FOUNDED 1920/INCORPORATED

AMERICAN CIVIL LIBERTIES UNION aclu

156 FIFTH AVENUE / NEW YORK / NEW YORK 10010 / ORegon 5-5990

August 23, 1966

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.
>
> 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....
>
> 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:
>
> 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.
>
> 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."

IN THE COURT OF GENERAL SESSIONS
District of Columbia

DISTRICT OF COLUMBIA)
)
-vs-)
)
ARTHUR KINOY)

Brief in Support of Motion in Arrest of Judgment

Attorneys for Defendant:

Philip J. Hirschkop
1025 Vermont Avenue, N.W.
Washington, D. C.

Beverly Axelrod
345 Franklin Street
San Francisco, California

Frank Donner
36 West 44th Street
New York, New York

Ira Gollobin
1441 Broadway
New York, New York

Jeremiah S. Gutman
363 - 7th Avenue
New York, New York

William M. Kunstler
511 Fifth Avenue
New York, New York

John de J. Pemberton, Jr.
156 Fifth Avenue
New York, New York

Morton Stavis
744 Broad Street
Newark, New Jersey 07102

Of Counsel on the Brief:

Anthony G. Amsterdam
3400 Chestnut Street
Philadelphia, Penn. 19104

George Cooper
435 West 116th Street
New York, New York

Robert F. Drinan, S.J.
Boston College Law School
Brighton, Mass.

Walter Gellhorn
435 West 116th Street
New York, New York

Willard Heckel
180 Plane Street
Newark, New Jersey 07102

Robert Knowlton
180 Plane Street
Newark, New Jersey 07102

Louis Lusky
435 West 116th Street
New York, New York

Of Counsel on the Brief: (Con't.)

John de J. Pemberton, Jr.
156 Fifth Avenue
New York, New York

Albert J. Rosenthal
435 West 116th Street
New York, New York

Morton Stavis
744 Broad Street
Newark, New Jersey 07102

Thomas P. Sullivan
Raymond, Mayer, Jenner & Block
135 S. LaSalle Street
Chicago, Illinois 60603

IN THE COURT OF GENERAL SESSIONS
District of Columbia

DISTRICT OF COLUMBIA)

-vs-) Brief in Support of Motion in Arrest of Judgment.

ARTHUR KINOY)

The motion in arrest of judgment raises a number of fundamental jurisdictional questions and questions arising on the face of the record which, it is submitted, require that the judgment of conviction be vacated.

STATEMENT OF FACTS

The facts relevant to the within motion are undisputed.

Arthur Kinoy, a member of the Bar and a professor of law was before the House Un-American Activities Committee representing two clients. Upon the occasion of a witness mentioning adversely the name of one of his clients, Mr. Kinoy rose to claim the right to cross-examine the witness. There ensued a colloquy as follows:

> "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 accorded 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 anyway 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."

(Stenographic transcript of hearings before HUAC August 17, 1966, 211-213 introduced in evidence in the hearing before this court.)

At the point in the transcript when Mr. Kinoy stated "Mr. Chairman let the record show--" and before the chairman ordered him removed, Mr. Kinoy was seized, a number of deputy marshals began to remove him from the hearing room, and he was placed under arrest. He was thereupon promptly taken to police headquarters.

A few moments after his removal, and as a result of colloquy between the chairman of the committee and other counsel present, Mr. Pool stated the following:

"Bring the gentleman back in."

(HUAC transcript page 220)

As the testimony before this court showed, Mr. Kinoy could not be returned because he had been arrested and detained at the police headquarters.

The information filed against Mr. Kinoy was as follows:

> "That Arthur Kinoy late of the District of Columbia aforesaid on or about the 17th day of August in the year A.D. 1966 in the District of Columbia aforesaid and on New Jersey and Independence Ave., S.E. and, in a public place, to wit: Cannon Building did then and there engage in loud and boisterous talking and other disorderly conduct contrary to and in violation of an Act of Congress police regulation in such case made and provided and constituting a law of the District of Columbia."

The statute under which the proceeding was brought reads as follows:

> "Unlawful assembly-Profane and indecent language. It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble...in or around the public building...and engage in loud and boisterous talking or other disorderly conduct..." D.C. Code 22-1107. 1/

In support of the charge, the prosecution's witnesses testified that Mr. Kinoy spoke in a loud voice, did not discontinue his arguement when told by the chairman to sit down, and vigorously protested his being carried from the room. No profanity was suggested nor was there any suggestion that Mr. Kinoy uttered anything other than matters constituting his legal argument or his protest against removal. While upon this motion we do not ask the court to pass upon any factual matters, it must be noted that the prosecution's characterization of Mr. Kinoy's conduct was sharply disputed by a number of prominent members of the bar who were in the hearing room with Mr. Kinoy. It was also decisively contradicted by the transcript of the hearing. 2/

1/ For the convenience of the court we have appended the full text of the statute as an appendix to this memorandum.

