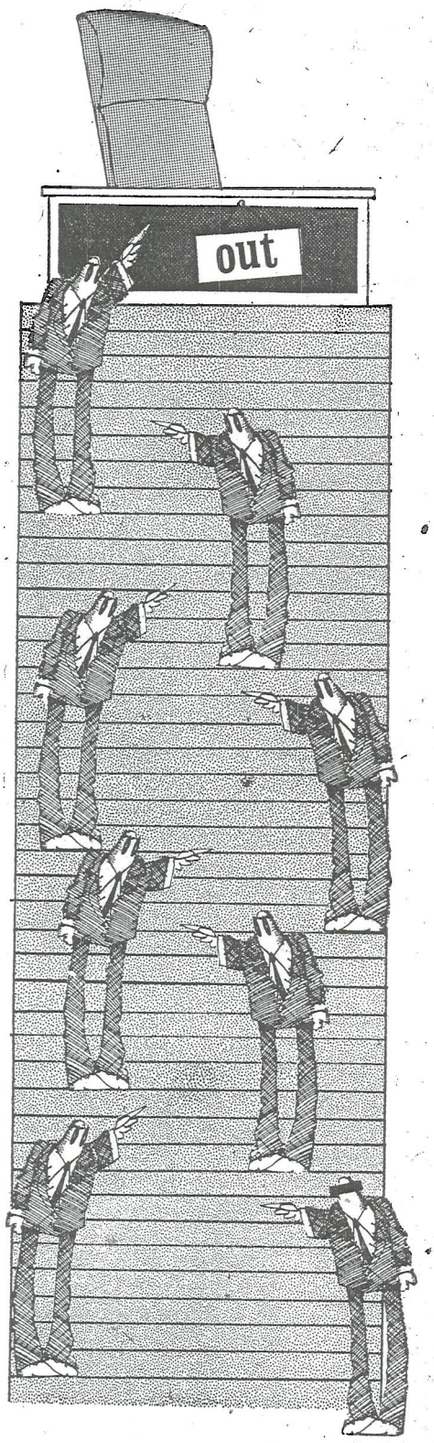
Making It All Perfectly Legal



By John Twohey—The Washington Post

By Richard R. Korn and Gregory B. Craig

Korn is a California criminologist; Craig is a Washington lawyer.

ON MARCH 23, 1973, Judge John J. Sirica read a letter from James W. McCord in open court, and the White House cover-up of Watergate began to unravel. Four days later, on March 27, the Nixon administration introduced in the Senate a bill to revise the U.S. criminal laws.

Relatively few took notice of the legislation, which was numbered S. 1400, and fewer still saw any connection between the two events. But there was indeed a connection: Buried in the bill's 340 pages were two brief sections that might do no less than protect public officials and their private agents from being convicted of federal crimes, whether future Watergates or other varieties.

They are truly remarkable, the two passages, descendants of the notorious I-was-just-following-orders and I-was-just-doing-my-duty defenses of Nuremberg, containing language that would make those excuses acceptable defenses for officials facing federal charges. What is also remarkable is that these provisions were not the brainchild of prophetic "plumbers" thinking ahead of ways to stay out of prison, but of well-intentioned academics, lawyers and other members of the outside legal community. Nonetheless, the administration did not object to adopting the outsiders' proposals, though Justice Department lawyers who worked on the bill also say they didn't *mean* the two sections that way. Almost nobody, it seems, meant them that way, and yet there they are.

Section 521, titled "Public Duty," declares:

"It is a defense to a prosecution under any federal statute that the defendant reasonably believed that the conduct charged was required or authorized by law to carry out his duty as a public servant, or as a person acting at the direction of a public servant . . ."

Section 532, titled "Official Misstatement of Law," declares:

"It is an affirmative defense to a prosecution under any federal statute that the defendant's conduct in fact conformed with an official statement of law, afterward determined to be invalid or erroneous, which is contained in . . . an administrative grant of permission to the defendant . . . if the defendant acted in reasonable reliance on such statement . . . and with a good faith belief that his conduct did not constitute an offense."

