02/25/75 United States of America v. Bernard L. Barker

1975.CDC.0000037 (1975) | Cited 0 times | D.C. Circuit | February 25, 1975

Before exploring the legal issues raised by appellants' contentions, it is necessary to recount in rather extensive detail the proceedings as they evolved in the District Court.

1. Appellants also claim that their guilty pleas to Counts 3, 4, 5, and 7 were improperly coerced by the District Judge's refusal to accept their compromise plea, agreeable to the Government, to Counts 1, 2 and 6 alone. For this contention, appellants rely on United States v. Ammidown, 162 U.S. App. D.C. 28, 497 F.2d 615 (1973). As the judge imposed concurrent sentences on all counts, we need not reach this contention. Instead, we hereby vacate appellants' sentences on Counts 3, 4, 5, and 7. See United States v. Greene, 160 U.S.App.D.C. 21, 33-34, 489 F.2d 1145, 1157-58 (1973).

2. Appellant in No. 73-2252, 509 F.2d 334, 166 U.S. App. D.C. 1, decided Dec. 12, 1974.

3. Appellant in No. 73-2199, 514 F.2d 270, 168 U.S. App. D.C. 374, also decided today.

4. Appellant in No. 73-1562, 506 F.2d 1293, 165 U.S. App. D.C. 254, decided Oct. 10, 1974, No. 73-1564, 510 F.2d 669, 166 U.S. App. D.C. 289, decided Dec. 12, 1974, & No. 73-1565, 509 F.2d 428, 166 U.S. App. D.C. 95, decided Nov. 8, 1974.

5. The counts charged against appellants, and to which they pleaded guilty, were as follows: Count 1: Conspiracy to commit the crimes charged in the other counts, a violation of 18 U.S.C. § 371 (1970). Count 2: Burglary, consisting of entry into the DNC to steal property of another, a violation of 22 D.C. Code § 1801(b) (1973). Count 3: Burglary, consisting of entry into the DNC with intent to intercept "wire and oral communications," as defined by 18 U.S.C. § 2510 (1970), a violation of 22 D.C. Code § 1801(b). Count 4: Endeavoring to intercept oral communications within the DNC, a violation of 18 U.S.C. § 2511 (1970). Count 5: Endeavoring to intercept wire communications within the DNC, a violation of 18 U.S.C. § 2511. Count 6: Unlawful possession of devices for intercepting oral communications, a violation of 23 D.C. Code § 543(a) (1973). Count 7: Unlawful possession of device for intercepting wire communications, a violation of 23 D.C. Code § 543(a). See note 1 supra.

6. Each affidavit makes this statement.

7. Barker Affidavit at 6.

8. Id.

9. Each affidavit makes this statement.

10. Brief for the United States at 11.

11. By order of this court on December 28, 1973, appellant Barker was released from prison pending this appeal. Appellant Sturgis was released pending this appeal by this court's order of January 18, 1974. The two other appellants have been released on parole.

12. FED. R. CRIM. PROC., Rule 32(d). (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

13. 18 U.S.C. § 4208(b): (b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

14. Thus, while appellants may have been "duped" by their co-conspirators into committing their crimes, see United States v. Ehrlichman, Criminal No. 74-116, Sentencing Tr. at 10 (D. D.C. July 31, 1974) (Gesell, J.), appeal pending, D.C. Cir. No. 74-1882, there is not the slightest hint or allegation that they were duped into offering their guilty pleas. Appellants allege absolutely no overt pressure, from Government officials or anyone else, for them to plead guilty. There is no reason to believe the decision was other than entirely their own. That appellants may have participated in the break-in as "dupes" is a consideration properly within the trial judge's sentencing discretion. That factor was expressly considered by Judge Gesell in sentencing appellants Barker and Martinez in United States v. Ehrlichman, supra (Judge Gesell also considered the sentences Barker and Martinez received for their related crimes in this case), and apparently considered by Judge Sirica, who sentenced appellants to less severe terms than those imposed on their co-defendants, the higher-ups in the conspiracy.

15. While Judge Wilkey taxes us for using a standard of objective reasonableness in assessing appellants' explanation of their guilty pleas, Judge Wilkey's dissent at 256-58, our approach is really not different from his. It is only our conclusions that differ. We all agree that the reasonableness of the movant's explanation of why he allegedly mistakenly pleaded guilty must be balanced against the prejudice to the Government in bringing the case to trial. Id. at 257. See p. 221-22 supra. Judge Wilkey chose first to assess the reasonableness of appellants' explanation and then to balance that reasonableness against the prejudice to the Government. We have assessed the factors in the opposite order, which, of course, is a difference of no matter. Nonetheless, that difference is the basis for Judge Wilkey's critique. Since Judge Wilkey first considers the reasonableness of appellants' explanation, in the absence of prejudice to the Government, he properly considers the broadest definition of reasonableness -- subjective reasonableness. Certainly if withdrawal would cause no prejudice to the Government, any explanation that was subjectively reasonable would likely be sufficient for withdrawal. See pp. 221-23 supra. Having found appellants' explanation to meet the minimal standard of subjective

reasonableness, Judge Wilkey then discounts the prejudice to Government interests in this case. Thus he argues that appellants' supposedly subjectively reasonable explanation is sufficient to justify withdrawal. We have approached the issue differently, although our theoretical premises are not different from Judge Wilkey's. We first assessed prejudice to the Government. In this case we found not only prejudice, but also flagrant abuse of the judicial process, and the complicating circumstance of provisional sentencing. See pp. 223-24 supra. As prejudice to the Government mounts, the movant's explanation of the reasons for his supposedly mistaken plea must necessarily become increasingly more convincing in order to justify withdrawal. At some point, only explanations of at least objective reasonableness are of sufficient weight to justify withdrawal. So we find it to be here. Since an explanation of subjective reasonableness would not outweigh the countervailing factors here, analysis of appellant's alleged purely subjective reasonableness is pointless. We find below that appellants have not successfully explained away their guilty pleas under a standard of objective reasonableness, so the balance tilts against allowing withdrawal in this case. We should note in passing, however, that although objective reasonableness is a higher standard than subjective reasonableness, it is by no means a high standard. Its purpose is merely to rule out bizarre and unreasonable explanations for plea withdrawal in cases where the Government would suffer significant prejudice. In most, if not all, of the presentence withdrawal cases cited above, see p. 221 supra, the movant could easily have met this standard.

16. Judge Wilkey accuses us of analyzing only appellants' asserted reasons for entering their original guilty pleas, and ignoring the reasons that possibly prompted appellants to make their withdrawal motion eight months later. Judge Wilkey's dissent at 250-51. Analysis of the former reasons is of the greatest importance in applying the "fair and just" standard, since by so doing the court can assure itself that the plea was not entered for tactical reasons, and can determine whether the plea was truly voluntary and knowing. See p. 221 supra. Analysis of the latter reasons is generally of far less concern, except insofar as it relates those reasons to the reasons for the original guilty plea (e.g., discovery of new evidence unknown to the movant at the time of his plea). In this case, however, where we find appellants' asserted exculpatory reasons for entering pleas to have been unreasonable, and thus insufficient to justify their withdrawal motion, the reasons that later might have prompted appellants to make their motion become of no concern at all. That appellants' original unreasonable beliefs may have become progressively more unreasonable is of no import. Thus Judge Wilkey's and Judge MacKinnon's lengthy recitations of the events during the eight-month period between guilty pleas and withdrawal motion, Judge Wilkey's dissent at 250-54, Judge MacKinnon's dissent at 237-38, while accurate, are entirely beside the point. Moreover, it should be noted that, insofar as he explains the effect of these events on appellants' original asserted belief in the national security justification for their pleas, Judge Wilkey is engaging in pure speculation. Appellants have provided in their affidavits absolutely no explanation of how they came to be disabused of their national security notions; indeed, throughout appellants' motion papers there is but one oblique reference to "subsequent events." Memorandum in support of motion to withdraw guilty pleas at 2, JA at 5. Instead, and properly, appellants' affidavits are addressed to the reasons why they originally chose to plead guilty when supposedly in possession of an allegedly valid defense. We have examined those professed reasons, presented in detail by appellants, with care. Since we find those reasons, all highly subjective and unsupported by factual evidence, to be patently unreasonable, if indeed they were held, we have no occasion to engage in needless speculation about what might have prompted appellants to this same conclusion.