2/ The contrast between the expansive testimony of the prosecution's witnesses and the official transcript is truly remarkable. Mr. Kinoy was told to sit down not three times as stated by one marshal or six times as stated by another, but as the transcript shows, on only one occasion. Mr. Kinoy, as the transcript shows, was seized by the marshals before Mr. Pool asked that he be removed, not afterwards as stated by the marshals. Notwithstanding the emphasis by the marshals on the loudness of Mr. Kinoy's voice, and the charge that he was shouting, the record gives no hint that anyone in the committee thought Mr. Kinoy's voice was too loud.

The record is barren of any of the following:

1) Any proof that Mr. Kinoy had assembled or congregated with anyone or had participated in any way except as an attorney for his client;

2) Any formal request by the House Committee, the House, or anyone connected with the committee that Mr. Kinoy should be prosecuted; indeed the record affirmatively shows that the chairman of the committee sought to have Mr. Kinoy returned.

3) Any action by a majority of the committee or any formal action of the committee with respect to the conduct of Mr. Kinoy.

The record before this court shows that Rule VIII of the rules of the Committee provides:

> "Conduct of counsel. Counsel for a witness should conduct himself in a professional, ethical and proper manner. His failure to do so shall, upon a finding to that effect, by a majority of the committee or subcommittee, before which the witness is appearing subject such counsel to disciplinary action, which may include, warning, censure, removal of counsel from the hearing, or a recommendation of contempt proceedings."

Upon the foregoing record this court adjudged Mr. Kinoy guilty of the offense charged.

It is submitted that upon the undisputed facts this court lacks jurisdiction over this matter, and that the conviction is contrary to law.

Point I

THE INFORMATION DOES NOT CHARGE AN OFFENSE UNDER THE STATUTE; THE PROOFS DO NOT INCLUDE AN ESSENTIAL ELEMENT OF THE OFFENSE; AND THE STATUTE BY ITS TERMS IS NOT APPLICABLE TO THE INSTANT CASE.

IF THE STATUTE IS INTERPRETED TO ENCOMPASS THE INSTANT CASE IT IS VOID ON GROUNDS OF VAGUENESS, AND IS VIOLATIVE OF THE FIRST AND SIXTH AMENDMENTS OF THE CONSTITUTION.

The statute sought to be invoked here is Sec. 22-1107 of the District of Columbia Code. As applicable here the statute reads as follows:

> "Unlawful assembly-Profane and indecent language. It shall not be lawful for any person or persons within the District of Colubmia to congregate and assemble... in or around any public building... and engage in loud and boisterous talking or other disorderly conduct." 3/ (emphasis supplied)

It is clear that under the statute as applied to this case two elements are required:

1. Congregation and assembly in a public building; and 4/

2. Loud and boisterous talking or disorderly conduct.

The complaint does not even charge congregation and assembly

3/ While the information does not specifically designate the statute, it is obviously based upon Sec. 22-1107 since the statutory language is to some extent followed. Moreover, the only other disorderly conduct statute is Sec. 22-1121 and it is evident by the merest inspection of that statute that no offense is being charged thereunder. The only reference to shouting or noises in that statute, refers to night time noises. These charges have not been made in this case.

4/ While the word "and" is, on occasion, taken to mean "or", it is not possible to read this statute except by giving full force to the conjunctive. Unless so read the statute would mean that it is unlawful to congregate and assemble without more, a reading not permissible under the First Amendment.

and of course there was no proof thereof. The proofs in fact were that Mr. Kinoy represented two clients and functioned exclusively as a lawyer. There is not an iota of suggestion that he was part of a group or an assembly.

We need not here deal with another type of fact situation, i.e., an individual who is part of a group or assembly and then singly engages in loud and boisterous talking. There is no charge, nor can there be, that Mr. Kinoy was ever part of any congregation or assembly.

The statutory words "congregate" and "assemble" have specific and well defined meanings, as in People v. Carcel, 3 N.Y. 2d 327, 144 N.E. 2d 81,85 (1957):

> "The term 'congregating' implies and is usually applicable to the coming together of a considerable number of persons (Powell v. State, 62 Ind. 531 (1878), or a crowd (Webster's New Collegiate Dictionary; the Oxford Dictionary [1923]) and a crowd has been defined as a throng, multitude or great number of persons (People v. Phillips, 245 N.Y. 401,402,157 N.E. 508,509)."

