UNION'S STANDS:

ACLU on Watergate

The ACLU on July 11 issued "Watergate and Civil Liberties," a question-and-answer presentation of the Union's stand on the principal civil liberties issues that had been raised, to that date, by the Watergate break-in and subsequent revelations of political espionage and secret government operations. The document, edited, is reprinted here.

Were the Watergate events justified by considerations of national security?

An integral element of Watergate was the creation of a governmental surveillance apparatus to monitor lawful political activities. The tone of life and spontaneity of spirit which characterize a free society cannot survive in an atmosphere where an individual's deviation from the political norm is noted by government snoopers and stored for future reference.

The second major element of Watergate was a sustained effort to prevent the dissemination of information to the general public. Our government must overcome a strong presumption for the public's right to know before withholding information from its citizens.

As part of their attempt to enhance their surveillance and secrecy apparatus, the Watergate participants engaged in the systematic violation of the law. It is the constant theme of totalitarianism that national security justifies extra-legal activities in the name of the greater good.

From time to time the President and his spokesmen have talked about executive privilege as a reason for not complying with requests from the Senate Watergate Committee and the prosecution. What is executive privilege and how is it relevant?

Executive privilege is a power claimed by most recent Presidents to withhold from Congress certain kinds of information or documents in the possession of the executive branch. There is no statute or language in the Constitution or decision of the Supreme Court recognizing such an "executive privilege." Furthermore, the withholding of documents or information from Congress by the President or other members of the executive branch imposes a severe and sometimes crippling limitation on Congress's power to conduct investigations and to inform itself so that it can legislate.

Until very recently the Nixon Administration took a broader view of executive privilege than any other presidency in our history. According to a study by the Library of Congress, in the last four years witnesses and documents have been formally withheld from Congress on 19 occasions, four times on the direct order of the President and the rest by cabinet officers and agency heads.

The basis for these actions was spelled out by former Attorney General Kleindienst on April 10, 1973, when he asserted that Congress had no power to order an employee of the executive branch to appear and testify or submit documents if the President claimed executive privilege.

The policy was stated just before the main disclosures in the Watergate affair began to occur. A month later, after the resignations of Messrs. Haldeman, Ehrlichman, Dean and Kleindienst, and in the face of growing pressures from Congress and the press for more information from the White House, a more modest position on executive privilege was articulated by Leonard Garment, the new Counsel to the President. The new policy did not bar the testimony of any executive department employee, including past and present members of the President's staff, but it did prevent the disclosure to Congress of conversations with the President, documents received or produced by the President or any member of the White House staff in connection with their official duties, and classified information.

The ACLU has presented testimony to Congress stating that the President can properly refuse to supply Congress with documents or witnesses concerning recommendations, advice and suggestions passed on to members of the executive branch for consideration in the making of policy. He may not, however, withhold information about what has been done, as distinct from what has been advised. Whatever the title of an individual, and whether he is called an "advisor" or an "assistant to the President," he should be accountable to Congress and to the public for actions that he took in the name of the government and decsions that he made that were implemented by others. Furthermore, an executive department witness may not decline to answer questions about facts that he acquired while acting in an official capacity, and a Congressional committee can require him to answer questions about actions he took or advice he gave, even to the President, which it has probable cause to believe constitute criminal wrongdoing. In this latter situation, of course, the witness would be entitled to exercise his constitutional rights including the privilege against self-incrimination.

What is the responsibility of persons who seek to explain their role in Watergate as one of just following orders?

In the absence of physical coercion or intimidation, no person can justify the commission of a crime by alleging that he was following orders.

What is the responsibility of government officials who did not personally participate in Watergate, but who permitted their subordinates to engage in illegal activities?

Our courts have consistently ruled in civil proceedings that a high official who fails to take adequate precautions to control the illegal activities of his subordinates must bear a full share of the legal and moral responsibility.

The standard in criminal cases is different. The ACLU believes that in a criminal case, personal involvement in illegal activity must be proven. Knowing and active support for criminal behavior should be a necessary condition before prosecution is undertaken.