17. Judge Wilkey finds "hard to accept" our holding that " even if the appellants can prove their innocence, under the circumstances Judge Sirica did not abuse his discretion in denying the motion." Judge Wilkey's dissent at 248 (emphasis

in original). It is, however, fundamental hornbook law that a defendant who pleads guilty foregoes his opportunity to prove his innocence. Cf. North Carolina v. Alford, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970). If a guilty plea can be withdrawn merely because the defendant would like to regain that opportunity, the plea becomes meaningless. As we have made clear above, however, a guilty plea is an act of great significance, and withdrawal is not automatically granted simply because the defendant now decides he would rather go to trial. Of course, whenever withdrawal is denied, it is denied "even if the [defendant] can prove [his] innocence." But while we necessarily deny withdrawal in this case although appellants might have been able to convince a jury of their innocence, it should be observed that in sending these men back to prison, we do not assume they are innocent. These men have all pleaded guilty. Their guilty pleas were accepted, and their withdrawal denied, because of the strong evidence of their guilt and the inadequacy of any alternative explanation of their guilty pleas. The pleas could not have been accepted if the court did not find they had a basis in fact. Rule 11, FED. R. CRIM. P. Appellants allege no violation of Rule 11, and, indeed, we have seen the extraordinary thoroughness with which Judge Sirica pursued the question of appellants' culpability. We have found that the pleas were voluntary and knowing, that is, that appellants were not coerced in any way to plead guilty, that they understood the charges against them, and that they freely pleaded guilty to those charges. In making their withdrawal motion, appellants alleged an alternative explanation of why they pleaded guilty. We have found that explanation to be so unreasonable as to be worthy of no cognizance in assessing the voluntariness of their original guilty pleas. Lastly, the national security defense that appellants would assert if they were granted a trial has been rejected as a matter of law by the only court that has considered it. United States v. Ehrlichman, D. D.C., 376 F. Supp. 29 (1974). While denial of a withdrawal motion is always troubling, since it denies the movant the opportunity of a trial by a jury of his peers, there must be occasions when withdrawal is so unmerited that to allow it would be to deprive guilty pleas of all meaning. We find this to be such an occasion. 1a In addition to their principal defense of lack of mens rea, the appellants also asserted defenses based on entrapment and selective prosecution. 2a In the absence of an evidentiary hearing, or fact-finding by the District Court, this court must take as true the facts stated in the appellants' affidavits. 3a Everett v. United States, 119 U.S. App. D.C. 60, 336 F.2d 979 (1964). 4a See, e.g., Kercheval v. United States, 274 U.S. 220, 71 L. Ed. 1009, 47 S. Ct. 582 (1927); United States v. Young, 424 F.2d 1276 (3rd Cir. 1970); Gearhart v. United States, 106 U.S. App. D.C. 270, 272 F.2d 499 (1959). 5a See United States v. Joslin, 140 U.S. App. D.C. 252, 434 F.2d 526 (1970); High v. United States, 110 U.S. App. D.C. 25, 288 F.2d 427, cert. denied, 366 U.S. 923, 6 L. Ed. 2d 383, 81 S. Ct. 1350 (1961); Gearhart v. United States, 106 U.S. App. D.C. 270, 272 F.2d 499 (1959). 6a Majority Opinion at 220, citing United States v. Joslin, 140 U.S. App. D.C. 252, 434 F.2d 526 (1970); United States v. Young, 424 F.2d 1276 (3rd Cir. 1970); Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963); Gearhart v. United States, 106 U.S. App. D.C. 270, 272 F.2d 499 (1959); Poole v. United States, 102 U.S. App. D.C. 71, 250 F.2d 396 (1957). 7a Brady v. United States, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970). 8a Majority Opinion at 221. 9a The question whether the appellants' pleas procedurally were properly entered is not a factor in this case. Judge Sirica's lengthy inquiry into the validity of those pleas complied fully with the requirements of Rule 11. (If a plea has been entered contrary to Rule 11 procedures, as a rule it must be permitted to be withdrawn, both before and after sentencing, regardless whether the defendant asserts a legally cognizable defense. See McCarthy v. United States, 394 U.S. 459, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969).) As the majority recognizes, however, even where a plea is properly entered, the standard for judging the acceptability of a withdrawal motion is very lenient, so long as the Government's interests have not been substantially prejudiced. (Majority Opinion at 222, citing United States v. Joslin, 140 U.S. App. D.C. 252, 434 F.2d 526 (1970) and Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963).) Thus, the proper focus of inquiry in this case is on that prejudice, rather than on the thoroughness of the plea-taking procedure. 10a The majority appears at some points in its opinion to argue that the eight-month delay between plea and withdrawal motion in itself constitutes a factor which

weighs against acceptance of the motions. The primary significance of the length of the delay, however, lies in whatever prejudice it has placed on the Government's ability to prosecute the case. In terms of balancing the interests of the appellants in withdrawing their pleas against those of the Government in blocking such withdrawal, therefore, the length of the delay cannot be considered an independent factor. Its "weight" is accorded ample recognition as the principal component of the element of prejudice to the Government. 11a The majority argue in a footnote that the reasons for the appellants' eight-month delay in asserting their innocence are "of no concern at all" in this case, because the appellants' justification for having entered guilty pleas in the first place is inadequate. Majority Opinion at 226 n.16. "That appellants' original unreasonable beliefs may have become progressively more unreasonable is of no import." Ibid. The fallacy in this position lies in the fact that the majority assert the length of the delay between guilty plea and withdrawal motion -- and concomitant prejudice to the Government's interests -- as their primary rationale for applying a stringent test of "objective reasonableness" to the appellant's original beliefs. See Majority Opinion at 28-31 and text at 20-26 infra. The majority make quite clear that if the appellants had requested withdrawal within a short period of time after entering their pleas, the standard for judging their reasons would have been quite low. Majority Opinion at 26. It is patently inconsistent with this position to use a longer time period as the basis for a much tougher standard of review without considering factors which mitigate the delay, or excuse it altogether. 12a See note 2 supra. 13a Affidavit of Bernard L. Barker, App. at 16. 14a Id. at 17. 15a See Majority Opinion at 219-20. 16a Tr. of Sentencing 3-5.

17. See SUSSMAN, THE GREAT COVER-UP: NIXON AND THE SCANDAL OF WATERGATE 176-79 (1974).

18. Affidavit of Bernard L. Barker, App. at 17.

19. Id. at 14-16.

20. Id. at 16.

21. Id. at 13.

22. SUSSMAN, supra note 17, at 227. 23 In August, 1971 Mr. Hunt came to Miami, Florida, met with me and asked me if I would be willing to help him on a matter of national security. He did not at that time tell me any details with respect to the operation itself but he did explain to me that it involved a traitor to this country who had been giving information to the Russian Embassy. . . . This operation and the subsequent operations were handled in a manner that was consistent in my mind with covert intelligence operations. I was not given any details of the operations, what the targets were or what our assignment was until shortly before the operations themselves. For example, I did not know that the office we were to enter was that of Dr. Fielding until after we had arrived in California and I believe it was also at that time that I was first informed by Mr. Hunt that the traitor he had referred to was Daniel Ellsberg. Affidavit of Bernard L. Barker, App. at 13-14.

24. [The theft of "The Pentagon Papers"] posed a threat so grave as to require extraordinary actions. Therefore during the week following the Pentagon Papers publication, I approved the creation of a Special Investigations Unit within the White House -- which later came to be known as the "plumbers". This was a small group at the White House whose principal purpose was to stop security leaks and to investigate other sensitive security matters. I looked to John

Ehrlichman for the supervision of this group. Egil Krogh, Mr. Ehrlichman's assistant, was put in charge. David Young was added to this unit, as were E. Howard Hunt and G. Gordon Liddy. The unit operated under extremely tight security rules. Its existence and functions were known only to a very few persons at the White House. These included Messrs. Haldeman, Ehrlichman and Dean. At about the time the unit was created, Daniel Ellsberg was identified as the person who had given the Pentagon Papers to The New York Times. I told Mr. Krogh that as a matter of first priority, the unit should find out all it could about Mr. Ellsberg's associates and his motives. Because of the extreme gravity of the situation, and not then knowing what additional national secrets Mr. Ellsberg might disclose, I did impress upon Mr. Krogh the vital importance to the national security of his assignment. I did not authorize and had no knowledge of any illegal means to be used to achieve this goal. However, because of the emphasis I put on the crucial importance of protecting the national security, I can understand how highly motivated individuals could have felt justified in engaging in specific activities that I would have disapproved had they been brought to my attention. Consequently, as President, I must and do assume responsibility for such actions despite the fact that I at no time approved or had knowledge of them. . . . The work of the unit tapered off around the end of 1971. The nature of its work was such that it involved matters that, from a national security standpoint, were highly sensitive then and remain so today. These intelligence activities had no connection with the break-in of the Democratic headquarters, or the aftermath.

9. Weekly Compilation of Presidential Documents, No. 21, at pp. 695-96 (May 22, 1973) (emphasis added).

25. 1 REPORT OF THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN PRACTICES, ch. 1, § 1(c).

