UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CASE NO. 21-cr-593 (ABJ)**
	:	
MATTHEW LOGANBILL,	:	
	:	
Defendant.	:	

PARTIES POSITIONS ON THE LAW

Pursuant to the Court's Pretrial Order, filed July 14, 2023 (ECF No. 53), the parties hereby submit their positions on the applicable law.

I. Requested Standardized Criminal Jury Instruction for the District of Columbia

Below are the Standardized Criminal Jury Instruction for the District of Columbia requested by both parties:

A. 2.101 Function of the Court

B. 2.104 Evidence in the Case—Judicial Notice & Stipulations

C. 2.105 Statements of Counsel

D. 2.106 Indictment Not Evidence

E. 2.107 Burden of Proof—Presumption of Innocence

F. 2.108 Reasonable Doubt

G. 2.109 Direct and Circumstantial Evidence

H. 2.110 Nature of Charges Not to Be Considered

I. 2.111 Number of Witnesses

J. 2.112 Inadmissible and Stricken Evidence

K. 2.200 Credibility of Witnesses

L. 2.207 Police Officer's Testimony

M. 2.208 Right of Defendant Not to Testify or 2.209 Defendant as Witness

N. 2.216 Evaluation of Prior Inconsistent Statement of a Witness (if applicable)

O. 2.305 Statements of the defendant – Substantive Evidence

P. 2.402 Multiple Counts—One Defendant

Q. 3.101 Proof of State of Mind

R. 2.505 Possible Punishment Not Relevant

II. Requested Jury Instruction for Counts One through Five

Below are the proposed jury instructions for Counts One through Five requested by both parties. Any objections, alternatively requested instructions, legal authority in support or opposed to the instruction, and responses are included below the instruction in a footnote.

Count One – Obstruction of an Official Proceeding and Aiding and Abetting Violation of 18 U.S.C. §§ 1512(c)(2), 2[1]

Count One of the Indictment charges the defendant with corruptly obstructing an official proceeding, which is a violation of the law. Count One also charges the defendant with attempt to obstruct or impede an official proceeding and aiding and abetting others to commit that offense.

[1] These instructions are substantially similar to and modeled after the instructions agreed to by the Court in *USA v. Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173 at 7-9), *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 1-6); *USA v. Williams*, No. 21-cr-618 (ABJ) (ECF 122 at 28-31). For other January 6 trials that have used this instruction, see, in part, *USA v. Robertson*, No. 21-cr-34 (CRC) (ECF 86 at 11-12), *USA v. Reffitt*, No. 21-cr-32 (DLF) (ECF 119 at 25), *USA v. Williams*, No. 21-cr-377 (BAH) (ECF 112 at 7), *USA v. Hale-Cusanelli*, No. 21-cr-37 (TNM) (ECF 84 at 24), *USAv. Bledsoe*, No. 21-cr-204 (BAH) (ECF 215 at 7), and *USA v. Jensen*, No. 21-cr-6 (TFK) (ECF 97 at 24).

Elements

In order to find the defendant guilty of corruptly obstructing an official proceeding, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: The defendant attempted to, or did obstruct or impede an official proceeding;

Second: The defendant intended to obstruct or impede the official proceeding;

Third: The defendant acted knowingly, with awareness that the natural and probable effect of his conduct would be to obstruct or impede the official proceeding; and

Fourth: The defendant acted corruptly;

Definitions

The word "attempt" in the first element means that the defendant had the intent to do the act and took a substantial step towards completing it. In connection with that, it would not be enough to show merely that the defendant thought about it. The evidence must prove beyond a reasonable doubt that the defendant's mental state passed beyond the stage of thinking about the crime to actually intending to commit it. Nor would it be sufficient if the defendant simply made plans to commit the offense; the evidence must show that the defendant took clear steps to carry out his intent. If the government proves either that the defendant knowingly committed the act or attempted to commit it, the first element is satisfied.