"Assemble" is defined "to bring or summon together into a group, crowd, company, assembly or unit" (Webster's Third New International Dictionary (1961)). The same work defines "congregate" as "to collect together into a group, crowd or assembly."

The general proposition that a criminal statute in the conjunctive requires proof of all elements of the offense seems too obvious to require citation. It would be sufficient to refer the court to the cases which establish the applicability

of that proposition to disorderly conduct cases. In State v. Mullen, 67 N.J.L. 451, 51 A. 461 (1902), the defendant was arrested under a statute prohibiting "loud and offensive or indecent language." The offense supposedly took place at a school meeting. The court said:

> "That Mullen used loud language is proven. It was evidently an excitable school meeting and there was much earnest talk. Mullen had made motions which had been ruled out of order. The proof of loud language, however, does not meet the statute. The offense is 'loud and offensive or indecent language.' There was not the least testimony that what he said was offensive or indecent. If all who are loud and persistent in soliciting support for their candidates or views at public elections or school meetings are to be held disorderly persons, it will lead to a new view as to who are disorderly persons." at 461.

See also State v. D'Aloia, 2 N.J. Misc. 1164, 146 A. 426 (Court of Common Pleas, Essex County 1924).

In Commonwealth v. Lombard, 321 Mass. 294, 73 N.E. 2d 465 (1947), the defendant was charged under a statute making it a crime to accost or annoy persons of the opposite sex "with offensive and disorderly act or language." The defendant was charged with accosting a young woman" with certain offensive acts and language" and the court ruled that the complaint had not charged him with a crime, stating:

> "We think that 'offensive' and 'disorderly' have different meanings, and that to come within the prohibition of the statute the accosting and annoying must be both 'offensive' and 'disorderly.' (citing cases) And we do not feel called upon at this time to define the precise meaning of either word.

> "We are therefore of the opinion that the defendant is right in his contention that the complaint, which charges him only with acts and language which were 'offensive; but does not allege that such acts and language were 'disorderly,' does not charge him with a crime." (citing cases) at 466,467.

In Commonwealth v. Greene, 410 Pa. 111, 189 A.2d 141 (1963), the court dealt with the statute which defined disorderly conduct as the making of "any loud, boisterous and unseemly noise." The court said:

> "It must be noted that noise, which was practically the entire substance of the accusation in this case must, under the Act, if it is to constitute disorderly conduct, be loud, boisterous and unseemly. It is admitted that motor propelled go-karts traveling at a speed of approximately 30 to 35 miles per hour make a loud and boisterous noise. Is that noise also unseemly? Something is unseemly when it is not fitting or proper in respect to the conventional standards of organized society or a legally constituted community." at 143.

The court analyzed the proofs and, after it came to the conclusion that the defendant's conduct was not unseemly, reversed the conviction.

The statute is designated in the code under the title "Unlawful assembly - Profane and indecent language". The first portion of the statute is apparently a statutory substitute for the common law crime of unlawful assembly.[5/] The second portion of the statute dealing with obscenity and profanity follows a semi-colon and obviously deals with wholly separate matters. While a code title of a statute might, as a general rule,

---

5/ The common law definition of unlawful assembly is "any gathering together of three or more persons, with intent to disturb the public peace, accompanied by some overt act or acts to effect that intent ..." State v. Butterworth, 104 N.J.L. 579,583, 142 A. 57 (1928).

not be wholly dispositive as to its meaning, it certainly is an important clue to the proper interpretation of the statute. Federal Trade Commission v. Mandel Brothers, Inc., 359 U.S. 385 (1959). In this case an omission of the charge of assembly or congregation is an omission of the most decisive portion of the statute in the application of the first part thereof.

Of course, a plain reading of the statute makes clear that, whatever else it applies to, it certainly cannot extend to the process of a legal argument. Indeed the effort to apply an inapplicable statute has been the difficulty with this case from the very beginning. A lawyer's argument conceivably can be loud, but how can one state on this record that Mr. Kinoy was boisterous, which means "violent; rough in operation; violent and rough in behavior; coarse in quality"? Edwards v. Hollywood Canteen, 160 P. 2d 94 (Cal. Dist. Ct. App. 1945). And, whatever else a lawyer making an argument before a tribunal may be doing, he is certainly not congregating and assembling.

Thus, on the face of the complaint, there is no violation of the statute and the very basis of the proofs negate the applicability of the statute. The conviction must fail for failure to charge an offense and for lack of evidence to support the charge. Louisville v. Thompson, 362 U.S. 199 (1960).