26. Ibid.

27. When Hunt finally appeared before the Senate Committee, on 24 September 1973, he testified as follows with respect to the motivation of the appellants in the Ellsberg and Watergate operations: . . . Senator WEICKER. With respect to the three Cuban-Americans who participated in the Fielding-Ellsberg break-in, those three, in your opinion, did those men act reasonably in believing that the break-in was legal, based upon your apparent authority to direct them in such an operation? Mr. HUNT. Yes, sir. Senator WEICKER. With respect to the four Cuban-Americans who participated in the two Watergate Democratic National Committee break-ins, in your opinion, did these men act reasonably in believing that those breakins were legal, based upon your apparent authority to direct them in such an operation? Mr. HUNT. Yes, sir. Senator WEICKER. Are you now willing to accept responsibility for the activity of those Cuban-Americans in those break-ins, based upon the authority you represented yourself to have to direct such operations? Mr. HUNT. Yes, sir. Senator WEICKER. And isn't it fair to say, Mr. Hunt, based upon such things as your past knowledge of the President's speech of May 8, 1972, on the Haiphong mining, your White House office, your accessibility to high levels of Government, your visit to the Executive Office Building and its agencies, that the Cuban-Americans acted reasonably in believing that those break-ins were legal and that you had the authority to direct them? Mr. HUNT. Yes, sir. Senator WEICKER. Well, I thank you very much, because at least we have started, I think, from the bottom up, if nowhere else, to ascertain some of the beliefs which motivated the matters that have come before this committee. I thank you for your candor.

9. Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate, 93rd Cong., 1st Sess., at 3787-88 (1973).

28. See Kastigar v. United States, 406 U.S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972).

29. Id. at 460.

30. Majority Opinion at 223.

31. See note 9 supra.

32. Majority Opinion at 223.

33. Barker Affidavit, App. at 18.

34. See the representative excerpt in the Majority Opinion at 215-16. Similarly, the appellants' adamant refusal to allow attorney Rosenblatt to present a "lack of criminal intent" defense (based on their mistake in thinking the break-in was authorized) reveals not their bad faith in raising that defense now, but the strength of their original belief that national security considerations required their silence.

35. Tr. at 417.

36. Majority Opinion at 224.

37. The majority attempt to nullify the distinction between this approach and their own by arguing that we have simply assessed the relevant factors in opposite order. Majority Opinion at 224-25 n. 15. This argument misapprehends the basic difference in our positions. If I understand their approach, the majority would erect two sliding scales -- one measuring the strength of the prejudice to the Government if a withdrawal motion is granted, and the other gauging the strength of the defendants' reasons for delaying the assertion of his innocence. When the prejudice to the Government reaches a certain level on the first scale, withdrawal will only be allowed the defendant if his reasons attain a position of "objective reasonableness" on the second scale. No matter how greatly the defendant's erroneous belief may have affected the voluntariness of his plea, or how reasonable his mistake was for him, he will not be allowed to present his defense. This is not my approach, regardless of the attempted order of analysis. The majority's statement that I would look first to the reasonableness of the defendant's belief is correct. That inquiry, however, is limited to a determination of the honesty, or subjective validity, of the defendant's error. (If his mistake has no credible basis, little prejudice to the Government need be found to justify denial of a withdrawal motion.) If it appears that the defendant reasonably believed, in the light of his experience and background, the facts which he asserts to support his motion, his reliance thereon is established as foundational to the balancing process which follows. Whether a detached reasonable man would have believed those facts is not germane. Rather, the balance is between the prejudice to the Government and the degree to which the defendant's mistake affected the voluntariness of his plea. This, in my estimation, is the proper measure of the "fairness and justice" of allowing the defendant to withdraw a mistaken guilty plea.

38. High v. United States, 110 U.S. App. D.C. 25, 27, 288 F.2d 427, 429, cert. denied, 366 U.S. 923, 6 L. Ed. 2d 383, 81 S. Ct. 1350 (1961).

39. Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963).

40. 466 F.2d 1092 (2d Cir. 1972), cert. denied, 410 U.S. 945, 93 S. Ct. 1405, 35 L. Ed. 2d 612 (1973).

41. Id. at 1097.

42. 455 F.2d 297 (2d Cir.), cert. denied, 407 U.S. 923, 92 S. Ct. 2471, 32 L. Ed. 2d 809 (1972).

43. 404 F.2d 456 (4th Cir. 1968), cert. denied, 395 U.S. 924, 89 S. Ct. 1778, 23 L. Ed. 2d 241 (1969).

44. Brady v. United States, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970); McMann v. Richardson, 397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970); Parker v. North Carolina, 397 U.S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458 (1970).

45. United States ex rel. Bullock v. Warden, Westfield State Farm, 408 F.2d 1326 (2d Cir. 1969), cert. denied, 396 U.S. 1043, 24 L. Ed. 2d 686, 90 S. Ct. 688 (1970).

46. 455 F.2d at 303 (Feinberg, J., concurring).

47. Affidavit of Bernard L. Barker, App. at 18.

48. Majority Opinion at 225.

49. Id. at 225.

50. Martinez Affidavit, App. at 22. As a practical matter, it is difficult to conceive exactly how these four Cuban-Americans would go about contacting "responsible Government officials" of the CIA, State or Defense Departments, or the White House. Past which gate would they have been allowed to go?

51. Majority Opinion at 225-26.

52. 410 U.S. 73, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973).

53. 5 U.S.C. § 552 (1970). Section 552(b)(1) exempted from the forced disclosure requirement of the Act those matters "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."

54. 410 U.S. at 81-84.

55. P.L. No. 93-502, 88 Stat. 1561 (1974).

56. During voir dire, Judge Sirica explained: I want you to be straightforward with these questions. I want you to come forward in a truthful manner, . . . it doesn't make any difference to this Court who you might mention or what it hurts or

helps. . . . Tr. at 386.

57. Judge Bazelon's concurrence in the majority opinion places great weight on this factor: The District Court and the defendants' attorney both very carefully sought to disabuse the defendants of any notion that they were required to plead guilty and also sought to uncover their motive in pleading guilty. These efforts were unsuccessful. In light of the diligent efforts of their attorney and the careful interrogation by the District Judge, one must conclude that the defendants' pleas were voluntary. They made a bargain with the government and were under no apprehensions as to what that bargain meant. Under North Carolina v. Alford, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970), we must enforce that bargain. Concurrence of Judge Bazelon at 227 n. 1 (emphasis added). In the Alford case, the Supreme Court held it is not constitutional error for a trial judge to accept a guilty plea from a defendant who disclaims his guilt, so long as "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." 400 U.S. at 31 (emphasis added). Without this freedom of choice, there can be no "bargain." Judge Bazelon appears to argue that because the appellants were advised they could plead innocent and instead "chose" to plead guilty, their plea was perforce voluntary. The appellants, however, believed they had a directive from their immediate superior to plead guilty. Only in the most mechanical sense can it be said that "footsoldiers" who obey the order of a superior officer have made a voluntary choice to do so. Concomitantly, if the appellants were counseled to take a course of action which, in their minds, would have required disobedience to their leader and disloyalty to their country, that alternative was never truly "open" to them. The Alford case, then, affords little support to Judge Bazelon's position. In every sense which has meaning in the context of withdrawal motions, the appellants' pleas did not represent a voluntary choice to waive assertion of their innocence.

58. Although eschewing a decision on the merits of the appellants' proffered defenses, the majority in a footnote makes the gratuitous observation that "the national security defense that appellants would assert if they were granted a trial has been rejected as a matter of law by the only court that has considered it. United States v. Ehrlichman, D. D.C., 376 F. Supp. 29 (1974)." Majority Opinion at 226-27 n. 17. As Part II of my opinion makes clear, however, the gravamen of the appellants' principal defense is not -- as was the case in Ehrlichman -- that warrantless searches are legal if conducted for national security purposes. Rather, the appellants contend that a citizen has a valid defense to criminal charges arising out of an unlawful search which he has aided in justifiable reliance on the authority and representations of a high government official. Therefore, even assuming, arguendo, that the Ehrlichman decision was correct, it is not controlling here.

59. Thus, I need not, and do not, reach their subsidiary defenses, based on entrapment and selective prosecution.

60. 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 157 (CUMM. SUPP. 1974); WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 52-74 (2d ed. 1961); MODEL PENAL CODE § 2.04(1) (P.O.D. 1962).

61. WHARTON'S, supra note 60, at § 162; WILLIAMS, supra note 60, at c.8; Hall & Seligman, Mistake of Law and Mens Rea, 8 U. CHI. L. REV. 641, 642 (1962).

62. See generally WILLIAMS, supra note 60, at 293-345.

63. 276 N.Y. 384, 12 N.E. 2d 514 (1938).

64. Id., at 387, 12 N.E.2d at 514.

65. Id., at 389-90, 12 N.E.2d at 515-16.

66. See Hall & Seligman, supra note 61 at 1.

67. The pleas of guilty which the majority opinion allows to stand (Majority Opinion at 211 n.1) are to the following counts: Count One: Conspiracy to commit the crimes charged in the other counts. See 18 U.S.C. § 371. Count Two: Burglary, consisting of entry into the Democratic National Committee headquarters, with intent to steal the property of another. See 22 D.C. Code § 1801(b). Count Six: Unlawful possession of devices for intercepting oral communications. See 23 D.C. Code § 543(a)(1). See note 70 infra.