A Law and Order Classic

THE BREADTH of the sections is astonishing. If an official simply convinces a jury that he "reasonably believed" he was acting legally, his crime would be excused. If he or anyone else "reasonably relies" on

an "administrative grant of permission"—even if it turns out to have given permission for crimes—they could be forgiven for breaking the law. And if the private agent of an official obeys orders which he, too, "reasonably believes" to be legal, a criminal case against him could be thrown out.

These must be viewed as the crowning provisions of a bill which is, in many ways, the quintessence of the law-and-order backlash of the 1960s, a period piece of the Mitchell-Agnew era. Democratic Sen. John L. McClellan of Arkansas has introduced his own criminal code reform legislation, which is also predictably tough, but even it cannot match the administration version in seeking more power for the state. Senate Judiciary subcommittee hearings on the measures have been only sporadic so far, with Watergate, ironically enough, a chief cause for the delay. The scandal has not let one attorney general stick around long enough to allow much Justice Department testimony on the bills.

The Nixon bill co-sponsored but not endorsed in every detail by McClellan and Sen. Roman L. Hruska (R-Neb.) attempts to take advantagee of everything that confused and frightened Americans in the 1960s—permissiveness, pornography, Dr. Spock, the Chicago conspiracy, Daniel Ellsberg, Abby Hoffman, the Weathermen, pot, LSD, the SDS and more.

Trivial or Absurd

FOR THOSE who worry that mollycoddling judges are shackling law officers, S. 1400 would make it easier to wiretap and entrap suspects. For those who complain that lawbreakers are punished too leniently, the bill would set up a presumption against parole and probation and reimpose a mandatory death penalty for certain offenses. For those who fear that too many criminals get off altogether, it would roll back the insanity defense in a way which would, as Prof. Louis B. Schwartz of the University of Pennsylvania Law School puts it, "return the law to a primitive state which it abandoned over a century ago, ignore the moral aspect of guilt, and fly in the face of virtual unanimity painfully achieved in the past decade."

Nor does the bill stop there. For those who would repeal the First Amendment in the name of national security, S. 1400 would repudiate the "clear and present danger" doctrine, declaring it illegal to incite others "to engage in conduct which then *or at any future time* would *facilitate* the overthrow or destruction by force of the government." Or, for those concerned about state secrets, the measure would make it a felony for any federal employee to disclose classified information to "unauthorized recipients," no matter how trivial the information or how absurd the classification.

But where S. 1400 truly matches the civil libertarians' worst nightmares is in the two sections allowing public officials to excuse crimes by citing their "public duty" or orders from superiors.

Consider, for example, the criminal charges against former White House aides John D. Ehrlichman and Egil Krogh, charges stemming from the burglary of Daniel Ellsberg's psychiatrist's office. Before Krogh pleaded guilty, both he and Ehrlichman asked that their cases be dismissed, arguing that they were acting as "officers of the United States." Ehrlichman's lawyer carried the point further, stating: "The President . . . specifically directed Ehrlichman to make known to Krogh, [David] Young and Charles Colson that [the investigation of Ellsberg] was impressed with a national security characteristic.

> ***"One who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state. These twin principles, working together, have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind."***
>
> —Justice Robert Jackson in his opening statement at the Nuremberg trials.

Ehrlichman's attorney based his argument on the old principle that there can be no crime without a guilty mind, a *mens rea*. He stated: "The essence of the crime of conspiracy is . . . evil intent. The association of persons with honest intent is not a conspiracy, and the association of Ehrlichman with the others on a presidential assignment cannot be transformed into a criminal conspiracy."

Then consider Adolf Eichmann contending in an Israeli courtroom that he was not guilty of the mass slaughter of Jews because he did not have the requisite evil or criminal intent, that he had merely obeyed superior orders. Or consider the words of Lt. Calley, testifying Feb. 22, 1971, at his court-martial for the Maylai massacre:

"Well, I was ordered to go in there and destroy the enemy. That was my job that day. That was the mission I was given . . . I felt then and I still do that I acted as I was directed and I carried out the orders that I was given, and I do not feel wrong in doing so, sir."

The Same Principle

THIS IS BY NO MEANS to suggest that mass murder or massacre are at all comparable to ordering a burglary. Nor is it to suggest that the administration bill would ex-

cuse all acts by public officials. An official, after all, would have to persuade a jury that he "reasonably believed" his action was legal. It is difficult to conceive of a presidential assistant succeeding in that, for example, in a murder case, though in the national security area it is not implausible that some juries would suspend all ordinary standards for judging an official's conduct.

