IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NUMBER 21-150**
	:	
JAMES DOUGLAS RAHM, JR.	:	

DEFENDANT'S REPLY TO UNITED STATES' RESPONSE TO
NOTICE OF PUBLIC AUTHORITY DEFENSE

Defendant James Douglas Rahm Jr. has provided notice that he may assert the entrapment by estoppel defense at trial. The government argues in response that the entrapment by estoppel defense cannot apply on the facts of this case. But the government's argument misses the mark. This is not about an "attempt to deflect responsibility." Gov't Response (ECF 49) at 2. Nor is this a claim of a defendant knowingly committing a crime upon a grant of authority from *some* government official to engage in illegal activity. Mr. Rahm seeks to raise this affirmative defense based on the clear directions to interfere with the Joint Session of Congress by the President of the United States.

By the morning of January 6, thousands of Trump supporters had flooded Washington, D.C. Many were prepared for violence and had plans to attack the Capitol. Others were there for a political rally. Beginning in the early morning, a series of speakers took the stage, all of whom primed the audience with forceful instigating speech to take back the country. Amy

Kremer, the head of Women for American First, spoke about voter fraud and told the crowd that they were there "to save the republic" and that they "[couldn't] back down."[1]

Following Kremer, Congressman Mo Brooks took the stage with the following message: patriots sometimes must make extraordinary sacrifices for their country, and that day was one such occasion. Brooks told the attendees at the rally that their country was literally being taken from them, that the scale of wrongdoing was of historical proportions, that it was time to start "kicking ass," and that the individuals who were there that day had to be ready to perhaps sacrifice even their lives for their country.[2] Of note, Brooks stated:

- "We are great because our ancestors sacrificed their blood, their sweat, their tears, their fortunes, and sometimes their lives."
- "We are here today because America is at risk unlike it has been in decades, and perhaps centuries."
- "I have a message that I need you to take to your heart and take back home and along the way, stop at the Capitol."
- "Let's be clear about these socialist Democrats . . . We're gonna stop them."
- "We are not gonna let the socialists rip the heart out of our country. We are not gonna let them continue to corrupt our elections and steal from us our God-given right to control our nation's destiny."
- "Today is a time of choosing, and tomorrow is a time for fighting!"
- "Today is the day American patriots start taking down names and kicking ass!"
- "Are you willing to do what it takes to fight for America? Louder—will you fight for America?"
- "The fight begins today."
- "The harder to conflict, the more glorious the triumph."
- "We, American Patriots, are gonna come right at 'em [socialists and weak-kneed Republicans on Capitol Hill]. We American Patriots are gonna take America back."

Then Giuliani spoke, and confirmed the magnitude of what it would mean for certification to occur: "This has been a year in which they have invaded our freedom of speech,

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[1] *Eric Swalwell v. Donald J. Trump, et al.*, No. 21-cv-586, ECF No. 1, Complaint ¶ 103 (D.D.C.).

[2] A video of Brooks's speech can be found at https://www.youtube.com/watch?v=ZKHwV6sdrMk.

our freedom of religion, our freedom to move, our freedom to live. I'll be darned if they're going to take away our free and fair vote. And we're going to fight to the very end to make sure that doesn't happen."[3] Giuliani stated, "This election was stolen," and "it has to be vindicated to save our country." Finally: "Let's have trial by combat."[4] Donald Trump Jr. then echoed such sentiments, declaring that other Republicans who refused to fight for his father were "fold[ing] up and giv[ing] in," but those in the crowd had "an opportunity" that day: "You can be a hero, or you can be zero. And the choice is yours, but we are all watching!"[5]

Donald Trump came next, and immediately incited the crowd. He continued the lie that the certification of Joe Biden's election was a "coup" and that their country was being stolen from them. Trump advocated rule-breaking: "When you catch somebody in a fraud, you're allowed to go by very different rules."[6] In that vein, Trump reminded the crowd that they would "never take back our country with weakness." He continued, "you have to show strength, and you have to be strong" and you have to "fight like hell." And then he told the crowd to "walk down to Pennsylvania Avenue . . . to the Capitol." There, he said, "we're going to try and give [the Republicans] the kind of pride and boldness that they need to take back our country."[7] He used the contraction, "We're" numerous times. Not "I'm." Not "You." According to an analysis of cell phone location data, approximately 40% of the rally attendees did just that.[8]