Jeb Stuart Magruder has explained his participation in Watergate by analogizing it to the civil disobedience of the Rev. William Sloane Coffin. Is the analogy fair?

No. The events of Watergate do not amount to civil disobedience in any generally understood meaning of that term. There is a moral obtuseness in the inability to differentiate publicly announced non-violent appeals to the public's sense of justice and fairness from the events of Watergate.

President Nixon has said that he first approved and then rescinded his approval of a 1970 intelligence gathering plan. What is the significance of that plan?

At this writing, it has been revealed that the 1970 plan called for electronic surveillance, burglaries, mail covers, the use of military undercover agents and the infiltration of college campus groups, all for the purpose of political intelligence. At the same time, the Nixon Administration was combatting any efforts to place legislative or judicial controls on intelligence gathering. William Rehnquist, then assistant attorney general of the United States, testified at a Senate hearing on March 9, 1971 that "self-discipline on the part of the executive branch will provide an answer to virtually all of the legitimate complaints of excesses of information gathering."

As a consequence of ACLU litigation and through other public disclosure, it is now known that all of the methods of political espionage contemplated in the 1970 plan (excepting only mail covers—about which little is known) were employed by the federal government during the past few years. The President's admission that he gave even temporary approval to these activities—and more permanent approval to wiretapping of news reporters and past and present employees of the National Security Council for purposes of political intelligence—indicates a contemptuous disregard for constitutional freedoms.

In President Nixon's May 22 statement redefining his knowledge of and involvement in matters related to Watergate, he stated that a number of wiretaps installed without court order for the alleged purpose of tracing leaks of information that endangered the "national security" were "legal at the time." Were they?

No. Those taps were as illegal when they were installed as they are now.

In June, 1972, the Supreme Court unanimously ruled (Mr. Justice Rehnquist not participating) that such taps were unconstitutional. It would have been a radical departure from previous court decisions for the Supreme Court to have ruled otherwise.

Are civil liberties questions raised by the sentencing procedures followed by Judge Sirica in the trial of the seven original Watergate defendants?

Yes. On March 23, 1973 the seven Watergate defendants were brought before Chief Judge John Sirica for sentencing. In the course of imposing provisional, maximum sentences, Judge Sirica stated to five of the defendants:

"I recommend your full cooperation with the Grand Jury and with the Senate Select Committee. You must understand that I hold out no promises or hopes of any kind to you in this matter, but I do say that should you decide to speak freely, I would have to weigh that factor in appraising what sentence will be finally imposed in each case."

Judge Sirica's interest in obtaining the full story is laudable, nevertheless the ACLU believes that the application of pressures, express or implied, upon a convicted defendant facing sentencing raises serious civil liberties problems.

The use of such pressures as a device for coercing incriminating testimony from an individual may violate the Fifth Amendment privilege against self-incrimination.

Moreover, conditioning the severity of a criminal sentence on the defendant's willingness to cooperate with law enforcement officials violates the principles of due process of law. The sentencing process generally is notoriously lawless. There are few procedures, if any, to prevent a judge from basing the sentence on impermissible factors.

Has the press been guilty of "McCarthyism" in its reporting on Watergate?

No. The wild charges of Senator Joseph McCarthy and his colleagues were largely based upon accusations that individuals were guilty of politically unpopular beliefs and associations. Charges of that sort are always insupportable under our Constitution.

The Watergate affair is different. Serious crimes have been committed. There are allegations that persons other than the defendants who have now been convicted or who have pled guilty were implicated. Law enforcement officers are, of course, authorized to track down others who may have participated in criminal activity. They can properly be charged with commission of crime and tried on the basis of the evidence. If convicted, they will have been found guilty not of political association, but of the precise charges against them.

Moreover, for the most part the charges and speculation being circulated today emerge from the efforts of the press to investigate the government. That is altogether different from the charges by government officials directed against private citizens.