However, if this statute is to be construed as not requiring congregating and assembling, the statutory language

notwithstanding, or that a lawyer representing a client before a legislative committee can, by some novel interpretative technique, be found to be congregating and assembling, then the conviction must be set aside for the failure of the statute to afford fair warning that such conduct has been made a crime. Bouie v. Columbia, 378 U.S. 347 (1964). No attorney can fairly be held to assume that the vigorous advocacy and defense of his client's rights could subject him to summary arrest under a statute characterized as prohibiting unlawful assembly, or that such advocacy could be considered part of a congregation and assembly, or that the clear use of the conjunctive would be ignored. To hold otherwise would be a gross violation of due process of law.

> "When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in Lanzetta, or to 'guess at [the statute's] meaning and differ as to its application,' as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question." Bouie v. Columbia, supra, at 352.

Furthermore, to construe this statute to punish the conduct of Mr. Kinoy renders the vagueness of the statute vulnerable on yet additional grounds. The statute so construed severely infringes rights guaranteed under the First Amendment to the United States Constitution. As Mr. Justice Brennan observed in

N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963), "the First Amendment also protects vigorous advocacy, certainly oflawful ends, against governmental intrusion." Similarly, such an interpretation would strike at the very heart of a right necessarily implied in the Sixth Amendment - the right of an attorney to represent a client by whom he was retained, free from the fear of harrassment. See Holt v. Virginia, 381 U.S. 131 (1965).

These major constitutional questions emerge from an effort to use the statute in a situation never intended to be covered thereby. All that is required at this point is a reading of the statute by its plain language. So read it cannot possibly apply to the instant case.

Point II

THE PROSECUTION AND ARREST HEREIN INTERFERE WITH THE BASIC AND TIME-HONORED PRIVILEGES OF AN ATTORNEY AND CONSTITUTE A VIOLATION OF THE CONSTITUTIONAL GUARANTEES OF FREEDOM OF SPEECH, AND THE RIGHT TO COUNSEL.

The unprecendented attempt to prosecute a lawyer under a disorderly persons statute for the manner in which he presents an oral argument--the equally unprecedented arrest of a lawyer in the very midst of oral argument--require consideration of the time-honored privileges of an attorney to represent his client, conduct an argument on his behalf and be free from arrest while so engaged.

The foregoing privileges of an attorney emerge from the familiar duty of the lawyer to give his "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability...no fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." Canons of Professional Ethics of the American Bar Association, No. 15.

The classic formulation of the duty of the lawyer appears in the colloquy between Lord Erskine and Buller, J. as reported in the following interchange:

> "At length Erskine said, 'I stand here as an advocate for brother citizen, and I desire that the word "only" be recorded;' whereupon Buller, J., said, 'Sit down, Sir! remember your duty or I shall be obliged to proceed

> in another manner,'--to which Erskine retorted, 'Your Lordship may proceed in whatever manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.' The Judge took no notice of this reply. Lord Campbell speaks of the conduct of Erskine as a 'noble stand for the independence of the Bar..'". Oswald, Contempt of Court, 3d Ed., pp. 51,52.

Lord Erskine's formulation of the lawyers' duty, is the basis for the lawyers' absolute privilege from criminal prosecution for his arguments.

As Lord Mansfield pointed out,

> "Neither party, witness, counsel, jury or judge can be put to answer civilly or criminally for words spoken in office." Rex v. Skinner, 98 English Reports 529 (King's Bench, 1772)., at 530,

quoted with approval by Cardozo, J., Andrews v. Gardiner, 224 N.Y. 440, 121 N.E. 341 (1918). Indeed, as Lord Mansfield pointed out in that case (involving indictment of a judge) "to go on an indictment would be subversive of all ideas of a constitution."

A lawyer is not required to be right; he may assert with utmost vigor a proposition whether or not it be correct. Platnauer v. Superior Court, 32 Cal. App. 463, 163 Pac. 237 (1917). He is entitled to be persistent, and under given circumstances has been sustained even though he did not obey an order to sit down. Curran v. Superior Court, 72 Cal. App. 258, 236 Pac. 975 (1925).

> "An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the advocate thinks irregular or

> detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case." Oswald, Contempt of Court, 3d Ed., pp. 56,57.

The considerations upon which these privileges of the attorney are based are the interest of society in the maintenance of an independent bar, the integrity of the adversary system of justice, and the continued functioning of the courts with the aid of attorneys.