But the point is that the same basic principle lies behind the Ehrlichman and Eichmann-Calley defenses—and that the Nixon bill would in part adopt that principle into federal law. Nuremberg surely taught us that a man cannot hide from the law by claiming he is more a machine than a man. Free will and individual choice and personal responsibility are at the heart of our criminal justice system. It would be inconceivable for us to hide them under a cloak of "public duty" or an "administrative grant of permission."

What Might Have Been

IMAGINE WHAT might have happened if S. 1400 had already been law when Ehrlichman and Krogh were contemplating a burglary. Ehrlichman need only seek an" administrative grant of permission" from, say a Justice Department confidante, and Krogh need only plan to persuade a jury that he "reasonably believed" the law not only authorized but required him to order the burglary.

Krogh's lawyers could submit a memorandum from the President describing the national security implications of the break-in. Ehrlichman could testify that he told Krogh national security made it all perfectly legal. And Ehrlichman's lawyers could introduce his "administrative grant of permission." Harry Truman's buck would be passed so rapidly from one person to another that, in the end, no criminal would have committed the crime, only public servants doing their duty.

In fact, Edgar Brown, a Justice Department attorney who helped write S. 1400, says that while "we certainly did not intend to provide greater protection for unlawful activity by government officials, you are right—if I were Bud Krogh and this provision were on the books, I would certainly use it in my defense." Brown also acknowledges that the "public duty" section probably would have served as an effective defense for the Cubans arrested in the Watergate complex; they could credibly have claimed ignorance of U.S. law and shown "reasonable reliance" on the words of high government officials.

But "taking this provision out of context and looking at it without reference to its history and purpose makes it look much broader than it was ever intended to be," he remarks.

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CRIME, From Page C1

The history and purpose of S. 1400's "Nuremberg" sections are strange and tangled. The provisions have passed through the hands of numerous lawyers, academics and legislators for at least 20 years. For example, one source of perhaps the choicest language was an American Bar Association committee. It was the ABA's Committee on Reform of Federal Criminal law, chaired by Prof. Livingston Hall of the Harvard Law School, which specifically recommended that the "reasonably believed" standard be included for public officials.

"We concluded," says Prof. Hall, "that the exact scope of public duty is so difficult to define that, in matters of criminal liability, the public servant should be given greater freedom of action and the benefit of the doubt. The law is so complex as to the duties and obligations of an official that, after considerable discussion and debate, we concluded that if an individual 'reasonably believed' his duty required certain action, that individual should not be subjected to criminal punishment."

Hall's ABA committee made its recommendation in November, 1972, and it certainly could not have anticipated its application to Watergate. But Prof. Hall says he still does not consider the section improper. " 'Reasonably believed' is not a subjective standard," he claims. "It is totally objective and it is one easily applied by the jury. It is a simple matter of determining intent. Juries do that every day.

"You've gotten hold of a philosophical dilemma at least 2,000 years old. Governments have to go on. If criminal law is looking over the shoulder of every public official every time that individual could conceivably be guilty of criminal conduct, the government would be paralyzed . . . If we are to arrange our laws to take account of a time when Herr Hitler comes to power, then we are in a sorry state indeed. I have not seen any good has been accomplished by putting anybody associated with the Watergate in jail, except to make them talk."

A Privilege of Ignorance?

IS "REASONABLY BELIEVED" a "totally objective" standard? Has no good been accomplished by putting Watergate criminals in jail other than to make them talk? Should public servants "be given greater freedom of action" than the rest of us "in matters of criminal liability?" These positions are, to put it mildly, highly debatable.

Most codes of justice, of course, recognize instances where the hapless or the helpless should not suffer the usual penalties for their crimes. These include acts involving insanity, coercion or duress, self-defense and certain mistakes of fact. But "ignorance of the law"—the other side of the "reasonably believed" coin—is not generally accepted as a justification for crime.

One reason for this, as Justice Oliver Wendell Holmes put it, is that "to admit the excuse at all would be to encourage ignorance." Another is that a reasonable person rarely need rely on someone else's authority to tell him an act is wrong. He has a closer authority at hand: his own conscience.