And now, Mr. Rahm finds himself charged with *inter alia* entering and remaining in what has now been deemed "a restricted building and grounds," and having "paraded, demonstrated,

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[3] *Eric Swalwell v. Donald J. Trump, et al.*, No. 21-cv-586, ECF No. 1, Complaint ¶ 111-12 (D.D.C.).
[4] *Id.* ¶ 113-14.
[5] *Id.* ¶ 118.
[6] *Id.* ¶ 126.
[7] *Id.* ¶ 128.
[8] https://www.nytimes.com/2021/02/05/opinion/capitol-attack-cellphone-data.html.

and picketed in any United States Capitol Building." Superseding Indictment (ECF 26). Mr. Rahm is not claiming that the defense applies to any and all violent, obstructive, or destructive behavior at the Capitol — nor that the former President authorized the same. *See United States v. Chrestman*, 525 F. Supp. 3d 14, 32–33 (D.D.C. 2021). But it does apply to the non-violent conduct for which Mr. Rahm has been charged.

"Entrapment by estoppel" applies "when an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues or initiates the conduct." *United States v. Achter*, 52 F.3d 753, 755 (8th Cir. 1995) (quoting *United States v. Smith*, 940 F.2d 710, 714 (1st Cir. 1991)). In 1965, the Supreme Court held that the Due Process Clause of the United States Constitution prohibited convicting a person for demonstrating in a location where state officials "told him he could." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965). In doing so, the Court relied on its previous holding in *Raley v. Ohio*, 360 U.S. 423 (1959). *Cox*, 379 at 571. In *Raley*, the Chairman of the 'Un-American Activities Commission' of the State of Ohio "who clearly appeared to be the agent of the State in a position to give such assurances, apprised three of the appellants that the privilege [to refuse answering questions of the Commission] in fact existed, and by his behavior toward the fourth obviously gave the same impression." *Raley*, 360 U.S. at 437. While the Court noted there was "no suggestion that the Commission had any intent to deceive the appellants" the Court held that "to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State — convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Id.* at 438. Both *Cox* and *Raley* involved a similar problem: "active misleading" from a person of apparent authority directing defendants to engage in conduct ultimately deemed by authorities to violate

the law. *Id.* at 438–39 ("Here there were more than commands simply vague or even contradictory. There was active misleading . . . The State Supreme Court dismissed the statements of the Commission as legally erroneous, but the fact remains that at the inquiry they were the voice of the State most presently speaking to the appellants."); *Cox*, 379 U.S. at 571 ("the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did, 101 feet from the courthouse steps," but then had the demonstrators subsequently arrested for picketing near a courthouse).

Both of these cases are considered to be the origin of the affirmative defense of "entrapment by estoppel." Note, The Immunity-Conferring Power of the Office of Legal Counsel, 121 HARV. L. REV. 2086, 2093 (2008). As the Department of Justice has recognized, whereas with the defense of "public authority," "it is the defendant whose mistake leads to the commission of the crime; with entrapment by estoppel, 'a government official commits an error and, in reliance thereon, the defendant thereby violates the law.'" Criminal Resource Manual, CRM 2055, Department of Justice (available at https://www.justice.gov/archives/jm/criminal-resource-manual-2055-public-authority-defense) (citing *United States v. Burrows*, 36 F.3d 875, 882 (9th Cir. 1994); *United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990); *United States v. Clegg*, 846 F.2d 1221, 1222 (9th Cir. 1988); *United States v. Tallmadge*, 829 F.2d 767, 773-75 (9th Cir. 1987)); *see also Achter*, 52 F.3d at 755 (quoting *Smith*, 940 F.2d at 714) ("Entrapment by estoppel has been held to apply when an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues or initiates the conduct."). "In short, the defense of entrapment by estoppel involves the 'concept of unintentional entrapment by an official who mistakenly misleads a person into a violation of the law.'" *Id.* (quoting *United States v. Brebner*, 951 F.2d 1017, 1025 (9th Cir. 1991)).