For the first element, to "obstruct" or "impede" means to block, interfere with, or slow the progress of an official proceeding.[2]

[2] This Court did not define obstruct or impede in *USA v. Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173 at 7), *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 2), and *USA v. Williams*,

For the first element, the term "official proceeding" includes a proceeding before the Congress. The official proceeding need not be pending or about to be instituted at the time of the offense. If the official proceeding was not pending or about to be instituted, the government must prove beyond a reasonable doubt that the official proceeding was reasonably foreseeable to the defendant. As used in Count One, the term "official proceeding" means Congress's Joint Session to certify the Electoral College vote.[3]

For the third element, a person acts "knowingly" if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. In

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No. 21-cr-618 (ABJ) (ECF 122 at 28). **The defense objects to this definition and requests that the Court decline to define "obstruct" and "impede" it as it did in *Williams*.**

[3] In *United States v. Fischer*, 64 F.4th 329, 342 (D.C. Cir. 2023), the D.C. Circuit held "that congressional certification of the Electoral College count is an 'official proceeding'" for purposes of § 1512(c)(2). *See also* 18 U.S.C. § 1515(a)(1)(B) (defining "official proceeding" to include "a proceeding before the Congress"); § 1512(f)(1) ("For the purposes of this section—(1) an official proceeding need not be pending or about to be instituted at the time of the offense"). For the nexus requirement (that the official proceeding need be reasonably foreseeable), see *United States v. Sandlin*, 575 F. Supp. 3d 16, 32 (D.D.C. 2021); *United States v. Aguilar*, 515 U.S. 593, 599-600 (1995). For other January 6 trials that have used this instruction, see*, e.g.*, *United States v. Reffitt*, No. 21-cr-32 (DLF) (ECF No. 119 at 25-26), *United States v. Robertson*, No. 21-cr-34 (CRC) (ECF No. 86 at 12), *United States v. Thompson*, No. 21-cr-161 (RBW) (ECF No. 832 at 26), *United States v. Williams*, No. 21-cr-377 (BAH) (ECF No. 112 at 7); and *United States v. Thomas*, No. 21-cr-552 (DLF) (ECF No. 150 at 23).

The defense requests the following instruction regarding official proceeding:

> The term "official proceeding" is a formal hearing before a tribunal. The official proceeding need not be pending or about to be instituted at the time of the offense. If the official proceeding was not pending or about to be instituted, the government must prove beyond a reasonable doubt that the official proceeding was reasonably foreseeable to the defendant.

See United States v. Ermoian, 752 F.3d 1165, 1172 (9th Cir. 2013). Defense counsel acknowledges that this meaning was not accepted by several judges in this court in opinions issued in response to motions to dismiss this charge. However, in *United States v. Sandlin*, 21-cr-088 (DLF), ECF No. 63 at 7, the court agreed that "official proceeding" is one that must be akin to a formal hearing.

deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did, said, or perceived.[4]

For the fourth element, to act "corruptly," the defendant must use independently unlawful means or act with an unlawful purpose, or both. The defendant must also act with "consciousness of wrongdoing." "Consciousness of wrongdoing" means with an understanding or awareness that what the person is doing is wrong or unlawful.[5]

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[4] *See* The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit §§ 1512 & 1515(a)(1); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005); *United States v. Carpenter*, No. 21-cr-305 (JEB) (ECF No. 97 at 11) (including instruction that the evidence to be considered includes "what [the defendant] did, said, or perceived"); *United States v. Kelly*, No. 21-cr-708 (RCL) (ECF No. 101 at 9) (same).
This Court in *Rodriguez* included an additional paragraph to the definition of "knowingly," which the defense requests:

> The law requires that there be a connection or relationship in time, causation, or logic between the obstructive act or attempt and the proceeding; that is, the government must show that the defendant had knowledge that his actions were likely to affect the proceeding.

USA v. Rodriguez et al, 21-cr-0246 (ABJ) (ECF 173 at 7). This Court did not include this paragraph in *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 3).