"No sane defendant has come forward to plead ignorance that the law forbids killing

a human being or taking another's property or burning another's house," the legal scholar Jerome Hall has remarked. "In such cases, which include the common law felonies and the more serious misdemeanors, instead of asserting that knowledge of law is presumed, it would be much more significant to assert that knowledge of law (equally, ignorance or mistake of law) is wholly irrelevant."

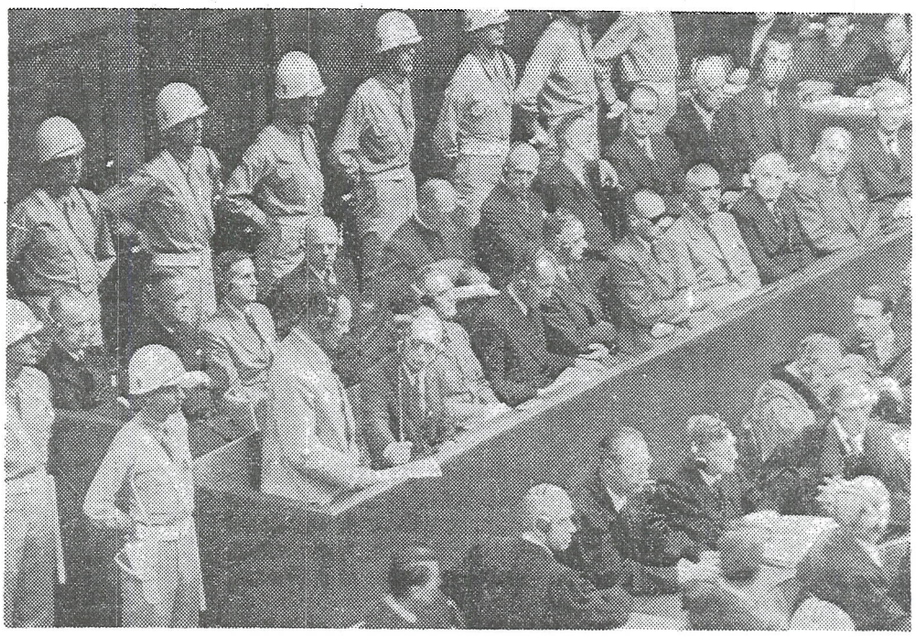
And the codes certainly do not give those who *administer* the law the special privilege of claiming ignorance when they break it. If anything, logic suggests that public officials should be held to a higher standard in understanding and obeying the law, not the lower one suggested by Prof. Hall.

A 20-Year History

YET IT IS NOT Prof. Hall's ABA committee that invented the two S. 1400 sections. Their origins are more intricate than that. They began in a far narrower provision of the Model Penal Code, a legal blueprint published by the American Law Institute in 1953. They then reappeared 18 years later in the 1971 report of the National Commission on Reform of Criminal Laws, a congressionally created panel headed by former California Gov. Edmund G. Brown—only by then the language had been significantly altered. As the Brown Commission commented:

"By virtue of the general requirement of only a reasonable belief . . . the scope of justified or excused action by a public servant is broader here than in the model Penal Code."

The Brown Commission had begun its work in 1966, at the height of the counterculture and Vietnam, and it, too, obviously could not have foreseen Watergate. Milton Stein, who wrote the commission comment as its special counsel, notes that the commission sections were concerned chiefly with the problems of the police and other law enforcement officials. He also contends that "a



Associated Press

Nuremberg, 1946: Hermann Goering, standing in the dock, makes his final plea.

jury would expect the public servant to know more, so a 'reasonable belief' that a criminal action was not criminal is less likely in the case of a public servant." But he adds: "The problem you describe was not anticipated, but it is there."

The Justice Depertment of John Mitchell then used the Brown Commission report as a model for writing many parts of S. 1400. Continuity from the Brown Commission to the Nixon-Mitchell Justice Department was provided in the person of John W. Dean III, who had been associate director of the Brown Commission and became the direct beneficiary of Mitchell's patronage in the administration. It was nearly two years after the Brown Commission report that the ABA specifically recommended including "reasonably believed" in the "public duty" section and that the Justice Department went along.