These privileges which are most often considered in contempt cases, emerge again in the field of libel, both civil and criminal. The rule of absolute privilege in respect to a lawyer's statements in court in civil libel cases is well known. Equally does the absolute privilege apply in criminal libel cases. As stated in Ange v. State, 98 Fla. 538, 123 So. 916 (1929), "no matter how false or how malicious such statements may in fact be, the words used by attorneys are privileged." See also People ex rel Bensky v. Warden of City Prison, 258 N.Y. 55, 179 N.E. 257 (1932), where the court quoted with approval Munster v. Lamb, 11 Q.B.D. 588,605, as follows:

> "No action of any kind, no criminal prosecution, can be maintained against a defendant, when it

> is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of the law."

Bleecker v. Drury, 149 F. 2d 770 (2nd Cir., 1945), though involving a matter of privilege in a civil libel case, sets out the basis of the attorney's privilege as follows:

> "Privilege is founded onpublic policy. Fearless administration of justice requires, among other things, that an attorney have the privilege of representing his client's interests, without the constant menance of claims for libel." at 771.

The privilege here at issue extends as well to legislative as to judicial procedures. Yancey v. Commonwealth, 135 Ky. 207 , 122 S. W. 123 (1909).

In evaluating the significance of the immunity of an attorney from prosectuion for criminal libel note should be taken of the fact that a criminal libel is premised on a threat of disturbance of the peace. Garrison v. Louisiana, 379 U.S. 64,68 (1964); Beauharnais v. Illinois, 343 U.S. 250,254 (1952).

It seems obvious on the face of it that if the privilege extends to the content of the words used, it must certainly encompass the tone of voice and the decibel level the lawyer uses. Viewed in this light, the efforts to subject Mr. Kinoy to criminal prosecution for disorderly conduct because of alleged loud and boisterous language in the very midst of an oral argument as an attorney is an indefensible assault upon the privileges, and indeed duties, of an attorney.

As the court pointed out in People ex rel Bensky v. Warden of City Prison, supra., (179 N.E. 259)

> "The underlying principle covering the courts of England and our own courts is that the proper administration of justice depends on freedom of conduct on the part of counsel and parties to litigation." (emphasis supplied)

The protection of this conduct demands that an attorney be protected from prosecution not only under libel laws, but under any "Breach of the Peace" statutes which could be construed to make the performance of professional duty a criminal act.

Whatever may be the limitations upon an attorney as articulated in some contempt cases when his conduct is considered as intentionally obstructing the administration of justice, the disorderly persons statute and the criminal process has never been the framework within which such a question is to be considered. Again it is appropriate to refer to Lord Mansfield, in Rex v. Skinner, supra. After emphasizing the absolute privilege from criminal prosecution he states: "If the words spoken are opprobrious or irrelevant to the case, the court will take notice of them as a contempt and will examine them on information." at 530.

But the process of contempt is wholly different from the criminal process attached to the prosecution of a disorderly persons case. In the contempt process, it is the body before whom the alleged misconduct occurred which either controls or initiates the prosecution. And it is with full recognition of

the availability of another remedy that the absolute privilege from a criminal prosecution (other than contempt) has been acknowledged.

Any interpretation of the disorderly conduct statute which would make it applicable to an attorney's oral argument and permits interference with the privileges and duties of an attorney, as manifested by the facts of this case, is obviously improper. Fortunately, as pointed out above, a fair reading of the statute hardly requires such a result.

The privileges of an attorney extend not merely to the content and manner of his expressions; they also include a privilege from arrest while in attendance at a court. 5(a)/ In Durst v. Tautges, Wilder & McDonald, 44 F. 2d 507 (7th Cir., 1930), the court dealt at length with this privilege of the attorney. It quoted Blackstone as follows:

> "Clerks, attorneys and all other persons attending the courts of justice (for attorneys, being officers of the courts, are always supposed to be there attending), are not liable to be arrested by the ordinary process of the court, but must be sued by bill (called usually a bill of privilege) as being personally present in court. Blackstone's Commentaries, 2 Cooley's 2d Ed. 288." at 509.

The court analyzed the privilege as not simply a personal privilege saying,

"...it is also the privilege of the court, and

5(a)/ See cases cited at 7 C.J.S.,821.

> is deemed necessary for the maintenance of its authority and in order to promote the due and efficient administration of justice." (Durst, supra., at 508-509).

The court was clear that the privilege extended to legislative as well as to judicial proceedings,

> "Hearings before arbitrators, legislative committees, commissioners in bankruptcy, and examiners and commissioners to take depositions have all been declared to be embraced within the scope of its application." (Durst, supra., at 509).