In the American constitutional scheme, generally the answer to the question, "who watches the watchers," is the press. Only a free and aggressive press can root out corruption or other malfeasance in office.

Is the Senate Watergate investigation a proper exercise of legislative power?

Yes—so long as the Committee respects the rights of the persons called before it or identified in the hearings.

The Supreme Court considered the question of legislative investigations in the case of *Watkins* v. *United States* in 1957. The Court stated: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. *It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste*" (emphasis added). The Court went on to say "that there is no congressional power to expose for the sake of exposure." However, the Court noted that in making that statement it did not intend to limit "the power of Congress to inquire into and publicize corruption and maladministration in agencies of the Government."

The *Watkins* decision makes clear that the rule against "exposure for the sake of exposure" was intended to apply to exposure of the private affairs of individual citizens. The Court was concerned, as it stated, with "the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly."

The purpose of the Senate Watergate Committee as set out in Senate Resolution 60 is to investigate and study "the necessity or desirability of the enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." This is certainly a valid legislative purpose.

What about the problem of prejudicial publicity?

We do not believe it is necessary for the Senate Watergate hearings to be cancelled or suspended because of the problem of prejudicial publicity. Even if they were cancelled or suspended, the problem would remain. The press would continue to conduct its own investigations and would continue to publicize the results. Because of the publicity generated by the Senate Watergate investigation and by the press on its own, some persons may not be able to get fair trials. If that turns out to be the case, it may not be possible to fairly convict those persons of criminal offenses. The ACLU will enter appropriate cases and urge that prosecutions be dropped or convictions reversed if they have been tainted by publicity.

Should the prosecution of the Watergate defendants take precedence over the Senate Watergate investigation?

The prosecution and the Senate investigation serve constitutionally distinct and proper purposes. The Senate investigation serves a legislative and informing function. The prosecution serves the public interest in punishing malefactors. The ACLU does not urge that either the Senate investigation or the prosecution take precedence over the other.

It should be noted that if the original prosecution had been prompt and properly wide in scope the Senate Watergate investigation might never have been necessary. However, the prosecution was delayed and, thereby kept information from emerging which might have influenced the 1972 elections. When it finally took place, the prosecution was restricted. That is why the Senate investigation came about. Under the pressure of the Senate investigation, an independent prosecutor was appointed. ACLU supported the appointment of an independent prosecutor with an independent staff.

Is the Senate Watergate Committee's grant of immunity to the witnesses who appear before it proper and adequate protection of their rights?

Relying on the 1970 Omnibus Crime Control Act, the Senate Committee proposes to confer immunity on a number of the witnesses appearing before it. However, only limited "use" immunity has been offered. This means that the witnesses' own testimony cannot be used against them in any subsequent criminal proceeding. But the witnesses may be prosecuted for any of the crimes they discuss in their testimony if the government presents independent evidence of the crime. While the government must prove that it has found such evidence, the prosecutor knows precisely what crime he is looking for and may easily be able to find the necessary proof to present to a jury.

It has always been the ACLU's position that the Fifth Amendment means what it says and that no person should be compelled by any device or means to bear witness against himself. In 1972, however, the Supreme Court upheld the validity of "use" immunity in the case of *Kastigar* v. *United States*.

Do the rules and procedures of the Senate Watergate Committee protect the rights of witnesses and persons identified during the hearings?

The rules and procedures of the Committee reflect a serious effort to respect fundamental principles of due process of law. Nevertheless, they fall short of the standards which the ACLU believes should govern such proceedings.

The rules guarantee the right to counsel but deny the witness, his lawyer or the subject of the investigation those rights which the right to counsel is designed to protect. There is no clear right to cross-examine witnesses or confront accusers. The subject of an investigation may submit questions which he would like to have asked, but they will be asked only if a majority of the Senators present agree. He can ask that witnesses be called, but they will be called only if a majority of the Senators present agree. And, under the rules, a single Senator sitting alone can preside over the hearings, thus placing a veto power over fundamental rights in the hands of one person.