Why Do It at All?

THE FUNDAMENTAL QUESTION to be asked about the "Nuremburg" provisions—as well as other parts of the bill—is not whether they should be changed, but whether they are needed at all and, if so, whether they should be considered in one massive measure.

The purpose of the bill is to "reform, revise and codify" the U.S. Criminal Code, an impenetrable legal museum in which most ancient monuments are crusted over with layers of precedent. This is certainly a worthy goal. But it has a deceptively mild ring about it. The fact is that in many areas, the bill would in effect create controversial new laws, each of which would normally trigger extensive congressional debate.

Neither the "Nuremburg" provisions nor anything like them, for example, are currently in the criminal code. The sections are based, rather, on scattered court rulings, in line with the intention to codify case law.

But some of the case law, as applied to public servants, has been turned on its head. One source of the "public duty' section, for instance, is an old case involving a car he suspected of containing liquor. The prohibition officer who fired two shots at a court held that the facts at hand would not have persuaded a reasonably prudent man that the car did contain booze and that the agent was not acting within the scope of his duty. Thus a ruling that protected the citizen is now helping to support a proposed general law that would also give greater license to officials.

Much of the "public duty" defense, moreover, comes out of a military context. The typical case is that of a soldier on guard duty killing an escaping prisoner. The courts have held that such killing is excusable, unless a man of ordinary sense would know that the authority or order under which he acted was clearly illegal. Any order that is not patently illegal should be obeyed, the courts have said, and that order will protect the soldier from criminal liability.

But a "public servant," acting freely, cannot be equated with a soldier acting under the compulsion of strict military discipline. An official can use discretion; a soldier must obey commands. An official can refuse; a soldier could end up in the stockade if he did. An official can resign; a soldier cannot.

As the judge in one of the military cases stated: "To ensure efficiency, any army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the period of his enlistment, and consents to come and go at the will of his superior officers."

The "Official Misstatement of Law" section would also turn the case law topsy-turvy as far as public officials are concerned. This provision stems largely from Supreme Court rulings which cleared citizens who had relied on official assurances that their acts were legal. Thus, witnesses before the Ohio Un-American Activities Commission in 1954 refused to answer questions after the commission told them of their right not to incriminate themselves. They were later convicted of violating an Ohio statute by refusing to answer, but the high court reversed the conviction.

This section clearly serves an important purpose in protecting citizens. The problem arises when the "administrative grant of permission" is given by one public official to another.

The Limits of Codification

EVEN IF BOTH these sections can serve worthwhile purposes in certain circumstances, should Congress adopt them for *all* circumstances? They were in the Model Penal Code in narrower form, but that was a theoretical document meant to be as comprehensive as possible. As for their appearance in the Brown Commission study, former special counsel Stein remarks, "The reason we needed a provision in the first place was because of our intent to be complete." But that does not mean they should be written into sweeping national law for the next half century or longer. As one of Frederick the Great's chief codifiers wrote:

"I first thought that it would be possible to reduce laws to simple geometric demonstrations so that whoever could read and tie two ideas together would be capable of pronouncing on them. I almost immediately convinced myself that this was an absurd idea."

Congress should similarly recognize that there are limits to codification. Judge Jerome Frank has written: "Codification . . . cannot create a body of rules which will exclude judicial innovation and thereby guarantee complete predictability . . . The idea of regulating, by anticipation, all possible legal relationships is to be abandoned."

If Congress does not kill these sections outright, it should at the very least consider them separately, along with other turn-back-the-clock provisions written in by the Mitchell Justice Department.

It would not be merely "codifying," for example, if it adopts the obscenity section, which would outlaw all material containing "unnecessary" or "inappropriate" close-ups of a human genital. Nor would it be merely "revising" the law by restoring, as the bill would, the "guilt by association" provision of the Smith Act, which the Supreme Court found unconstitutional. The measure would make it a crime just to "join" or be "an active member" of a group which plans to incite conduct that would "facilitate" the overthrow of the government—"then or at any future time."

And if insanity is no longer to be recognized as a disease by the law; if capital punishment is to be re-established; if leaking classified information is to be published as a felony, — these cannot be considered little sections of a giant bill. They must receive, one by one, the complete, open and individual debate they demand.