This Court has previously relied on the Third Circuit's test for determining whether the entrapment by estoppel defense applies. *See United States v. Khanu*, 664 F. Supp. 2d 35, 41 (D.D.C. 2009) (quoting *United States v. W. Indies Transport, Inc.*, 127 F.3d 299, 313 (3d Cir. 1997)). Under that test, the defense applies where "the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement." *Id.*

Like the protestors in *Cox* who were wrongly told by "the Chief of Police and other officials" to demonstrate at a specific location, Mr. Rahm would show that the Commander in Chief of the United States wrongly told him (and thousands of others) that, together, they would march down to the Capitol building to "cheer on our brave senators, and congressmen and women," showing "strength," and to "give them the kind of pride and boldness they need to take back our country." *See Cox*, 379 U.S. at 571. Like the "highest police officials of the city" in *Cox*, by his words, tone, and action the President "in effect told the demonstrators [including Mr. Rahm] that they could meet where they did." *See id.* This, in turn, created the effect of advising Mr. Rahm and others that their actions were legal. *See Khanu*, 664 F. Supp. at 41. Mr. Rahm ignorantly "relied on the government official's statements. *See id.* And Mr. Rahm would show that his "reliance" on those statements was "in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement." *Khanu*, 664 F. Supp. at 41.

The Government asserts that the defense does not apply because Trump did not "actively mislead" Mr. Rahm, *see* Govt. Resp. at 10, and that any reliance on Trump's statements would

not have been reasonable, *see id.* at 12. Indeed, Trump did not use explicit language stating that the U.S. Capitol grounds were no longer "restricted" or that it would not constitute obstruction to enter the Capitol. *Id.* at 11. But following other political leaders' demands for protestors to "save the republic," "not back down," "kiss ass," "stop" the "socialist Democrats," "fight for America," "fight to the very end," and "have a trial by combat," Trump directed those at the rally to "walk down to the Capitol," and to "show strength" and "fight like hell."

One could certainly find that it was reasonable for Mr. Rahm to believe that the former President of the United States himself could dictate where a person "could meet where they did" and likewise what was and was not a "restricted" area or building. *Cox*, 379 U.S. at 571. That Mr. Rahm himself did not engage in destructive behavior or enter through broken windows, for example, will help establish that his belief was reasonable. And given a lack of precedent and clear definition of what it means to "parade, protest, or picket," the situation present in *Cox* is present here: there is some "lack of specificity in those words" which, "may not render the statute unconstitutionally vague," but make it nevertheless "clear that the statute . . .. foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it." *Cox*, 379 U.S. at 568. Certainly, the former President of the United States directing Mr. Rahm to parade on the Capitol could be interpreted as the same sort of action seen by law enforcement officials in *Cox*.

To be clear, Mr. Rahm does not maintain that anything President Trump did or said that day was legal or justifiable. As the recent hearings before Congress related to the events of January 6 have demonstrated, President Trump was, at a minimum, complicit in creating the situation that enabled what took place at the Capitol on January 6 to take place. While Judge Howell said generally that "January 6 defendants asserting the entrapment by estoppel defense

could not argue that they were at all uncertain as to whether their conduct ran afoul of the criminal law, given the obvious police barricades, police lines, and police orders restricting entry at the Capitol," *Chrestman*, 525 F. Supp. 3d at 28–29, Mr. Rahm intends to show that he entered the building through a door that was unoccupied by police and, unbeknownst to him, had been opened by other violent and destructive individuals. Then, once inside the Capitol, when he saw police lined up and restricting access to certain areas, he exited after just eleven minutes inside. *Compare id.* ("video footage clearly show[ed] [the] defendant in the front of the crowd, interfering with police barriers, confronting and threatening law enforcement, encouraging the crowd to 'take' the Capitol, and leading the mob and his co-conspirators in efforts to keep the metal barriers in the Capitol tunnels from closing, including by using his axe handle"; defendant there also a known member of the Proud Boys).

To be further clear, Mr. Rahm does not, as Judge Howell insinuated, presently believe President Trump's directives "waived the entire corpus of criminal law" and gave him "permission and privilege" to violate the law. *Chrestman*, 525 F. Supp. at 32. However, the entrapment by estoppel defense is not meant to justify, ratify, or permit the government official's action. It is based on notion that, in simplest terms, one person should not be held to account for violating the law when a government agent gives that person permission to violate the law, even when that permission is unlawful or "misleading." *Raley*, 360 U.S. at 438–39. It is the action of "convicting a citizen for exercising a privilege which the State had clearly told him was available to him" that the "Due Process Clause does not permit." *Cox*, 379 U.S. at 571 (quoting *Raley*, 360 U.S. at 437).