[5] **The defense objects to this definition of corruptly and proposes this definition**:

> To act "corruptly," the defendant must act with the intent to procure an unlawful benefit either for himself or for some other person. The defendant must not only know he was obtaining an unlawful benefit, it must also be his objective or purpose. That benefit may be unlawful either because the benefit itself is not allowed by law, or because it was obtained by dishonest unlawful means. The defendant must engage in independently dishonest unlawful means – meaning the obstructive act must independently involve dishonesty. (i.e., altering evidence investigators are seeking, lying on interrogatories, seeking a false alibi witness, trying to get a grand juror to vote "no bill" regardless of evidence).

See United States v. Fischer, No. 22-3038, 2023 WL 2817988 (D.C. Cir. Apr. 7, 2023) (Walker, J. concurrence). In *Fischer*, Judge Walker concurred in the opinion contingent upon his definition of "corruptly" holding firm – explaining that this definition was the only way that this statute could remain constitutional. Judge Pan, who wrote the lead opinion, also recognized this definition but did not ultimately decide the issue given the fact that it was not squarely before the Court.

While the defendant must act with intent to obstruct the official proceeding, this need not be the defendant's sole purpose. A defendant's unlawful intent to obstruct justice is not negated by the simultaneous presence of another purpose for the defendant's conduct.[6]

Not all attempts to obstruct or impede an official proceeding involve acting corruptly. For example, a witness in a court proceeding may refuse to testify by invoking his or her constitutional privilege against self-incrimination, thereby obstructing or impeding the proceeding, but that person does not act corruptly. In addition, the First Amendment to the

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However, because the concurrence is conditional upon this definition, it is currently the controlling law on this issue.

Government response: The government opposes this definition of "corruptly." This definition is inconsistent with instructions given by this Court and other judges in this district. *See* The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit; *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005); *United States v. Gordon*, 710 F.3d1124, 1151 (10th Cir. 2013); *United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir. 2011); *United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013); *United States v. North*, 910 F.2d 843, 883 (D.C. Cir. 1990), withdrawn and superseded in part by *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990); *United States v. Sandlin*, No. 21-cr-88 (DLF), 2021 WL 5865006, at *11- 13 (D.D.C. Dec. 10, 2021); *United States v. Caldwell*, No. 21-cr-28 (APM), 2021 WL 6062718, at *11 (D.D.C. Dec. 20, 2021); *United States v. Mostofsky*, No. 21-cr-138 (JEB), 2021 WL 6049891, at *11 (D.D.C. Dec. 21, 2021); *United States v. Montgomery*, No. 21-cr-46 (RDM), 2021 WL 6134591, at *19-21 (D.D.C. Dec. 28, 2021); *United States v. Nordean*, No. 21-cr-175 (TJK), 2021 WL 6134595, at *10-11 (D.D.C. Dec. 28, 2021); *United States v. Lonich*, No. 18-10298, 2022 WL 90881, at *18 (9th Cir. Jan. 10, 2022).

Moreover, on August 2, 2023, Judge Bates denied a motion for a new trial premised on the argument that the court's jury instruction as to the definition of "corruptly" – which was substantially the same as the government's proposed instruction here – was made erroneous by the D.C. Circuit's ruling in *Fisher*. *United States v. Sheppard*, 21-cr-203 (JDB) (ECF 105). Specifically, the court found that the definition of "corruptly" set forth by the *Fisher* concurrence was not controlling, and thus did not require the defendant's proposed jury instruction, which added language regarding "obtain[ing] an unlawful benefit for himself or an associate." *Id.* at 19.

[6] **The defense objects to this additional language**.
Government response: The government cites as support *United States v. Carpenter*, No. 21-cr-305 (JEB) (ECF No. 97 at 11); *United States v. Kelly*, No. 21-cr-708 (RCL) (ECF No. 101 at 10), wherein the jury instructions included this language.