68. See PERKINS ON CRIMINAL LAW 629 (2nd ed. 1969).

69. WILLIAMS, supra note 60, at 678.

70. It should be noted, however, that mistake of law has been recognized as a defense to conspiracy when the target offense was not " malum in se." See PERKINS, supra note 68, at 630-31; Landen v. United States, 299 F. 75 (6th Cir. 1924); Mitchell v. State, 248 Ala. 169, 27 So.2d 36 (1946). Burglary is clearly " malum in se." It is possible, on the other hand, to view the D.C. Code offense of possession of eavesdropping devices as merely "malum prohibitum." If this view is correct, and the defendants were unaware that possession of eavesdropping devices is a crime, then they cannot be convicted of conspiracy to eavesdrop. Of great importance to this case, however, is the fact that, as with the kidnapping statute involved in Weiss (and unlike the statutes here prohibiting burglary and conspiracy), the D.C. statute prohibiting possession of eavesdropping devices may itself recognize a mistake of law defense. The statute is directed only at one who " wilfully possesses " an interception device. "Wilfull is a word of many meanings, its construction often being influenced by its context. . . ." Screws v. United States, 325 U.S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945). One commentator has made the following generalization: When found in a statute creating a civil offense [i.e., malum prohibitum] the word "wilful" means intentional as distinguished from inadvertent or negligent and does not imply anything in the nature of an evil intent or bad motive, whereas such additional element is required when the word is found in a common-law definition or in a statute dealing with a true crime. PERKINS, supra note 68, at 780-81. The question of whether the offense involved here is a "true crime" (malum in se) or only a "civil offense" (malum prohibitum) is difficult of resolution. "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set of comprehensive criteria for distinguishing between [the two types of offenses]." Morissette v. United States, 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240 (1952). The possibility of five years imprisonment for a violation indicates a legislative intent that possession of eavesdropping devices be regarded as a "true crime." The fact, however, that such possession has not long been prohibited, and may still not be considered illegal in the mind of the public, argues that it should be treated as "malum prohibitum" only. With no discussion, the only court in this jurisdiction to construe the term "wilfully" in a statute similar to the D.C. Code provision concluded that it required that the defendant "knew his activity to be unlawful." United States v. Bast, 348 F. Supp. 1202, 1203 (1972). That decision referred to the prohibition, contained in 18

U.S.C. 2512(1)(c), against placing an advertisement for an interception device in any publication. The United States Code provision closely parallels that of the D.C. Code. Both prohibit wilful advertisement as well as wilful possession of eavesdropping devices. Indeed, in the U.S. statute, the term "wilfully" is used only once, and modifies all activities prohibited by the statute. If "wilful" advertisement of an eavesdropping device means advertisement with knowledge of its unlawfulness, then "wilful" possession would appear to require the same kind of knowledge. The defendants' mistake in believing their activity was lawful, therefore, would, if honest, constitute a complete defense to that charge.

71. 22 D.C. Code § 1801(b).

72. Even if the defendants had believed that the detective had a valid warrant, their mistake would have been one of law, in the absence of facts known to them which could support a proper judicial determination that an arrest warrant should issue. The situation in which a citizen relies on the authority of a judge, rather than a police officer, presents a stronger case for recognizing a defense based on mistake as to the lawfulness of his action. Reliance on the pronouncement of an attorney general or any other high state official also presents a stronger case. But if the citizen relies entirely on that authority, his mistake remains one of law, not of fact. This does not mean that no defense can be recognized in such a situation. It means only that such a defense must be viewed as an exception to the mistake of law doctrine, rather than an extension of mistake of fact protection.

73. To illustrate, if a man is charged with kidnapping under a statute which prohibits enticing a girl under sixteen away from her parents, he should have a good defense, based on mistake of fact, if he honestly believed the girl was over sixteen. See State v. Suennen, 36 Idaho 219, 209 P. 1072 (1922) (dictum). If he did not know whether or not she was under sixteen, his ignorance of fact cannot excuse him. His action was not legal under the facts as he knew them. Any impression that he was acting innocently, therefore, rested on a mistake of law, even if he was assured erroneously by an employee of the government that his action was not prohibited. See Hopkins v. State, 193 Md. 489, 69 A.2d 456. (1950).

74. The Model Penal Code allows a "mistake of law" defense to a charge of unlawful use of force for a private person called to the aid of a police officer, if he honestly believes that the officer who calls his aid is acting lawfully. M.P.C. § 3.07(4)(a), Commentary at 64-65 (Tent. Draft No. 8 1958). This rule is explicitly recognized as an exception to the general rule that mistake of law is no defense. M.P.C. § 3.09(1)(b). Significantly, only a mistake of fact is a defense to a criminal prosecution for an unlawful arrest when a private person has come to the aid of another private person. In such a case, the Code requires not only that "(i) he believes the arrest is lawful" but also that "(ii) the arrest would be lawful if the facts were as he believes them to be." M.P.C. § 3.07(4)(b) (emphasis added).

75. In support of the proposition that a mistake of law engendered by reliance on the authority of a public official provides a valid defense in compelling circumstances, see Cox v. Louisiana, 379 U.S. 559, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965), Raley v. Ohio, 360 U.S. 423, 3 L. Ed. 2d 1344, 79 S. Ct. 1257 (1959), and United States v. Mancuso, 139 F.2d 90 (3rd Cir. 1943). Cf. United States v. Laub, 385 U.S. 475, 487, 17 L. Ed. 2d 526, 87 S. Ct. 574 (1967) ("Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. . . . and certainly not if the Government's conduct constitutes 'active misleading ' . . .").

76. This parallels the defense of a good faith, reasonable belief in the lawful nature of their conduct which has been

afforded police officers in a civil suit under the Fourth Amendment for an unlawful arrest or search. See Bivens v. Six Unknown Federal Agents, 456 F.2d 1339, 1347-49 (1972). Significantly, if a mistake as to the authority of a government officer could be characterized as one of fact, rather than law, it would afford a defense no matter how unreasonable the defendant's perception. Although there is some authority to the effect that a mistake of fact must be reasonable to negate intent, (WHARTON'S, supra note 60, at 382 n.19.) the better, and more widely held, view is that even an unreasonable mistake, if honest, constitutes a valid defense. (WILLIAMS, supra note 60, at 201; MODEL PENAL CODE, Tentative Draft No. 4, at p. 136 (Commentary on § 2.04(1) (1953).) In view of the strong public policy supporting the general principle that citizens disobey the law at their peril, whether they are cognizant of their disobedience or not, it would appear unwise to allow defendants a complete defense based on an irrational reliance on the authority of a government official. At the same time, there is a presumption of regularity in official action on which, I would argue, the individual citizen should be able to rely, when his reliance is reasonable. As one pair of commentators has put it, arguing in favor of a limited mistake of law defense, "in dealing with a defendant who has followed advice from an officer of the state, one aspect of our general policy is to make the community do this very thing in its dealings with the state, and a rule that no defense will be given under any circumstances to such a defendant will be self-defeating." (Hall & Seligman, supra note 2, at 676 (emphasis added).) Whether this argument is accepted as applied to all state action, it remains true that a limited defense based on a reasonable mistake as to authority can be justified under the rubric of "mistake of law," but is an analytic anomaly when placed in the category of "mistake of fact."

77. This court is currently considering this question en banc in the case of Zweibon v. Mitchell, et al., No. 73-1847 (filed 1 August 1973).

78. As early as 1940 President Roosevelt asserted the power to authorize warrantless surveillances on "national security" grounds -- specifically, against "persons suspected of subversive activities against the Government of the United States, including suspected spies." Memorandum from President Roosevelt to Attorney General Jackson, May 21, 1940, reproduced in United States v. United States District Court, 444 F.2d 651, 669-70 (6th Cir. 1971), aff'd, 407 U.S. 297, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972) (subsequent authorizations of Presidents Truman and Johnson also reproduced).

79. United States v. Brown, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960, 39 L. Ed. 2d 575, 94 S. Ct. 1490 (1974); United States v. Butenko, 494 F.2d 593 (3rd Cir.), cert. denied, Ivanov v. United States, 419 U.S. 881, 95 S. Ct. 147, 42 L. Ed. 2d 121 (1974).

80. United States v. United States District Court, 407 U.S. 297, 321-22, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972); Giordano v. United States, 394 U.S. 310, 313-14, 22 L. Ed. 2d 297, 89 S. Ct. 1163 (1969) (concurring opinion of Stewart, J.); Katz v. United States, 389 U.S. 347, 358 n.23, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

81. 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972).

82. See note 78 supra. IN AGREEMENT FOOTNOTES

1. There is a stronger case for waiver by plea of guilty here than was present in United States v. Sambro, 147 U.S. App. D.C. 75, 454 F.2d 918 (1971). Since the Court is en banc, I would adhere to my dissenting views expressed in Sambro but

consider the case sub judice as distinguishable. It is distinguishable because here the government did not make any representation to these defendants that any particular effects would occur or not occur upon a plea; nor did the government represent to them that they had a duty to remain silent. Even if we might take the extra step of holding the government responsible for the sense of duty or "code" by which the defendants apparently felt bound, we cannot vitiate their plea bargain on that basis. The Court's opinion is conclusive on the issue. I emphasize one point which is particularly persuasive to me. The District Court and the defendants' attorney both very carefully sought to disabuse the defendants of any notion that they were required to plead guilty and also sought to uncover their motive in pleading guilty. These efforts were unsuccessful. In light of the diligent efforts of their attorney and the careful interrogation by the District Judge, one must conclude that the defendants' pleas were voluntary. They made a bargain with the government and were under no apprehensions as to what that bargain meant. Under North Carolina v. Alford, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970), we must enforce that bargain.