See also Edward Thompson's Case, 122 Mass. 428 (1877). Equally was the court clear that the arrests to which the privilege extended included both a criminal and a civil arrest. "If the word 'arrest' refers to arrest on a criminal warrant-- and we are convinced it does--..." Durst v. Tautges, Wilder & McDonald, 44 F. 2d 507,510 (7th Cir., 1930).

The arrest of Mr. Kinoy in the midst of a legal argument was in flagrant violation of this privilege.

Since in this case it was the arrest itself which really rendered the entire proceeding disorderly, and since it was the very arrest which prevented Mr. Kinoy's return as requested by the chairman of the committee, the entire prosecution must fail. Obviously, if Mr. Kinoy had not been arrested--had he been returned to the committee as requested--there would have been no prosecution. Since the arrest itself was unlawful--and since it was this unlawful conduct which literally brought about the prosecution--the prosecution itself must fail.

The privileges which we have here referred to have emerged from the common law. Additionally they touch directly upon fundamental constitutional rights, under the First and Sixth Amendments. The vindication of these privileges is essential to the maintenance of our system of justice. The prosecution of Mr. Kinoy and his forcible arrest in the very midst of an oral argument must necessarily have a "chilling" effect (Dombrowski v. Pfister, 380 U.S. 479 (1965)) upon the bar as a whole unless promptly rectified.

As we have pointed out above, the maintenance of this prosecution requires that the plain language of the statute be ignored. We submit that certainly such a strained interpretation should not be adopted when its consequence so directly imperils the time-honored privileges of the lawyer and his significant role in the administration of our judicial system.

Point III

THE USE OF THE CRIMINAL PROCESS OF DISORDERLY CONDUCT TO REGULATE THE CONDUCT OF AN ATTORNEY ENGAGED IN ACTUAL ARGUMENT BEFORE A CONGRESSIONAL COMMITTEE IS BEYOND THE JURISDICTION OF THIS COURT AND CONSTITUTES AN ATTEMPT UNLAWFULLY TO INTERFERE WITH THE POWER OF A CONGRESSIONAL COMMITTEE TO REGULATE ITS OWN PROCEEDINGS.

The inapplicability of the disorderly conduct statute seems clear on its face. The conflict between the application of the statute in this case and the privileges of an attorney is a further reason why the claimed offense is beyond the scope of the statute. But further, the effort to press that statute into use in respect to the conduct of a lawyer before a congressional committee is beyond the jurisdiction of this court and constitutes a gross interference with the legislative process and a violation of the most basic principles of separation of powers.

It should be noted that in Rex v. Skinner, supra, Lord Mansfield expressed not merely the substantive privilege of an attorney not to be prosecuted for crimes, but also a basic procedural and jurisdictional limitation. If, as he stated, contempt is the proper procedure, then its enforcement must be determined or at least initiated by the offended body.

Indeed, it is really quite unbelievable that a bailiff should have the power - independently of a determination by the presiding officer of a court or committee - to interrupt a lawyer's argument, physically remove him, and bring him before another judge to determine the propriety of his conduct constitu-

ting a part of an oral argument. Such a power of course threatens the functioning of lawyers in a hotly contested and possibly unpopular cause; more than that, it threatens a court's control of its own proceedings.

Courts and legislative bodies have zealously guarded their powers to regulatethe conduct of attorneys before them. The power of contempt is considered to be essential to the maintenance of the integrity of the proceedings of the body in question.

We do not for a moment concede that Mr. Kinoy's conduct was contemptuous or that the House would have the power to proceed against him. It is sufficient at this time to emphasize that the issue is one of jurisdiction and that if there is any regulation required of the conduct of an attorney in respect to the content and tone of his argument, the power to initiate regulation of the same vests in the court or legislative body before which the attorney makes his argument, and not some other court 6/ enforcing the criminal law independent of the body concerned.

6/ We are not here concerned with the question of whether the legislature may use its own forum for trying a contempt, as in Anderson v. Dunn, 19 U.S. 204 (1821), or whether it must seek the aid of a court to adjudicate a question of contempt, as in United States v. Gojack, 384 U.S. 702 (1966). The point here is that even if the aid of a court is sought to punish for contempt such action by the court follows a first and formal determination by the legislative body that a contempt occurred and a subsequent formal application to the court that it render aid.

This of course explains why this case is unprecedented and why there does not appear to be a single case where alleged misconduct of counsel in the course of argument was punished as disorderly conduct,[7/] though there are innumerable cases where such misconduct was proceeded upon by contempt. See Gallagher v. Municipal Court, 192 P. 2d 905, 31 Cal.2d 784(1948), and the numerous cases cited therein.