United States Constitution affords people the right to speak, assemble, and petition the Government for grievances. Accordingly, an individual who does no more than lawfully exercise those rights does not act corruptly. In contrast, an individual who obstructs or impedes a court proceeding by bribing a witness to refuse to testify in that proceeding, or by engaging in other independently unlawful conduct, does act corruptly. Often, acting corruptly involves acting with the intent to secure an unlawful advantage or benefit either for oneself or for another person.[7]

Aiding and Abetting

In this case, the government further alleges that the defendant aided and abetted others in committing obstruction of an official proceeding as charged in Count One. A person may be

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[7] This paragraph was not included in *USA v. Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173), or *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70). The government is requesting this paragraph and offers the following support: The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit; *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005); *United States v. Fischer*, 64 F.4th 329, 340 (D.C. Cir. 2023) (opinion of Pan, J.); *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013); *United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir. 2011); *United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013); *United States v. North*, 910 F.2d 843, 883 (D.C. Cir. 1990), *withdrawn and superseded in part by United States v. North*, 920 F.2d 940 (D.C. Cir. 1990); *United States v. Sandlin*, 575 F. Supp. 3d 16, 32 (D.D.C. 2021); *United States v. Caldwell*, 581 F. Supp. 3d 1, 19-20 (D.D.C. 2021); *United States v. Mostofsky*, 579 F. Supp. 3d 9, 26 (D.D.C. 2021); *United States v. Montgomery*, 578 F. Supp. 3d 54, 82 (D.D.C. 2021); *United States v. Lonich*, 23 F.4th 881, 902-03 (9th Cir. 2022). For other January 6 trials that have used similar instructions, see*, e.g.*, *United States v. Williams*, No. 21-cr-377 (BAH) (ECF No. 112 at 7), and *United States v. Reffitt*, No. 21-cr-32 (DLF) (ECF No. 119 at 25-29); *United States v. Kelly*, No. 21-cr-708 (RCL) (ECF No. 101 at 10).

The defense objects to the final line of this instruction and requests that the Court decline to include it did *Rodriguez* and *Black*.

The government would request the last line because incorporates aspects of the lead and concurring opinions in *United States v. Fischer*, 64 F.4th 329, 340 (D.C. Cir. 2023) (opinion of Pan, J.); *id.* at 352 (Walker, J., concurring), and was provided in *United States v. Nordean, et al*, 21-cr-175 (TJK) (ECF No. 767 at 31-32), *United States v. Kelly*, No. 21-cr-708 (RCL) (ECF No. 101 at 10), and *United States v. Thomas*, No. 21-cr-552 (DLF) (ECF No. 150 at 24).

guilty of an offense if he aided and abetted another person in committing the offense. A person who has aided and abetted another person in committing an offense is often called an accomplice. The person whom the accomplice aids and abets is known as the principal. It is not necessary that all the people who committed the crime be caught or identified. It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted that person in committing the crime.

In order to find the defendant guilty of obstruction of an official proceeding because he aided and abetted others in committing this offense, you must find the that the government proved beyond a reasonable doubt the following five requirements:

Elements

First: that others committed, or attempted to commit, obstruction of an official proceeding by committing each of the elements of the offense charged;

Second: that the defendant knew that obstruction of an official proceeding was going to be committed by others, or was being committed by others, or that others were attempting to commit it[8];

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[8] **The defense proposes the following as to element two**:

> That Mr. Loganbill had advance knowledge that the offense charged was going to be committed or was being committed by others.

See Rosemond v. United States, 572 U.S. 65, 81-82 (2014) ("The District Court erred…because it did not explain that Rosemond needed advance knowledge of a firearm's presence.").

