

The Federal Lawbreaker

By TOM WICKER

WASHINGTON, May 31—"If the Government becomes a lawbreaker, it breeds contempt for law," the U.S. Third Circuit Court of Appeals pointed out the other day. And in a resounding understatement it continued: "To declare that the Government may commit crimes in order to secure the conviction of a criminal may well bring unfortunate retribution."

Yet, more and more often, the Federal Government appears to be bending, often breaking the law in order to convict suspected lawbreakers — particularly those suspected of some form of subversion. When, for instance, the District of Columbia police dragged the Mayday demonstrators in Washington, the Justice Department, while disclaiming responsibility, never protested that the tactics were either unconstitutional or overzealous; quite the opposite. More than 48 hours after some of the demonstrators had been jailed, Federal prosecutors still were trying to have them held, even though there was no arrest record, no charge and no evidence to support a charge.

The latest example is the case of Sister Jogues Egan, named as a co-conspirator but not a defendant in the alleged conspiracy to kidnap Dr. Henry Kissinger. Sister Jogues was brought before a grand jury in Harrisburg last January, granted immunity from prosecution, and questioned. But she refused to answer on grounds that the questions were based on conversations overheard by an illegal tap on her telephone.

If that is true, the questions would clearly be improper, since the 1968 Omnibus Crime Control Act forbids grand jury questioning based on electronic surveillance conducted without a court order. Yet, to Sister Jogues's allegations, the Justice Department replied that she had no right to demand a hearing on the wiretap question, since such a hearing would delay the grand jury investigation.

According to the Third Circuit Court opinion, the Justice Department did not argue either that it had not tapped Sister Jogues or that, if it had, the tap had been authorized by a Federal court. The department simply maintained that the nun had no right to raise the tapping question, since that would delay the grand jury investigation; and it also pointed out that Sister Jogues had been granted immunity.

The court rejected both arguments. The possibility of slowing a grand jury investigation was not a sufficient justification, it ruled, for violating Sister

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Jogues's Fourth Amendment rights against improper searches with an illegal tap, much less for making her answer questions that might be based on the fruits of the tap. And promising her immunity against prosecution did not rectify the original Fourth Amendment offense alleged against the Government.

Happily, therefore, the Circuit Court ruled that Sister Jogues had a right to a hearing to determine whether the questions put to her were, indeed, the fruits of an illicit wiretap. But unhappily, a Justice Department spokesman said the ruling undoubtedly would be appealed to the Supreme Court because of its importance in this and several other cases.

The plain meaning of that is that the Government intends to stick to its position that Sister Jogues has no right to such a hearing. Yet, if there was no illegal wiretap, the Government could surely speed the grand jury investigation by demonstrating its innocence at a hearing.

It would not be right to adopt Justice Department reasoning and conclude that, therefore, there must have been an illegal wiretap, as claimed by Sister Jogues. It is sufficient to say that the department appears willing to leave that impression, even though if such a tap existed, the later questioning of Sister Jogues was a clear violation of the 1968 crime law.

What are we to make of a Justice Department with so little concern for appearing to be like Caesar's wife? Already, we know that Attorney General Mitchell claims the right to tap anyone's phone without a court order, and without any admission that he is doing so, on mere suspicion that the person tapped is a threat to the national security; yet the 1968 crime act specifically sets up requirements for court orders to authorize wiretaps. In the case of Sister Jogues, Mr. Mitchell also seems to claim the right to base grand jury questioning on unauthorized taps, even if the 1968 law does specifically prohibit it.

Either the Justice Department believes it is above the law when it conceives the necessity to be great enough; or else it wants potential criminals and subversives to think it so believes. The great danger, as the Circuit Court pointed out, is that if the Government itself is a lawbreaker, or appears to be, it cannot for long expect anyone else to respect the law, or those supposed to uphold it.

* See NYTimes 29 May 71, this file