2. This contention is apparently directed against all counts in their indictment but seems most appropriate in light of the offenses charged in Counts 3, 4, 5, and 7. The Court vacates these four counts pursuant to the so-called Hooper doctrine as enunciated in United States v. Greene, 160 U.S. App. D.C. 21, 489 F.2d 1145, 1157-58 (1973), cert. denied, 419 U.S. 977, 95 S. Ct. 239, 42 L. Ed. 2d 190 (1974). I objected to the use of the Hooper doctrine in Greene, 489 F.2d at 1174 (Statement of Bazelon, C.J.) and do not approve of its use in this case.

3. Compare United States v. Cox, 509 F.2d 390, 393, 166 U.S. App. D.C. 57 (1974) (Leventhal, J. concurring).

4. R. Pound, Introduction, F. Sayre, Cases on Criminal Law (1927), quoted in Morissette v. United States, 342 U.S. 246, 250 n.4, 96 L. Ed. 288, 72 S. Ct. 240 (1952). For similar statements, see United States v. Moore, 158 U.S. App. D.C. 375, 486 F.2d 1139, 1151, cert. denied 414 U.S. 980, 38 L. Ed. 2d 224, 94 S. Ct. 298 (1973) (Statement of Wilkey, MacKinnon & Robb, JJ.); id. at 1241 (Statement of Wright, Bazelon, Robinson & Tamm, JJ.); United States v. Brawner, 153 U.S. App. D.C. 1, 471 F.2d 969, 985 (1972) (en banc); Easter v. District of Columbia, 124 U.S. App. D.C. 33, 361 F.2d 50, 54 (1966) (en banc) citing Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966); Lee v. Dangar, Grant & Co.

5. 2 W. Holdsworth, A History of English Law 50-54, 258-59 (4th ed. 1936); 3 id. at 310-14, 371-75. See also N. Hurnard, The King's Pardon for Homicide Before A.D. 1307, at 68-130 (1969); T. Plunknett, A Concise History of the Common Law 444-45, 463-65 (1956) and authorities cited; 1 F. Pollack & F. Maitland, The History of English Law 52-55 (2d ed. 1923).

6. 2 W. Holdsworth, supra note 5, at 258-59.

7. 3 id. at 372-75. See also O. Holmes, Jr., The Common Law 40-51 (1881).

8. See G. Williams, The Criminal Law -- General Part 1-2 (2d ed. 1961). Similarly criminal liability is gradated in part on the basis of resulting harm, regardless of the actor's intent, as in inchoate crimes. See Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 U. PA. L. REV. 1497 (1974).

9. See Morissette v. United States, 342 U.S. 246, 252-59, 96 L. Ed. 288, 72 S. Ct. 240 (1952); Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55 (1933).

10. This was the situation in United States v. Alexander & Murdock, 152 U.S. App. D.C. 371, 471 F.2d 923, 928, cert. denied, 409 U.S. 1044, 34 L. Ed. 2d 494, 93 S. Ct. 541 (1973). For other incidents of criminal activity based in part on racial animosity, see United States v. Robertson, 165 U.S. App. D.C. 325, 507 F.2d 1148 (1974); Brief for the United States at 3-4; United States v. Harris, No. 72-1826 (D.C. Cir. Sept. 9, 1974).

11. This was the alleged situation in Everett v. United States, 119 U.S. App. D.C. 60, 336 F.2d 979 (1964).

12. This was the situation in United States v. Moore, 158 U.S. App. D.C. 375, 486 F.2d 1139 (D.C. Cir.), cert. denied, 414 U.S. 980, 38 L. Ed. 2d 224, 94 S. Ct. 298 (1973). See also Easter v. District of Columbia, 124 U.S. App. D.C. 33, 361 F.2d 50 (1966) (en banc).

13. The classic formulation is Justice Holmes' in Ellis v. United States, 206 U.S. 246, 257, 51 L. Ed. 1047, 27 S. Ct. 600 (1907).

14. The central problems in this area relate to concepts of "diminished responsibility." It is established that at least a reasonable mistake of fact relating to the circumstances of an act negates criminal responsibility. See G. Williams, supra note 8, at 140-42; R. Perkins, Criminal Law 939-44 (2d ed. 1969); J. Hall, General Principles of Criminal Law 361-68 (2d ed. 1960) and authorities cited therein. The issue arises whether the effect of alcohol, drugs or even physical and mental duress so affects the operation of an individual's perception of the facts as to render him not criminally responsible. See United States v. Alexander & Murdock, 152 U.S. App. D.C. 371, 471 F.2d 923, 948-52 & n.69, cert. denied, 409 U.S. 1044, 34 L. Ed. 2d 494, 93 S. Ct. 541 (1973) (Bazelon, C.J. dissenting on this point) and authorities cited. See also People v. Wolff, 61 Cal.2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); Model Penal Code §§ 2.08-09, 4.02 (Prop. Official Draft 1962).

15. This occurs in absolute liability crimes, see note 9 supra, and in certain elements of otherwise contingent liability crimes, such as in statutory rape, bigamy and felony murder. See Packer, Mens Rea and the Supreme Court, 1962 SUPREME COURT REV. 107, 140-42. Of course, the law also recognizes absolute liability to the extent it does not take full account of duress, necessity of circumstances, intoxication or addiction, and indeed mistake of law. See Fletcher, The Individualization of Excusing Conditions, 47 SO. CAL. L. REV. 1269, 1273-99 (1974). See also examples cited in notes 10-12 supra.

16. One might quickly dispose of the argument that everybody is "presumed to know the law". As an empirical matter, there is insufficient evidence that the individual citizen knows either what the law is or how it should be applied in particular circumstances. See G. Williams, supra note 8, at 289-90, quoting the observation by Maule, J. that "everybody is presumed to know the law except His Majesty's judges, who have a Court of Appeal set over them to put them right."

17. J. Hall, supra note 14, at 383, applied in Hopkins v. State, 193 Md. 489, 498, 69 A.2d 456, 460, appeal dismissed, 339 U.S. 940, 94 L. Ed. 1357, 70 S. Ct. 797 (1950).

18. See Fletcher, supra note 15, at 1298-99; Ryu & Silving, Error Juris: A Comparative Study, 24 U. CHI. L. REV. 421, 433 (1957).

19. O. Holmes, supra note 7, at 48.

20. Id. See also United States v. Calley, 46 C.M.R. 1131, 1184 (Army Ct. of Mil. Rev.), aff'd, 22 U.S.C.M.A. 534, 541-44 (1973); Beverly's Case, 4 Co. Rep. 1236, 76 Eng. Rep. 1118 (K.B. 1603) (Coke, J.).

21. Id. at 49. Cf. the subsidiary justification of prevention of mob violence discussed in Schulhofer, supra note 8, at 1511-14.

22. Cf. Furman v. Georgia, 408 U.S. 238, 395-96, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (Burger C.J., dissenting); id. at 453-56 (Powell, J., dissenting).

23. O. Holmes, supra note 7, at 43, discussing I. Kant, The Philosophy of Law, pt. 2, § 49, at 195-97 (W. Hastie trans. 1887), Cf. F. Zimring & G. Hawkins, Deterrence 38 (1973): "Why should his grief pay for their moral education."

24. Cf. Furman v. Georgia, 408 U.S. 238, 355, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (Marshall, J. concurring); Cross v. Harris, 135 U.S. App. D.C. 259, 418 F.2d 1095, 1101-07 (1969); Dershowitz, Preventitive Confinement: A Suggested Framework for Constitutional Analysis, 51 TEXAS L. REV. 1277 (1973); Morris, The Future of Imprisonment: Toward a Punitive Philosphy, 72 MICH. L. REV. 1161, 1164-73 (1974). See also Schulhofer, supra note 8, at 1588-99.

25. Cf. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 644-48, 39 L. Ed. 2d 52, 94 S. Ct. 791 (1974) and cases cited therein. See also Baxstrom v. Herold, 383 U.S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760 (1966); In re Ballay, 157 U.S. App. D.C. 59, 482 F.2d 648 (1973).

26. See Furman v. Georgia, 408 U.S. 238, 342-45, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (Marshall, J. concurring); id. at 452-54 (Powell, J. dissenting); Williams v. New York, 337 U.S. 241, 247-48, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949). Cf. H. Packer, The Limits of the Criminal Sanction 37-39, 62 (1968).

27. O. Holmes, supra note 7, at 45.

28. Horning v. District of Columbia, 254 U.S. 135, 138, 65 L. Ed. 185, 41 S. Ct. 53 (1920).

29. Novak v. Beto, 453 F.2d 661, 672 (5th Cir. 1971), rehearing en banc denied, 456 F.2d 1303 (5th Cir.), cert. denied sub nom. Sellars v. Beto, 409 U.S. 968, 34 L. Ed. 2d 233, 93 S. Ct. 279 (1972) (Tuttle, J. dissenting).