Government response: The government's proposed instruction is appropriate and was taken from this Court's instructions in *USA v. Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173 at 8), *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 5). The defendant relies on *Rosemond.* In *Rosemond*, the Supreme Court determined the instruction in the case, that the defendant "knew his cohort used a firearm," was faulty because it did not ask the jury to determine when the defendant obtained the knowledge of the firearm, transforming the robbery to an armed robbery. 572 U.S. at 82. Here, we have no such ambiguity. The proposed instruction requires the government to prove the defendant knew the crime was going to be committed or knew it was actively being committed. Additionally, even if there was a risk in the Court's instruction, this is a bench trial and the Court is well aware of the law.

Third: that the defendant performed an act or acts in furtherance of the offense;

Fourth: that the defendant knowingly performed that act or acts for the purpose of aiding, assisting, soliciting, facilitating, or encouraging others in committing, or attempting to commit, the offense of obstruction of an official proceeding; and

Fifth: that the defendant did that act or acts with the intent that others commit, or attempt to commit, the offense of obstruction of an official proceeding.

To show that the defendant performed an act or acts in furtherance of the offense charged, the government must prove some affirmative participation by the defendant which at least encouraged others to commit the offense. That is, you must find that the defendant's act or acts did, in some way, aid, assist, facilitate, or encourage others to commit the offense. The defendant's act or acts need not further aid, assist, facilitate, or encourage every part or phase of the offense charged; it is enough if the defendant's act or acts further aided, assisted, facilitated, or encouraged only one or some parts or phases of the offense. Also, the defendant's acts need not themselves be against the law.[9]

In deciding whether the defendant had the required knowledge and intent to satisfy the fourth requirement for aiding and abetting, you may consider both direct and circumstantial evidence, including the defendant's words and actions and other facts and circumstances. However, evidence that the defendant merely associated with persons involved in a criminal

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the defendant aided and abetted a robbery, which became an armed robbery when a codefendant utilized a firearm. the jury instruction no knowledge of a gun, enhancing the crime to armed robbery. 572 U.S. 65, 81-82

[9] **Defense objects to this addition**.

Government response: This instruction was given by the Court in *USA v. Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173 at 9) and *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 5). In *Rodriguez*, the Court noted that the instruction was agreed to by the parties. *Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173 at 9).

venture or was merely present or was merely a knowing spectator during the commission of the offense is not enough for you to find the defendant guilty as an aider and abettor. If the evidence shows that the defendant knew that the offense was being committed or was about to be committed, but does not also prove beyond a reasonable doubt that it was the defendant's intent and purpose to aid, assist, encourage, facilitate, or otherwise associate the defendant with the offense, you may not find the defendant guilty of obstruction of an official proceeding as an aider and abettor. The government must prove beyond a reasonable doubt that the defendant in some way participated in the offense committed by others as something the defendant wished to bring about and to make succeed.

A defendant may be found guilty of the offense charged in Count One if the defendant obstructed of an official proceeding, attempted to obstruct of an official proceeding, or aided and abetted an obstruction of an official proceeding. Each of these three ways of committing the offense is described in the instruction. If you find beyond a reasonable doubt that the defendant committed the offense of obstruction of an official proceeding in any one of these three ways, you should find the defendant guilty of Count One, and you need not consider whether the defendant committed the offense of obstruction of an official proceeding in the other two ways.

Count Two – Entering and Remaining in a Restricted Building or Grounds
Violation of 18 U.S.C. § 1752(a)(1)[10]

Count Two of the Indictment charges the defendant with entering or remaining in a restricted building or grounds, which is a violation of federal law.

[10] These instructions are substantially similar to and modeled after the instructions agreed to by the Court in *USA v. Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173 at 7-9), and *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 7).

Elements

In order to find the defendant guilty of this offense, you must find that the government proved each of the following elements beyond a reasonable doubt:

First: that the defendant entered or remained in a restricted building or grounds without lawful authority to do so.

