AFTER TWO years of Watergate, Assistant Attorney General Petersen criticizes us for not believing in the honorable purposes of the administration's omnibus criminal justice bill. Then, going far beyond anything we've said, he accuses us of implying that "the defense provisions of the bill were inserted or on behalf of individuals accused . . . in the Watergate matter." He calls this "nothing short of ludicrous."

We agree: Of course, we never suggested that in the first place. What we did say, citing one of Petersen's own departmental lawyers, was that the "public duty" provision *could have* served as an effective defense for some of the defendants arrested at Watergate. And we were very concerned that the "public duty" defense could serve such a function in the future. We regret Petersen's use of the straw man tactic; we are troubled by how he uses what we did not say as a device for distracting attention from what we did say.

Yet even in his defense of the bill itself, certain citations of law are clearly disingenuous; others are boldly incorrect.

Petersen denies, for instance, that S. 1400 would reinstate the unconstitutional "guilt by association" provisions of the Smith Act. On page 36 of S. 1400 he will read a provision punishing anyone who "joins or remains an active member of an organization which incites others to engage in conduct which *then or at some future time* would facilitate the overthrow . . . of [the] government." In the face of such language, how can Petersen deny that S. 1400 would repudiate Justice Holmes' "clear and present danger" test which has long protected provocative speech?

Whether "brazenly" or subtly, S. 1400 takes the "public duty" defense, which was developed for certain limited circumstances, and applies it universally. In our view, moving from the specific to the general *ipso facto* extends the law. The case law which supports the "public duty" defense comes largely from a military context. To the extent that the "public duty" defense was originally intended to protect policemen from being prosecuted and convicted for honest mistakes made in the line of duty, the case law seems reasonable. The danger lies, however, in taking a principle from the military and applying it to all government officials. One of the lessons of Watergate surely is that a perceived insulation from criminal prosecution, whether it comes from a President or a statute, can lead to dangerous abuses of official power.

Petersen's demurrer notwithstanding, the "official misstatement of law" provision does turn the case law topsy-turvy. The relevant cases deal exclusively with private individuals prosecuted when they acted in reliance on official pronouncements. S. 1400 is innovative in that it would effectively extend a defense to situations in which one government official could allege that he "mistakenly" authorized criminal conduct by another government official, thereby immunizing that official from criminal sanctions. Thus, a principle intended to protect the individual from irrational government behavior might be used to protect official collusion in wrongdoing. Once again, a shield originally designed for the citizen is beaten into an executive sword.

Petersen writes that the provisions we object to are "relatively minor segments." We do not agree. We do not agree that entrapment, official malfeasance, insanity, wiretapping, freedom of association and the death penalty are minor matters. That is why we wrote the article. Perhaps we were overly concerned. After all, in one way or another, the Nixon administration will come to an end within three years. But the Nixon administration bill, if passed, will long outlive Mr. Nixon's presidency. If we were in any way intemperate it was because of our fear that residues of the Watergate mentality might persist, and pollute the administration of justice in this country for an indefinite time to come.

—RICHARD R. KORN
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