allege that the mandate which authorizes the Committee to investigate un-American "propaganda" activities sets forth a charter authorizing investigations into the areas protected by the First Amendment, namely freedom of speech, belief and association. The question of the mandate was before the court in Barenblatt v. United States [360 US 109 (1959)] and was upheld by a 5 to 4 vote. It has also been raised subsequently in Wilkinson v. United States [365 US 399 (1961)] and Braden v. United States [365 US 431 (1961)].

Just this last term, the Supreme Court, in granting certiorari in the ACLU directly supported Gojack case [369 US 749 (1962)], granted the petition on, among other grounds, the question of the constitutionality of the Committee's mandate. Although the reversal of the conviction in Gojack on other than constitutional grounds was ordered, we have argued in this suit that the Supreme Court has in effect ruled that the issue of the Committee's mandate presents a substantial Federal and Constitutional question.

Our attempt to secure a court order enjoining the hearings rests on the premise, first, that because of its mandate anything the Committee does is constitutionally impermissible; and second, that the practices of the Committee have damaged irreparably the lives of those who have been subpoenaed to appear before it because of exposure without the protection of due process.

Moreover, it is ACLU policy that

> A witness who believes that a committee has asked him a question which he has a legal right not to answer should be allowed to make an immediate application to a federal court, which will then decide whether the question is a proper one or whether the witness is constitutionally privileged not to answer it. (Board minutes, 9-13-65)

There is a great deal of talk by the Committee of its consideration of the "Pool" Bill which would make it a crime punishable by a $20,000 fine and/or twenty years imprisonment to give aid to "any hostile power, or agency or national thereof, or to any organization, group, or person acting in hostile opposition to the Armed Forces of the United States." Rather than engage in a discussion concerning the merits of the Pool Bill and its grave constitutional defects, the ACLU has taken the position that since the mandate is unconstitutional every action of the Committee is tainted by that unconstitutionality, including the nominal subject matter of these hearings, the Pool Bill.

3. <u>The Question of the Separation of Powers</u>

When the ACLU complaint was filed on August 15, there were angry cries from Congressmen and others that the principle of the separation of powers was being abridged. THe ACLU takes the position that (1) HUAC's mandate is unconstitutional. (2) The suit seeks to establish the unconstitutionality of that mandate. (3) The court is an appropriate forum for the declaration of that

unconstitutionality, especially in light of the Supreme Court's grant of certiorari in Gojack.

The power of any of the three branches of government is not absolute, for the principle of "checks and balances" is also in operation. Ever since 1803, when Chief Justice John Marshall, speaking for the Supreme Court in Marbury v. Madison, first declared an act of Congress unconstitutional, the authority of the courts to act as a check on the legislative branch has been generally recognized. Although a Congressional legislative hearing is not the same as an Act of Congress, the ACLU feels that a judicial remedy is appropriate whenever an individual's civil liberties are jeopardized or abridged in the course of a legislative hearing where the traditional procedural protections of due process are not available to him. The recent Supreme Court decisions commanding reapportionment of the state legislatures on the basis of one man, one vote makes clear that the doctrine of separation of powers is no bar to the assertion of individual rights.

Moreover, it has been suggested that Congress itself, in allowing HUAC free reign is overstepping the principle of the separation of powers, for any hearing conducted by HUAC invariably takes on the aspects of a judicial proceeding, but lacks the guarantees of due process to the witnesses provided by a proper court.

4. Additional Information

An important source of information dealing with HUAC is the pamphlet, "The Case Against the House Un-American Activities Committee" published by the ACLU. Copies may be ordered from this office for $.35 each.

The New York Times of August 22, 1966 printed an editorial on both the nature of the HUAC and the ACLU's attempt to secure judicial relief. A copy is attached as appendix B for your information.

Mr. Nittle. Now, in the course of your attendance, did you come in contact with a person named Walter Dorwin Teague III?

Mr. McCombs. Yes, sir, I believe I did.

Mr. Kinoy. I object, Mr. Chairman. As one of the attorneys for Walter Teague, who is present in the hearing room, I object to any testimony about him in open session. I also object if I am not given the American right to cross-examine this witness in reference to any statement about Mr. Teague, and I ask for a ruling on both of my requests.

Mr. Pool. I believe you made the same objection yesterday; is that correct?

Mr. Kinoy. I made the same objection with reference to Mr. Kreb yesterday and Stanley Nadel.

Mr. Ashbrook. Mr. Chairman, I move that the objection be overruled.

Mr. Kunstler. My name is William M. Kunstler

Mr. Kinoy. Mr. Chairman, I would like to be heard on that motion, and I also am an attorney for Mr. Teague. Do I understand that it is the ruling of this committee that the fundamental right of cross-examination is not to be afforded to witnesses who are called before this committee when the committee is attempting to defame?

Mr. Pool. You are arguing the question.

Mr. Kinoy. Of course lawyers always argue questions, Mr. Chairman.

Mr. Ashbrook. You didn't argue the question; you made a misinterpretation of fact when you said we are endeavoring to defame something.

He is totally out of order, Mr. Chairman. Such is not the case.

Mr. Kinoy. Mr. Chairman, that question will be settled in Federal Court whether you are attempting to defame witnesses.

Mr. Ashbrook. You made it as a statement of fact, and as a lawyer you know you are absolutely wrong. You are out of place.

Mr. Pool. The objection is overruled.

Mr. Kinoy. May the record show we take a strenuous objection to your ruling.

Mr. Pool. Now sit down. Go over there and sit down. You have made your objection. You are not going to disrupt this hearing any further.

Mr. Kunstler. Mr. Chairman, you don't have to deal discourteously to an attorney in front of you. That is wholly un-American.

Mr. Pool. I will deal any way I want under the rules in this hearing. I have just told him to be quiet and I ask you to sit down now.

Mr. Kinoy. Mr. Chairman, let the record show -- don't touch a lawyer. Mr. Chairman --

Mr. Pool. Remove the lawyer.

Mr. Kinoy. Mr. Chairman, I will not be taken from this

courtroom. I am an attorney-at-law and I have the right to be heard.

Excerpt from The New Republic, August 27, 1966, "T. R. B. from Washington":

"We sat about 15 feet from where lawyer Arthur Kinoy was making a point of order for one of the subpoenaed witnesses. On the raised dais above him sat Chairman Pool, like a frog on a lily pad. Mr. Kinoy is a respectable attorney, member of the bar of the US Supreme Court and professor of law at Rutgers. He is a counsel for that subversive organization, the American Civil Liberties Union. He was making a persistent point for his client, but in a quiet voice. Suddenly in front of us all Pool lost control. He seemed to swell. At the top of his voice he bellowed, "Now sit down!" He gave a tremendous whack with his gavel.

"Without any chance to sit, let alone turn, little Kinoy was instantly pinioned by three big plainclothesmen, his wrists twisted, an arm choked about his throat, and he was dragged out. Seven other defendants' lawyers looked aghast and learned incredulously that their eminent colleague had been taken off to jail. Pool, looking a little scared, calmed down a bit. We felt a bit frightened, too. We had never seen a client's lawyer taken off to jail before."