Second: that the defendant did so knowingly.[11]

[11] **The defense requests the following as to the elements of Count Two**:

> Count Two of the Indictment charges the defendant with entering or remaining in a restricted building or grounds.
>
> In order to find the defendant guilty of this offense, you must find that the government proved each of the following elements beyond a reasonable doubt:
>
> **First:** that Mr. Loganbill entered or remained in a restricted building or grounds without lawful authority to do so;
>
> **Second:** that Mr. Loganbill did so knowingly, meaning he knew that the area he entered or remained in was a "restricted building or grounds" as defined below, and he knew he lacked lawful authority to enter or remain there.

See Legal Instruction adopted by Judge Lamberth in *United States v. Sturgeon*, 1:21CR91(RCL), ECF. No. 163.

Government response: The Government opposes this modification of the instruction. 18 U.S.C. §§ 1752, 3056; *see United States v. Jabr*, 4 F.4th 97, 101 (D.C. Cir. 2021). This Court has previously utilized the government's proposed instruction. *USA v. Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173 at 6), *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 7); *see also United States v. Eicher*, 22-cr-38 (BAH) (ECF No. 82 at 6).

Definitions

The term "restricted building or grounds" means any posted, cordoned off, or otherwise restricted area of a building or grounds where a person protected by the Secret Service is or will be temporarily visiting. The term "person protected by the Secret Service" includes the Vice President and the immediate family of the Vice President.

The term "knowingly" as the same meaning described in the instruction for Count One.[12]

Count Three – Disorderly or Disruptive Conduct in a Restricted Building or Ground (Violation of 18 U.S.C. § 1752(a)(2)[13]

Count Three of the Indictment charges the defendant with disorderly or disruptive conduct in a restricted building or grounds, which is a violation of federal law.

Elements

In order to find the defendant guilty of this offense, you must find that the government proved each of the following elements beyond a reasonable doubt:

First: that the defendant engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building or grounds.

Second: that the defendant did so knowingly, and with the intent to impede or disrupt the orderly conduct of Government business or official functions.[14]

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[12] *Supra*, note 11.

[13] These instructions are substantially similar to and modeled after the instructions agreed to by the Court in USA v. *Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 9-10), unless otherwise noted.

[14] T**he defense requests the same as to this element as its request as to Count Two**. The defense further requests the same as to "knowingly" as to Count Two, namely, the instruction adopted by Judge Lamberth in *United States v. Sturgeon*, 1:21CR91(RCL), ECF. No. 163.

Government response: The Government opposes this modification of the instruction. 18 U.S.C. §§ 1752, 3056; *see United States v. Jabr*, 4 F.4th 97, 101 (D.C. Cir. 2021). This Court has

Third: that the defendant's conduct occurred when, or so that, his conduct in fact impeded or disrupted the orderly conduct of Government business or official functions.

Definitions

"Disorderly conduct" is conduct that tends to disturb the public peace or undermine public safety. Disorderly conduct includes when a person acts in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken, uses words likely to produce violence on the part of others, or is unreasonably loud and disruptive under the circumstances.[15]

"Disruptive conduct" is a disturbance that interrupts an event, activity, or the normal course of a process.

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previously utilized the government's proposed instruction. *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 9); *see also United States v. Eicher*, 22-cr-38 (BAH) (ECF No. 82 at 6). And, as noted in the above discussion of Count Two, the Court utilized the government's proposed definition of knowledge for a similar charge in *USA v. Rodriguez et al*, 21-cr-0246 (ABJ) (ECF 173 at 6).

[15] This paragraph differs from *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 9-10). The government offers the following support for this paragraph, *United States v. Grider*, 21-cr-22 (CKK) (ECF No. 150 at 24) ("'[D]isorderly' conduct is that which 'tends to disturb the public peace, offend public morals, or undermine public safety.' 'Disorderly,' *Black's Law Dictionary* (9th ed. 2009); *United States v. Schwartz, et al,*, No. 21-cr-178 (APM) (ECF No. 172 at 27); *see also* 'Disorderly,' *Oxford English Dictionary* (2nd ed. 1989) ('Not according to order or rule; in a lawless or unruly way; tumultuously, riotously.')").