30. See O. Holmes, supra note 7, at 50-51 (the balance is reflected in the concept of the "reasonable man"); cf. Furman v. Georgia, 408 U.S. 238, 295-300, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (Brennan, J. concurring); id. at 360-70 (Marshall, J. concurring); id. at 385-90 (Burger, C.J. dissenting); id. at 434-43 (Powell, J. dissenting); United States v. Dougherty, 154 U.S. App. D.C. 76, 473 F.2d 1113, 1142-43 (1972) (Bazelon, C.J. concurring in part, dissenting in part); Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 243-54, 285-311 (1973).

31. J. Selden, Table Talk-Law 61 (3d ed. 1716). For similar statements of this argument, see United States v. Moore, 158 U.S. App. D.C. 375, 486 F.2d 1139, 1181-85, cert. denied, 414 U.S. 980, 38 L. Ed. 2d 224, 94 S. Ct. 298 (1973) (Leventhal, J.); People v. O'Brien, 96 Cal. 171, 176, 31 P. 45, 47 (1892). 32 If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try. . . . Furthermore, now that parties can testify, it may be doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into. The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the lawbreaker. O. Holmes, supra note 7, at 48. The argument that the fact of knowledge of the law is too difficult to be ascertained often reflects a distrust of the powers of the jury, Thomas v. The King, 59 Commonw. L. Rep. 279, 309 (High Ct. of Austr. 1937) (Dixon, C.J.). Compare United States v. Moore, 158 U.S. App. D.C. 375, 486 F.2d 1139, 1181-85, cert. denied, 414 U.S. 980, 38 L. Ed. 2d 224, 94 S. Ct. 298 (1973) (Leventhal, J.) with United States v. Dougherty, 154 U.S. App. D.C. 76, 473 F.2d 1113 (1972) (Leventhal, J.). As for Holmes' argument that mistake of law might be an affirmative defense, I would argue that such a contention is inconsistent with In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). See United States v. (La Vance) Greene, 160 U.S. App. D.C. 21, 489 F.2d 1145, 1174-80 (1973) cert. denied, 419 U.S. 977, 95 S. Ct. 239, 42 L. Ed. 2d 190 (1974) (Statement of Bazelon, C.J.). However, it would seem that the difficulties of proving knowledge of the law require that the defendant bear the burden of going forward on the issue, with the ultimate burden only resting on the government.

33. See J. Hall, supra note 14, at 376; 1 M. Hale, Pleas of the Crown 42 (1680); Keedy, Ignorance and Mistake in the Criminal Law, 22 HARV. L. REV. 75, 78 (1908).

34. See Morissette v. United States, 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240 (1952); Scott v. State, 29 Ala. App. 110, 192 So. 288 (1939); authorities cited and discussed, G. Williams, supra note 8, at 304-05, 306-44. Another area in which the similarity of mistakes of fact and mistakes in the application of the law to certain facts has caused some attenuation of the distinction between fact and law is bigamy. The prevailing American rule is that even a mistake of fact is not a defense to a charge of bigamy. See Anno., 56 A.L.R.2d 915 (1957). However, those courts which have eroded this strict absolute liability have in some instances permitted a reasonable mistake as to the legal validity of a divorce to be admitted as a defense. See People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956); Long v. State, 44 Del. 262, 65 A.2d 489 (1949); R. v. Gould, N.Z.L. Rep. 321 ; Thomas v. The King, 59 Commonw. L. Rep. 279 (High Ct. of Austr. 1937); cases cited Anno. (supra) at 933-38. Cf. Forbes v. Brownell, 149 F. Supp. 848, 851 (D.D.C. 1957). See also Alexander v. United States, 78 U.S. App. D.C. 34, 136 F.2d 783, 784 (1943) (dictum). The scholarly criticism directed in support of this result has focused on the tenuous distinction between a mistake of fact and of law in such circumstances. See J. Hall, supra note 14, at 400-01; G. Williams, supra note 8, at 178-83; cf. R. Perkins, supra note 14, at 945-48. The so-called "claim of right" cases and the bigamy cases have led some commentators to suggest that a mistake as to purely "civil" law is exculpatory while a mistake as to the "criminal" law is not. See G. Williams, supra at 344-45. The Model Penal Code, §§ 3.04(1), 309(1)(b), Commentary at 18, 76-77 (Tent. Draft No. 8 1958), accepts this distinction but makes absolutely clear that a mistake as to the legal requisites of a search or arrest is a mistake as to criminal law. One area of law in which mistake of law is apparently recognized as a defense concerns inchoate crimes which are not "mala in se." It has been held that such a mistake is a defense to a charge of conspiracy. See Landen v. United States, 299 F. 75 (6th Cir. 1924); Mitchell v. State, 248 Ala. 169, 27 So.2d 36 (1946). Cf. Keegan v. United States, 325 U.S. 478, 89 L. Ed. 1745, 65 S. Ct. 1203 (1945) (solicitation crime apparently requires knowledge of the illegality of the solicited acts). See also the leading cases of People v. Powell, 63 N.Y. 88 (1875); Commonwealth v. Gormley, 77 Pa. Super. 298 (1921); Commonwealth v. Benesch, 290 Mass. 125, 194 N.E. 905 (1935). This rule has been criticized in dictum, United States v. Mack, 112 F.2d 290, 292 (2d Cir. 1940), and in

dissent, Keegan v. United States, supra at 506 (Stone, C.J. dissenting). It has been trimmed back by holdings that the government need not prove actual knowledge of the law in question, this knowledge being inferred from facts and circumstances. See United States v. Thaggard, 477 F.2d 626, 631-32 (5th Cir. 1973); United States v. Cruz, 106 F.2d 828, 830 (10th Cir. 1939). See also the critical discussion in United States v. Boardman, 419 F.2d 110, 114-15 (1st Cir. 1969); United States v. Spock, 416 F.2d 165, 178 n.29 (1st Cir. 1969). The rule, to the extent it is valid, is limited to prosecutions for inchoate crimes and not prosecutions for completed crimes. Compare Okamoto v. United States, 152 F.2d 905 (10th Cir. 1945) with Warren v. United States, 177 F.2d 596, 600 (10th Cir. 1949), cert. denied, 338 U.S. 947, 94 L. Ed. 584, 70 S. Ct. 485 (1950). The harshness of the rule that mistake of law is not a defense is also one factor responsible for the parallel rule that penal statutes should be strictly construed in favor of the accused. See United States v. Bass, 404 U.S. 336, 347-48, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971); United States v. Moore, 164 U.S. App. D.C. 319, 505 F.2d 426, 427 (1974), cert. granted, 420 U.S. 924, 43 L. Ed. 2d 392, 95 S. Ct. 1116 (1975). Compare this rule of construction with Lambert v. California, 355 U.S. 225, 2 L. Ed. 2d 228, 78 S. Ct. 240 (1958).

35. See Easter v. District of Columbia, 124 U.S. App. D.C. 33, 361 F.2d 50 (1966) (en banc); Rouse v. Cameron, 125 U.S. App. D.C. 366, 373 F.2d 451, 455 (D.C. Cir. 1966); cf. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390-92, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970); Note, The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution, 82 YALE L.J. 258 (1972).

36. In any event, it may be seriously doubted whether the court's ruling in Weiss was as much predicated upon actual legislative intent as a presumed legislative intent implied by the court in the exercise of its own policy making discretion. The statutory language "without lawful authority" could easily bear a meaning limited to an objective determination that the defendants in fact did have authority for their actions, as Judge Crane in dissent and the appellate division below apparently held. Cf. G. Williams, supra note 8, at 28-29. The court thus presumes a legislative intent to depart from the settled rule that mistake of law is no defense from the bare statutory language. Surely, the court's implicit reasoning is that its result is a better approximation of the true principle of criminal liability in such circumstances than the rule that mistake of law is no defense. Compare the reasoning in Weiss with State v. Stern, 526 P.2d 344, 348-52 (Wyo. 1974) and authorities cited therein. There are a number of difficulties with Weiss which need not be fully explored. Its significance in the development of modern notions of criminal responsibility may be seen by a brief consideration of the common law background of the case. See generally Wilgus, Arrest Without a Warrant, 22 MICH. L. REV. 673, 685-98 (1924). Of particular interest is the rule recognized by the Model Penal Code, § 3.07(4)(a), Commentary at 64-65 (Tent. Draft No. 8 1957); cf. id. § 3.03(3)(b), that a private person called to the aid of a police officer is justified in using force if he entertains an honest belief that the officer who calls his aid is acting lawfully. See Jefferson v. Yazoo & M.V.R.R., 194 Miss. 729, 11 So.2d 442 (1943); State v. Ditmore, 177 N.C. 592, 99 S.E. 368 (1919); La Chance v. Berlin St. Ry. Co., 79 N.H. 291, 109 A. 720 (1919); Purdy v. State, 60 Tex. Crim. 130, 131 S.W. 558 (1910); Firestone v. Rice, 71 Mich. 377, 15 Am. St. Rep. 266, 38 N.W. 885 (1888); McMahan v. Green, 34 Vt. 69, 80 Am. Dec. 665 (1861). But see Mitchell v. State, 12 Ark. 50, 54 Am. Dec. 253 (1851); Elder v. Morrison, 10 Wend. 128, 25 Am. Dec. 548 (1833). This rule applies only if the officer is known as such and is acting in an official capacity. See Cincinnati, N.O. & Tex. P. Ry. Co. v. Cundiff, 166 Ky. 594, 179 S.W. 615, 1916C Ann. Cas. 513 (1915); Hooker v. Smith, 19 Vt. 151, 47 Am. Dec. 679 (1847). Cf. the Good Samaritan "mistake of fact" defense discussed in United States v. Kartman, 417 F.2d 893, 895-96 & n.5 (9th Cir. 1969); United States v. Grimes, 413 F.2d 1376 (7th Cir. 1969). This "call to aid" rule is explicitly recognized as an exception to the rule that mistake of law is not a defense, this latter rule being a restriction on the police officer himself. Model Penal Code, § 3.09(1)(b) (Tent. Draft No. 8