The reason why matters relating to the conduct of counsel in oral argument always involve a first determination by the body before whom counsel appears is, of course, that the power to punish is also the power to regulate and intervene. Where a court of criminal jurisdiction without prior formal request undertakes to punish attorneys for their conduct in oral argument before another court or a congressional committee, the threat of interference becomes obvious.

Legislative hearings by nature deal with political and controversial issues. In fact, the theoretical basis for most legislative hearings is that Congress is gathering facts upon which to base legislation. Witnesses and lawyers frequently are contributing testimony or arguments which may be distasteful to particular persons. Often enough such persons are either on the executive or judicial branch of the government.

7/ So strong is the limitation of the punitive power to the process of contempt that even in cases that involve conduct rather obviously unlawyerlike, e.g., lawyers drawing a bowie knife on a U.S. Marshal (Ex parte Terry, 128 U.S. 289 (1888)), fist fighting in court (see State v. Buddress, 63 Wash. 26, 114 P. 879 (1911)), the device of contempt is used.

Suppose a witness before a congressional committee loudly denounces the John Birch Society and a law enforcement officer does not appreciate such denunciation. Is he empowered to whisk away the witness and lodge a charge of "loud and boisterous talking"? Or let us suppose the committee is investigating the conduct of the office of the U.S. Marshal, or possibly that of judicial tribunals. Is the committee to be at the mercy of the executive or the judicial branch of the government on the matter of such elementary questions as the conduct of counsel or witnesses?

The application of these problems to judicial tribunals is equally clear. Consider the case of Sheppard v. Maxwell, 384 U.S. 333 (1966), which incidentally included the forcible ejection of an attorney who "attempted to place some documents in the record" of the proceedings before the coroner (at 340). The court set aside the conviction because of the deluge of publicity and the failure of the court to exercise control over the same. The Supreme Court insisted that the trial court had the power to control these matters and was required to exercise that power. Significantly, the Court said:

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." at 363.

Lest it be thought that the jurisdictional conflict above referred to is an academic matter, we refer the court to the record in the case which establishes that there was in fact interference by the U.S. Marshals with the functioning of the Committee.

It was after the Marshals had removed Mr. Kinoy from the room that they sua sponte and with no formal direction from the Congress, the Committee, or the subcommittee, determined to charge him under the District of Columbia statute. They thus removed him from the building and handed him over to the metropolitan police, and made it impossible for him to return to the room when Mr. Pool, who obviously had some second thoughts on the matter, said, "Bring the gentleman back." Thus the Committee's processes were indeed frustrated by the independent action of the Marshals.

The House has recognized that counsel has some role to play in its proceedings. Indeed, the nature of the issues which have characterized litigation relating to the Committee emphasizes that lawyers do in fact have a most significant task to protect their clients.[8/]

8/ Whatever may be the role of counsel before other congressional committees, counsel before this Committee performs an indispensable role. In the 21 years of HUAC's tenure it has cited for contempt more witnesses than all the other congressional investigating committees combined. When such contempt citations are reviewed judicially, the vigilance of counsel before the Committee may well determine his client's guilt or innocence. For example, his failure to object to the absence of a quorum (cf., Christoffel v. United States, 338 U.S. 84 (1949)), or lack of pertinency of questions (Watkins v. United States, 354 U.S. 178 (1957)), or lack of authority of the subcommittee to proceed to the particular subject matter (Gojack v. United States, 384 U.S. 702 (1966)), or

However grudging has been the Committee's willingness to recognize the function of the lawyer - and it will be recalled that a claim of the right to cross-examine was at the root of Mr. Kinoy's argument - it is not prepared to exclude them. Perhaps the Committee realizes that the legal basis of its power to compel witnesses to appear would be further called into question if lawyers were excluded.

It is understandable, therefore, that the chairman of the Committee, being somewhat sensitive to the various questions that have been raised as to its functioning, and perhaps after he realized the implications of what had transpired, sought to have Mr. Kinoy return. It is perhaps too much to expect that a Deputy U.S. Marshal would be responsible for determinations of the role of counsel, but this would be all the more reason why he should not interfere with the processes of the Committee absent appropriate and orderly request therefor by the Congress under its rules. Nor, for that matter, should this court undertake, by sustaining this prosecution, further to extend the interference with the Committee without formal request therefor.

Further evidence that the actions of the Marshals without formal request of the Congress interfered with the functioning of the Committee appears in the record of the House

8/ (Continued from previous page.) the improper refusal by the subcommittee of the right to be heard in executive session (Yellin v. United States, 374 U.S. 109 (1963)), may foreclose an effective defense to the contempt charged. It is therefore clear why Mr. Kinoy's statements to the subcommittee were reasonably considered by him to be essential to the preservation of his client's legal rights.