With respect to the definition of disorderly conduct, the defense requests the following, which mirrors what was given in *U.S v. Hale Cusanelli*, 1:21CR37(TNM) and is the definition found in the Red Book:

"Disorderly conduct" occurs when a person acts in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession if likely to be harmed or taken, uses words likely to produce violence on the part of others, is unreasonably loud and disruptive under the circumstances, or interferes with another person by jostling against or unnecessarily crowding that person.

The term "knowingly" has the same meaning described in the instructions for Count One.

The term "restricted building or grounds" has the same meanings as described in the instructions for Count Two.

Count Four – Disorderly Conduct in a Capitol Building
Violation of 40 U.S.C. § 5104(e)(2)(D)[16]

Count Four of the Indictment charges the defendant with violent entry and disorderly and disruptive conduct in a Capitol Building, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following elements beyond a reasonable doubt:

Elements

First: that the defendant engaged in disorderly or disruptive conduct in any of the United States Capitol Buildings.

Second: that the defendant did so with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress.[17]

Third: that the defendant acted willfully and knowingly.

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[16] These instructions are substantially similar to and modeled after the instructions agreed to by the Court in *USA v. Joshua Matthew Black*, 21-cr-127 (ABJ) (ECF 70 at 14).

[17] **The defense requests that the Court define "orderly conduct of a session of congress" as was defined in *United States v. Hale Cusanelli*, ECF. No. 84 at 37**:

> For the purpose of Count Three, "the orderly conduct of a session of Congress or either House of Congress" includes all the actions of the Joint Session of Congress convened on January 6, 2021, to certify the Electoral College Presidential Election of 2020.

Definitions

The term "disorderly or disruptive conduct" has the same meaning described in the instructions for Count Three defining "disorderly conduct" and "disruptive conduct."[18]

The term "United States Capitol Buildings" includes the United States Capitol located at First Street, Southeast, in Washington, D.C.

A person acts "willfully" if he knew his conduct was unlawful and intended to do something that the law forbids, that is, to disobey or disregard the law. "Willfully" does not, however, require proof that the defendant had any evil motive or bad purpose other than the purpose to disobey or disregard the law, nor does it require proof that the defendant be aware of the specific law or rule that his conduct may be violating.

The term "knowingly" has the same meaning described in the instructions for Count One.

Count Five – Parading, Demonstrating, or Picketing in a Capitol Building
Violation of 40 U.S.C. § 5104(e)(2)(G)[19]

Count Eleven of the Indictment charges the defendant with parading, demonstrating, or picketing in a Capitol Building, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following elements beyond a reasonable doubt:

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[18] **The defense requests the definition of disorderly conduct requested above as to Count Three**.

[19] These instructions are modeled after, *United States v. Barnett*, 21-cr-38 (CRC) (ECF No. 158 at 23); *United States v. Jensen*, No. 21-cr-6 (TJK) (ECF No. 97 at 42); *United States v. Williams*, 21-cr-618 (ABJ) (ECF 122 at 40).

Elements

First: that the defendant paraded, demonstrated, or picketed in any of the United States Capitol Buildings.

Second: that the defendant acted willfully and knowingly.

Definitions

The terms "parade" and "picket" have their ordinary meanings. The term "demonstrate" refers to conduct that would disrupt the orderly business of Congress by, for example, impeding or obstructing passageways, hearings, or meetings, but does not include activities such as quiet praying.[20]

The terms "United States Capitol Buildings," "knowingly," and "willfully" have the same meanings described in the instructions for Counts One and Four.

[20] The example was not given in *United States v. Williams*, 21-cr-618 (ABJ) (ECF 122 at 42). The government offers the following cases for support, *United States v. Barnett*, 21-cr-38 (CRC) (ECF No. 158 at 23); *see also Bynum v. United States Capitol Police Board*, 93 F. Supp. 2d 50, 58 (D.D.C. 2000). The defense objects to this example and requests that the Court decline to incorporate an example into its instruction, as it did in *Williams*.