

McCord 'Gag' Poses Questions

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Does a federal judge have the right to restrict the freedom of a man on bail by ordering him not to give any public speeches?

The question is raised by the American Civil Liberties Union in the bail orders issued in U.S. District Court in the case of convicted Watergate conspirator James W. McCord Jr.

Chief Judge John J. Sirica gave the order Sept. 5, citing the danger of prejudicial publicity and his fear that Watergate defendants would "profit by their wrongdoing."

Last week Judge Sirica, extending McCord's freedom on \$50,000 appeal bond, also extended the restrictions. He said McCord could travel anywhere in the United States but could not give lectures, write articles or talk to news reporters.

McCord faces a prison sentence of one to five years, a much milder term than he apparently would have received if he had not offered to cooperate with Watergate investigators and the Senate Watergate committee just before his scheduled sentencing in March.

According to the ACLU, it is unconstitutional and beyond a judge's power to force a bail applicant to trade his First Amendment free speech rights for his liberty.

"A citizen does not lose his First Amendment rights because he is arrested, charged or convicted of a crime. He must be free to speak his mind on any subject before, during or after a criminal trial," the ACLU said.

The Constitution forbids excessive or unreasonable bail. Federal law confines judges in their bail orders before conviction, when the accused enjoys the presumption of innocence, to orders calculated to insure the defendant's appearance at trial.

After conviction, judges have more discretion to take into account danger to the community, but the ACLU said that even prison inmates are winning more rights to express themselves despite the loss of many other rights.

Legal experts cannot cite a direct precedent for Judge Sirica's order. In 1970, Judge Julius J. Hoffman threatened to revoke the bail of "Chicago 8" defendants who criticized him in speeches outside the federal court, but he did not carry out the threat and the speeches continued throughout the five-month trial. Lawyers for H. Rap Brown contended off and on that certain bail restrictions were aimed at keeping him from speaking, but they did not convince higher courts.

Civil liberties lawyers cite the case of convicted atom spy conspirator Morton Sobell for the proposition that free speech rights protect even federal prisoners who have been released under supervision of the U.S. Parole Board.

Sobell, who had been released on "good behavior" time after serving 18 years of a 30-year sentence, was forbidden to travel from New York to Washington to speak at antiwar rallies or to address a meeting sponsored by the Communist Party.

But Judge Marvin E. Frankel in New York struck down the parole board restrictions as a violation of constitutional rights, which he said now reached even "inside prison walls." The Justice Department had argued that the power to confine a convicted person includes the lesser power to attach conditions on his liberty.

Supporters of Judge Sirica's action say that the critics may be correct in an abstract sense but that the trial judge has the hard job of weighing the intangibles of possible prejudice to future defendants.

No legal defense is offered for Sirica's other stated reason for the order. Even lawyers who deplore glorification of Watergate defendants in widely publicized public appearances do not contend that the judge's disapproval of lecture fees for convicted felons is a valid basis for the restriction.

A similar restriction was placed on Jeb Stuart Magruder after his guilty plea last summer to one count of conspiracy in the Watergate cover-up. The curb, which does not apply formally to Magruder's release on his own recognition, was not contested by defense attorney James C. Bierbower.

Charles Morgan Jr., director of ACLU's Washington national office, said the issue apparently will not be tested because of the natural reluctance of defense counsel to risk offending the judge. He noted that a trial judge holds the ultimate sentencing power and could find some other reason to revoke bail altogether.

McCord's lawyer, Bernard Fensterwald, refused to discuss the issue beyond saying that he had abandoned previous efforts to oppose the restrictions.