1958). Weiss, if viewed as an extension of a general "call to aid" rule, as its facts suggest, indicates a breakdown in the strict distinction between mistakes of fact and of law when applied to the heavily fact-laden law of search and seizure or arrest, an area of law also on the borderline between "civil" and "criminal" law. See also Pierson v. Ray, 386 U.S. 547, 555-57, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967); Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1347-48 (2d Cir. 1972).

37. Local 761, Electrical Workers v. NLRB, 366 U.S. 667, 674, 6 L. Ed. 2d 592, 81 S. Ct. 1285 (1961).

38. The defendants' mistake of law is largely a mistake as to Hunt's authority -- i.e. whether he had reasonable grounds for ordering the burglary. As is implicitly suggested by the "call to aid" rule suggested in note 36 supra, a mistake as to the lawful authority of a government official, which is what Hunt allegedly presented himself as, is sufficiently close to a mistake of fact and sufficiently similar to a mistake as to civil law -- a mistaken "claim of right" as it were -- that exculpation should be permitted. See also United States v. Calley, 22 U.S.C.M.A. 534, 541-44 (1973); G. Williams, supra note 8, at 301. Compare id. at 160-63 (suggests that ignorance of the law may cause ignorance of facts which would have been known if the defendants had known the law). This analysis is buttressed by reference to the fact that these defendants were formerly citizens of a nation which arguably did not adhere to Anglo-American concepts of permissible search and seizure. In common law contract doctrine, a mistake as to foreign law was considered a "mistake of fact" and grounds for equitable intervention. See E.H. Taylor, Jr. & Sons v. First Nat'l Bank, 212 F. 898, 902 (6th Cir. 1914) (dictum); Miller v. Bieghler, 123 Ohio St. 227, 174 N.E. 774 (1931); cases cited and discussed Anno., 73 A.L.R. 1260 (1931). In the Federal Republic of Germany, a mistake as to German law by a foreigner is considered a defense to criminal chrages. See H. Jescheck, Lehrbuch des Strafrechts 298-99 (1969).

39. See Long v. State, 44 Del. 262, 65 A.2d 489 (1949); People v. Hernandez, 61 Cal.2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964); United States v. Short, 4 U.S.C.M.A. 437 (1954); cf. O. Holmes, supra note 7, at 50-51. That exculpation on the basis of reasonable mistakes of law is consistent with conventional morality may be seen in decisions of the Bundesgerichthof or Supreme Court of the Federal Republic of Germany on this subject. The discussion that follows is drawn from Judgment of March 18, 1952, 2 BGHSt. 194; H. Jescheck, Lehrbuch des Strafrechts 294-306 (1969); Ryu & Silving, supra note 18, at 450-58, 461-65. Originally, the Supreme Court of the Reich had held that mistake as to civil law, not the law defining the elements of the crime for which the individual is being prosecuted, was exculpatory but that a mistake as to criminal law was not exculpatory. In the 1952 decision cited above, the Bundesgerichthof found this distinction untenable and rejected it in favor of a rule that all reasonable mistakes of law were exculpatory. Mistakes of fact, it found, were different and if made honestly and in good faith were exculpatory. As to the requirement of reasonableness in mistakes of law, the Bundesgerichthof had this to say: [The defendant] must . . ., in everything he is about to undertake, call to his consciousness whether it agrees with the dictates of the legal [order]. He must dispel doubts by thought and inquiry. This requires an exertion of conscience; the degree [of exertion] is determined by the circumstances of the case and by the life environment and occupation of the individual. If, notwithstanding exertion of conscience as thus expected, he could not acquire the insight into the wrongfulness of his conduct, the error was invincible and the act unavoidable. . . . In this case, no blame of guilt can be raised against him. Compare Judgment of Oct. 6, 1953, Juris. Rund. 188 (BGHSt), discussed Ryu & Silving, supra at 457 with cases cited note 10 supra. Cases decided after the Judgment of March 18, 1952, seem to take a very liberal view of mistake of fact, to include as mistakes of fact all mistakes as to law which do not directly concern the definition of the elements of the offense.

40. See United States v. Moore, 158 U.S. App. D.C. 375, 486 F.2d 1139, 1260 (D.C. Cir.), cert. denied, 414 U.S. 980, 38 L. Ed. 2d 224, 94 S. Ct. 298 (1973) (Bazelon, C.J. concurring in part, dissenting in part); United States v. Brawner, 153 U.S. App. D.C. 1, 471 F.2d 969, 1022-34 (1972) (Bazelon, C.J. concurring in part, dissenting in part); United States v. Alexander & Murdock, 152 U.S. App. D.C. 371, 471 F.2d 923, 948-51, cert. denied, Murdock v. United States, 409 U.S. 1044, 34 L. Ed. 2d 494, 93 S. Ct. 541 (1973) (Bazelon, C.J. concurring in part, dissenting in part). See also United States v. Dougherty, 154 U.S. App. D.C. 76, 473 F.2d 1113, 1138 (1972) (Bazelon, C.J. concurring in part, dissenting in part); United States v. Robertson, 507 F.2d 1148, 165 U.S. App. D.C. 325 (1974).

41. As Judge MacKinnon notes in his dissent, Judge Gesell has exercised his sentencing discretion in favor of these very defendants due to the fact that they were "duped" by government officials. Other famous examples of the use of sentencing discretion in mens rea type defenses include the case of R. v. Dudley & Stephens,

42. See generally United States v. Ammidown, 162 U.S. App. D.C. 28, 497 F.2d 615 (1973).

43. See Ex parte Grossman, 267 U.S. 87, 120-21, 69 L. Ed. 527, 45 S. Ct. 332 (1925); State v. Leak, 5 Ind. 359, 363 (1854); 2 Hawkin's Pleas of the Crown, ch. 37, § 8, at 533 (8th ed. J. Curwood 1824).

44. See United States v. Dougherty, 154 U.S. App. D.C. 76, 473 F.2d 1113, 1142 (1972) (Bazelon, C.J. concurring in part, dissenting in part).

45. See 3 W. Holdsworth, supra note 5, at 312-13, 371-72.

46. See N. Hurnard, supra note 5.

47. See Fletcher, supra note 15, at 1307.

48. See United States v. Moore, 158 U.S. App. D.C. 375, 486 F.2d 1139, 1185-86, 1203-05, cert. denied, 414 U.S. 980, 38 L. Ed. 2d 224, 94 S. Ct. 298 (1973) (Statement of Leventhal & McGowan, JJ.). Part of the minimalist approach is a reliance on the legislature to resolve any issue raised by the suggested development of judicially created and judicially administered principles. That is, the doctrine of stare decisis causes previous judicial decisions to be embedded in concrete subject only to legislative action.

