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The Ellsberg Break-In Revisited

BERNARD L. BARKER and Eugenio R. Martinez, in case you have forgotten, were two of the men recruited by E. Howard Hunt in 1971 to help the White House, as Mr. Hunt explained it to them, uncover national security information on "a traitor." In carrying out this assignment, they broke into the office of a psychiatrist in California and, in due course, they, along with John D. Ehrlichman and G. Gordon Liddy, were convicted of conspiring to deprive that psychiatrist of his Fourth Amendment right to be free from illegal searches. We bring this up because the fact of their recruitment was crucial to the decision of the U.S. Appeals Court here last week reversing their convictions while upholding those of Messrs. Ehrlichman and Liddy. In reaching this judgment, the court grappled, rather unsuccessfully, with one of the hardest of legal issues: When should a misunderstanding of facts or law excuse the commission of a crime? But it nonetheless reached what seems to us to be a fair and just result.

Mr. Ehrlichman raised this issue by arguing that he believed the burglary was legal. He said he understood the President had power to authorize physical searches of homes or offices in national security cases and had delegated that power to him. The Court of Appeals quite rightly rejected this line of argument on the grounds that (1) even if the President does have such power it cannot be delegated and (2) Mr. Ehrlichman's alleged misunderstanding of the law is no excuse. The latter is a straight-forward application of the general rule that criminal conduct is not excused merely because the person engaging in it thought what he was doing was legal.

The case of Messrs. Barker and Martinez, however, presents one of those situations that may be an exception to that general rule. Unlike Mr. Ehrlichman, then a high White House aide, they had no positions of authority. Their defense was that they believed Mr. Hunt, another White House aide, did in fact have authority to authorize the burglary. This defense does have some appeal: Why should these two men be punished for doing something if an agent of the White House led them to believe that what they were doing was legal? But it is a defense that raises some difficult questions. For example, a citizen ordered by a policeman to help make an arrest will usually be excused from responsibility for any illegal acts flowing from that arrest. But a citizen volunteering to help a policeman—or making an arrest on his own—runs the risk of liability if the arrest is illegal. The courts have not done well in sorting out the nuances in situations of this kind and neither has anyone else. Indeed, this issue is one of the most controversial parts of S. 1, the criminal law reform bill.

Thus, it is not surprising that the three judges in the Barker-Martinez case could not agree. Judge Malcolm R. Wilkey said the two men should be acquitted if they relied on Mr. Hunt's authority to authorize the burglary and if there was a legal theory on which to base a belief that Mr. Hunt had such authority; he found a legal theory in the idea—not yet entirely repudiated—that the President can order break-ins in national security cases. Judge Robert Merhige said the two should be acquitted if they reasonably relied on a conclusion of law stated by someone charged with administering or enforcing that law; he thought they might be able to convince a jury that they had been told that Mr. Ehrlichman had said this search was legal. Judge Harold Leventhal, voting to uphold the convictions, said that Barker and Martinez, unlike the citizen asked to help a policeman, had no duty to help Hunt. He reasoned that only Hunt could have told them the break-in was legal and that by no stretch of the imagination was Hunt in a position to interpret the law.

None of these answers is particularly satisfying. If individuals can be relieved of responsibility for commiting a crime solely because someone in a position of authority asks them to do so and tells them it is legal, government officials might find it easier to get outsiders to do extra-legal things. On the other hand, a request to a citizen from someone—even a minor someone—in the White House does carry with it an aura of authority, necessity and regularity that may understandably be accepted without question.

So it is probably just as well that the Court of Appeals was not able to establish a precedent—or a general rule—in this case. And that is why we would be content to see the matter end with a dismissal of the charges against Messrs. Barker and Martinez. Having also been convicted in the Watergate break-in case, they have suffered enough, it seems to us. The development of the defense they assert can await a clearer case.