The government relies on *United States v. North*, 910 F.2d 843, 879 (D.C. Cir. 1990) (per curiam), *opinion withdrawn and superseded in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990) in

arguing that Mr. Rahm is not entitled to an entrapment by estoppel defense instruction. In *North*, the D.C. Circuit found that the defendant, Oliver North, was not entitled to an absolute authorization defense in his criminal prosecution for his involvement in the Iran/Contra Affair, despite his assertions that he had been directed to engage in certain actions by the National Security Advisor to President Reagan. *Id.* at 881. But North himself was a Lieutenant Colonel and a former member of the National Security Counsel. *Id.* at 851. Thus, the D.C. Circuit found that simply "following orders, without more" could not "transform an illegal act into a legal one." *Id.* In so holding, however, the appellate court specifically noted that other defendants may be able to "avail themselves of the defense of reliance on an official misstatement of law." *Id.* at 851 n.10. Moreover, the D.C. Circuit found no error in the district court's instruction allowing the jury to consider evidence of authorization to some extent in deciding whether North had the requisite intent to convict him of 18 U.S.C. § 1505. In its instruction, "the trial court drew the three requirements that there be (1) specific instruction, (2) no alternative lawful means of compliance, and (3) a reasonable belief in the legal propriety of the order." *Id.* at 883. This instruction was drawn in part from *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) (per curiam).

In *Barker*, E. Howard Hunt, working in conjunction with John Erlichman, G. Gordon Liddy, and others, and acting in his capacity working for the White House, recruited the two defendants to illegally enter the office of a psychiatrist without a warrant to search for a file belonging to Daniel Ellsberg, the source of the Pentagon Papers leak. *Id.* at 943–44. While the court found it debatable whether Hunt had the legal authority to act as he did in his capacity working on behalf of the President, as Judge Wilkey noted, "that is not the issue here for [the defendants]." *Id.* at 950. The issue, rather, was "whether, given undisputed facts as known and

represented to them, it was reasonable in 1971 for [the defendants] to act on the assumption that authority had been validly conferred on" Hunt. *Id.*; *see also id.* at 957 (Merhige, J., concurring). Because the trial court failed to submit that issue to the jury, the defendants' convictions were reversed, and the matter was remanded for a new trial. *Id.* at 954.

Here, instead of a lieutenant colonel and member of the National Security Counsel, Mr. Rahm is a layman who works in construction. And instead of the edict coming from a presidential foot soldier like E. Howard Hunt, the commands that Mr. Rahm heard came from the President of the United States himself. *See Khanu*, 664 F. Supp. at 41 (noting that reasonableness of the reliance is based on *inter alia* the identity of the government official making the statement). Whether the President had the legal authority to direct a massive protest at the Capitol is likewise not the issue. At a minimum, a juror could find it was reasonable for Mr. Rahm to believe that President Trump's tone, words, and actions, especially in light of the preceding speeches, authorized Mr. Rahm to parade on Capitol ground and engage in disorderly and disruptive conduct with the intent to impede, disrupt, and disturb an orderly session of Congress to accomplish that goal.

This case is not a case of some crazed individual who came to Washington, D.C. intending to do harm or expecting to do violence. There is no evidence to even suggest that Mr. Rahm expected to end up on the Capitol grounds or its building prior to the former President's speech. However, when the former President himself told Mr. Rahm and others to go there — and provided the added comfort that he would be going there along with them — it was entirely reasonable for Mr. Rahm to rely on those representations. To allow the possibility of conviction for going there would amount to "the most indefensible sort of entrapment by the State —

convicting a citizen for exercising a privilege which," not just "the State," but the Head of the State himself "clearly had told him was available to him." *Raley*, 360 U.S. at 438.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anna Kessler, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have served a copy of Defendant's Reply to United States' Response to Notice of Public Authority Defense, by electronic case filing and/or hand delivery, upon:

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