49. United States v. Dougherty, 154 U.S. App. D.C. 76, 473 F.2d 1113, 1138 (1972) (Bazelon, C.J. concurring in part, dissenting in part). See also Note, Towards Principles of Jury Equity, 83 YALE L.J. 1023 (1974). MINORITY OPINIONFOOTNOTES

1. This was first printed in the November 5, 1974, issue of The Washington Post, Washington, D.C., at A-12, and has been the subject of testimony in the recent trial of the obstruction of justice charges, n.3 infra. We take judicial notice thereof. Fletcher v. Evening Star Newspaper Co., 77 U.S.App.D.C. 99, 133 F.2d 395 (1942); Hipp v. Hipp, 191 F. Supp. 299 (D.D.C. 1960). The account reads: Following is the text of a memorandum written by Watergate defendant E. Howard Hunt Jr. Nov. 14, 1972, five months after the break-in, pressing the Nixon administration for pardons and hush money. The memo,

initially given to Hunt's attorney, William O. Bittman, was introduced yesterday by prosecutors at the conspiracy trial. REVIEW AND STATEMENT OF PROBLEM The seven Watergate defendants and others not yet indicted, bugged DNC offices initially against their better judgment, knowing that Larry O'Brien was seldom there, and that many items of interest were being moved to Florida. Furthermore, the defendants pressed an alternate plan to bug O'Brien's Fontainebleau convention suite, before occupancy, a low-risk high-gain operation which was rejected. The seven defendants again protested further bugging of DNC Headquarters on June 16-17, the intercepted conversations by then having shown clearly that O'Brien was not using his office. Again, objections were overridden and the attempt was loyally made even though money for outside guards was struck from the operational budget by Jeb Magruder. In fact the entire history of GEMSTONE was characterized by diminishing funding coupled with increasing demands by those who conceived and sponsored the activity. If initial orders to bug DNC Headquarters were ill-advised, the defendants' sponsors compounded the fiasco by the following acts: 1. Indecisiveness at the moment of crisis. 2. Failure to quash the investigation while that option was still open. 3. Allowing Hunt's safe to be opened and selected contents handed to the FBI. 4. Permitting an FBI investigation whose unprecedented scope and vigor caused humiliation to families, friends and the defendants themselves. 5. Granting immunity to Baldwin. 6. Permitting defendants to fall into the hands of a paranoid judge and three self-admitted liberal Democrat prosecutors. 7. Failure to provide promised support funds on a timely and adequate basis; continued postponements and consequent avoidance of commitments. 8. An apparent wash-hands attitude now that the election has been won, heightening the sense of unease among all defendants who have grown increasingly to feel that they are being offered up as scapegoats ultimately to be abandoned. Items for consideration: 1. Once the criminal trial ends, the DNC civil suit resumes. In his deposition John Mitchell may well have perjured himself. 2. Pending are three investigations by congressional committees. The Democratic Congress is not going to simply let the Watergate affair die away. 3. The media are offering huge sums for defendants stories. For example, an offer to one defendant for his "autobiography" now stands at $745,000. 4. The Watergate bugging is only one of a number of highly illegal conspiracies engaged in by one or more of the defendants at the behest of senior White House officials. These as yet undisclosed crimes can be proved. 5. Immunity from prosecution and or judicial clemency for cooperating defendants is a standing offer. 6. Congressional elections will take place in less than two years., Defendants' Position The defendants have followed all instructions meticulously, keeping their part of the bargain by maintaining silence. They have not, until now, attempted to contact persons still in positions of responsibility in an effort to obtain relief and reassurance, believing pre-election security to be a primary consideration. The administration, however, remains deficient in living up to its commitments. These commitments were and are: 1. Financial support 2. Legal defense fees 3. Pardons 4. Rehabilitation Having recovered from post-election euphoria, the administration should now attach high priority to keeping its commitments and taking affirmative action in behalf of the defendants. To end further misunderstandings the seven defendants have set Nov. 27 at 5 p.m. as the date by which all past and current financial requirements are to be paid, and credible assurances given of continued resolve to honor all commitments. Half-measures will be unacceptable. Accordingly, the defendants are meeting on Nov. 25 to determine our joint and automatic response to evidence of continued indifference on the part of those in whose behalf we suffered the loss of our employment, our futures and our reputations as honorable men. The foregoing should not be misinterpreted as a threat. It is among other things a reminder that loyalty has always been a two-way street.

2. The Freedom of Information Act does not permit secret national defense and foreign policy material to be disclosed to a federal judge, even in camera. EPA v. Mink, 410 U.S. 73, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1972): We do not believe that Exemption 1 permits compelled disclosure of documents, such as the six here that were classified pursuant to this

Executive Order. Nor does the Exemption permit in camera inspection of such documents to sift out so-called "nonsecret components." Id. at 81. What has been said thus far . . . also negates the proposition that Exemption 1 authorizes or permits in camera inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter. Id. at 84.

3. U.S. District Court, District of Columbia, Criminal No. 74-110.

4. Affidavit of Barker at 4, Appellants' App. at 15.

5. 18 U.S.C. § 2386provides in part: An organization is "subject to foreign control" if: (a) it solicits or accepts financial contributions, loans, or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof . . ..

6. Affidavit of Barker at 1, Appellants' App. at 12.

7. Affidavit of Martinez at 6, Appellants' App. at 25.

8. Affidavit of Sturgis at 1, 3, Appellants' App. at 27, 29 (emphasis added).

9. Id. at 6, Appellants' App. at 32 (emphasis added).

10. 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 157 (1957, 1975 Cumm. Supp.); WILLIAMS, CRIMINAL LAW: The General Part §§ 51 & 68 (2d ed. 1961); PERKINS ON CRIMINAL LAW 939-44 (2d ed. 1969); 21 AM.JUR.2d Criminal Law § 93 (1965). See also Stone v. United States, 167 U.S. 178, 189, 42 L. Ed. 127, 17 S. Ct. 778 (1897).

11. Appellants were allegedly mistaken not only as to the existence of official authorization for their operation, but also as to their status as government agents charged with uncovering rumored financial ties between the Democratic Party and Castro's regime in Cuba. On the facts here, it must be assumed that appellants could convince a jury that they had indeed entertained these mistaken beliefs at the time of the break-in. Hence no further reference to this mistake of fact is necessary.

12. No brief need be held for those in this affair -- Liddy, Hunt and McCord -- who knew they were not conducting the Watergate operation on governmental authority, but the allegations in the affidavits, which we must here accept as true, indicate that appellants are in a different category.

13. 18 U.S.C. § 2511(3) provides: (3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the

constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power. (Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 213 [and amended Pub. L. 91-358, title II, § 211(a), July 29, 1970, 84 Stat. 654.)].

14. It is reported that on May 13, 1915, in the aftermath of the sinking of the Lusitania, President Wilson authorized William J. Flynn, Chief of the U.S. Secret Service, to tap the telephones of the German Embassy and the private homes of the Ambassador and his attaches. William J. Flynn, Tapped Wires, LIBERTY, June 2, 1928, at 19; COLIN SIMPSON, LUSITANIA 190 (1972). As to the possible use of surreptitious entry (burglary) at this time by the United States Government, see LUSITANIA (supra) 233-37 and citations to archival documents in nn. 1, 2 and 3, on the affair involving the burglary of the Austrian Consulate in Cleveland on July 18, 1915, and the theft of the papers of a chemist named Ritter von Rettegh who had given an affidavit concerning the possible existence of explosives aboard the Lusitania.

15. The Supreme Court in United States v. United States District Court dealt only with the domestic aspects of national security surveillance: We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.

407. U.S. at 321-22.

16. The precise Presidential directives of Franklin D. Roosevelt, Harry S. Truman and Lyndon B. Johnson authorizing warrantless wire tapping, and part of a memorandum by then Acting Attorney General Ramsey Clark affirming the policy announced by President Johnson, are reproduced as an Appendix to this opinion. 17 On the other hand, the general rule in criminal cases is that a mistake of law upon the part of the accused does not constitute justification for his act; that, if he deliberately and intentionally commits the prohibited act, it is criminal, regardless of his belief that his act was lawful; except in cases where ignorance of the law may disprove the existence of a required specific intent. (Emphasis added.) Townsend v. United States, 68 App.D.C. 223, 229, 95 F.2d 352, 358, cert. denied, 303 U.S. 664, 82 L. Ed. 1121, 58 S. Ct. 830 (1938). See also United States v. Squires, 440 F.2d 859, 863-64 (2d Cir. 1971); Long v. State, 44 Del. 262, 65 A.2d 489, 497, 5 Terry 262 (Del. 1949); United States v. One Buick Coach Automobile, 34 F.2d 318, 320 (N.D.Ind. 1929); People v. Goodin, 136 Cal. 455, 69 P. 85, 86 (1902).

18. James v. United States, 366 U.S. 213, 221-22, 6 L. Ed. 2d 246, 81 S. Ct. 1052 (1961); California v. Latimer, 305 U.S. 255, 261, 83 L. Ed. 159, 59 S. Ct. 166 (1938); United States v. Murdock, 290 U.S. 389, 396, 78 L. Ed. 381, 54 S. Ct. 223 (1933); Burns v. State, 123 Tex. Cr. 611, 61 S.W.2d 512, 513 (1933).

19. The majority opinion vacates all but one count of burglary, one count of possessing listening devices and the conspiracy count. See Majority Op., nn.1,5.

20. D.C. Code § 22-1801(b) provides: (b) Except as provided in subsection (a) of this section, whoever shall, either in the

night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years.

21. The 1972 Presidential election was not the first to be plagued with political espionage. In an interview former President Nixon granted James J. Kilpatrick, printed in the Washington Star-News on Thursday, May 16, 1974, page A-1, col. 1, he revealed that J. Edgar Hoover, the Director of the Federal Bureau of Investigation , had apprised him of certain bugging operations: He [President Nixon] recalled how much he had resented it when he learned that his own offices had been bugged in his 1962 gubernatorial campaign. He also remembered 1968 with equal resentment. "There was not only surveillance by the FBI, but bugging by the FBI, and (J. Edgar) Hoover told me that my plane in the last two weeks [of the 1968 presidential campaign] was bugged." These bugging offenses apparently were not investigated by Congress or prosecuted.

22. 18 U.S.C. § 2511 et seq. (1970).

23. 18 U.S.C. § 2511(3), supra n. 13.