Un-American Activities Committee on the following day. The violent assault upon Mr. Kinoy - and it was at least that - caused all the other lawyers to refuse to attend the hearings. Upon the lawyers' refusal, a large number of witnesses refused to testify. The Committee was compelled to recognize the validity of their refusal and the hearings as to some of the witnesses were postponed until November 15. Realistically, then, the precipitate action of the Marshals did in fact bring about a gross interference with the program of the Committee.

If this case had involved two tribunals of the same branch of government, the issues would be serious enough. But dealing here with the relationship between the executive and judicial branches of the government on the one hand and the legislative branch on the other, large issues of separation of powers necessarily come to the fore.

This is not a case where the legislature calls upon the judicial branch of the government to aid and assist in the performance of its legislative duties; in such cases, of course, the courts require compliance with judicial standards of due process and the whole panoply of protective devices which characterize our judicial system. Gojack v. United States, 384 U.S. 702 (1966). Nor is this a case involving the power of courts to protect the citizenry from the abuse of process or unconstitutional conduct of a committee of Congress. The power of the courts in such a case to enforce the Constitution and laws of the United

States is clear. This is rather a case where a group of U.S. Marshals and a court of the District of Columbia are undertaking, without any congressional authority, to apply to a committee of Congress their own standards of how a lawyer should conduct himself before a committee. This action is especially vulnerable when the Committee has a rule respecting the conduct of attorneys (Rule VIII) supra, which includes a range of controls, presumably designed to meet different situations. The action of the Marshals and indeed of this court takes no account of these differences.

Any control of a lawyer's conduct in the midst of oral argument must necessarily start with a determination by the body before whom the lawyer is arguing that his conduct needs to be controlled. To ignore this basic proposition is to attack the ability of the affected body to control its own proceedings. No court has jurisdiction to assert itself in this area without a prior determination by the body concerned. In the context of relationship between the Legislative and Judicial branches of the Government these limitations of jurisdiction take on the added restrictions of the separation of powers.

In England even the King or his attendents may not enter the House of Commons without the permission of the House - a permission sought through the ceremony of the Black Rod (3 Encyclopedia Britannica 685 [1960 Ed.]). The marshals and this court are equally lacking in power to usurp the functioning of the congressional committee in determining the conduct of attorneys

Point IV

THE PROSECUTION IS VOID BECAUSE OF FAILURE TO COMPLY WITH THE COMMITTEE'S RULES.

It is clear enough that the Committee made no formal request that Mr. Kinoy be arrested and that he be prosecuted. But even if there had been such a request by the chairman or any member of the Committee, the prosecution must fail because of failure to comply with the rules of the Committee.

Rule VIII of the rules of the Committee provides:

> "Conduct of counsel. Counsel for a witness should conduct himself in a professional, ethical and proper manner. His failure to do so shall, upon a finding to that effect, by a majority of the committee or subcommittee, before which the witness is appearing subject such counsel to disciplinary action, which may include, warning, censure, removal of counsel from the hearings, or a recommendation of contempt proceedings."

Thus any action relating to the disciplining of an attorney is subject to determination by a majority of the Committee The record is clear that the majority of the Committee was neither called upon to act nor did it act.

The Supreme Court has recently dealt with the consequences of failure to comply with the Committee's rules which grant a specific power to the majority of the Committee. In Yellin v. United States, 374 U.S. 109 (1963), the Court reversed a conviction of refusal to answer questions before the Committee because the Committee majority had not - as required by its rules - passed upon an application for an executive session.

In United States v. Gojack, 384 U.S. 702 (1966), the Court set aside a conviction because the majority of the

Committee had not, asrequired by its rules, determined the subject matter of the inquiry.

The Committee has set up its own machinery for regulating the conduct of attorneys. If this proceeding be considered in any way as ancillary to the Committee's hearings, the failure to comply with the Committee's own rules is a decisive and jurisdictional omission.

CONCLUSION

The defects in the judgment of conviction are apparent on the face of the record. The judgment of conviction should be arrested. Walls v. Guy, 4 F.2d 444, 55 App.D.C. 251 (1925). The information should be dismissed.

Respectfully submitted,

One of Attorneys for Defendant

Philip J. Hirschkop
1025 Vermont Avenue, N.W.
Washington, D. C.

APPENDIX

§ 22–1107. Unlawful assembly—Profane and indecent language.

It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both for each and every such offense. (July 29, 1892, 27 Stat. 323, ch. 320, § 6; July 8, 1898, 30 Stat. 723, ch. 638; June 29, 1953, 67 Stat. 97, ch. 159, § 210.)