

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

LUKE WESSLEY BENDER and
LONDON BRYCE MITCHELL,

Defendants

Criminal Case No. 21-508 (BAH)

Chief Judge Beryl A. Howell

MEMORANDUM AND ORDER

Defendants Luke Wessley Bender and Landon Bryce Mitchell face a stipulated trial on December 2, 2022, on one felony charge and five misdemeanor charges each stemming from their alleged conduct at the U.S. Capitol on January 6, 2021. The government has moved to preclude defendants from pursuing a trio of hypothesized lines of defense that the government contends would be improper. Gov't's Mot. *in Limine* Preclude Improper Def. Args. and Evid. About Law Enf't ("Gov't's Mot."), ECF No. 46. For the reasons discussed below, the motion is granted.

I. DISCUSSION

The government "requests that the Court issue an order precluding defendants" from: "(1) arguing any entrapment by estoppel defense related to law enforcement; (2) offering evidence or argument concerning any claim that by allegedly failing to act, law enforcement made the defendants' entry into the United States Capitol building or grounds or their conduct therein lawful; or (3) arguing or presenting evidence of alleged inaction by law enforcement unless the defendants specifically observed or were otherwise aware of such conduct." *Id.* at 1. Mitchell responds that, as to the first two parts of the government's motion, he "does not intend to claim entrapment by estoppel nor does he intend to argue that law enforcement gave him lawful authority to enter and remain in the building." Def. Mitchell's Resp. Gov't's Mot. *in*

Limine Preclude Improper Def. Args. and Evid. About Law Enf't ("Mitchell's Opp'n") at 2, ECF No. 58. *See also* Def. Bender's Resp. Gov't's Mot. *In Limine* Preclude Improper Def. Args. and Evid. About Law Enf't ("Bender's Opp'n") at 1, 4, ECF No. 60 (disclaiming any intention to raise an entrapment defense).¹ Thus, those parts of the government's motion are promptly granted and defendants are precluded from asserting an entrapment by estoppel defense or arguing that law enforcement, by failing to act or censure their conduct, somehow made any of their otherwise allegedly unlawful conduct lawful.

Defendants resist only the third part of the government's motion to preclude them from presenting evidence or argument about alleged inaction by law enforcement officers, except to the extent that defendant observed or was otherwise actually aware of such inaction. *See* Gov't's Mot. at 4. According to Mitchell, "any evidence that relates to [his] subjective intent—that is, whether he knew he did not have lawful authority to enter, whether he specifically intended to disrupt government business, and whether he specifically intended to obstruct or impede an official proceeding—is relevant and admissible at trial." Mitchell's Opp'n at 2–3. *See also* Bender's Opp'n at 4 (arguing that "law enforcement's failure to stop, arrest, or detain [Bender] inside the U.S. Capitol goes directly to his knowledge as to whether his actions were unlawful and his state of mind"). The government concedes as much, noting that "the conduct of law enforcement officers may be relevant to the defendants' state of mind on January 6, 2021." Gov't's Mot. at 4. As a logical matter, however, any action or inaction of which defendants were

¹ Defendants' responses were a wise choice. Defendants are entirely unable to establish the elements of an estoppel defense to avoid criminal liability, since not even the President of the United States may unilaterally abrogate statutory law, let alone government actors in less powerful offices, such as law enforcement officers protecting the U.S. Capitol Building. *See United States v. Chrestman*, 525 F. Supp. 3d 14, 32 (D.D.C. 2021) (holding that the estoppel defense is unavailable "in cases where a government actor's statements constitute 'a waiver of law' beyond his or her lawful authority" (quoting *Cox v. State of La.*, 379 U.S. 559, 569 (1965))). Defendant's "public authority" defense, which alleges that former president Donald Trump "directed and authorized" his conduct, *see* Def. Mitchell's Notice of Public Authority, ECF No. 61, suffers from the same deficiency. *See Chrestman*, 525 F. Supp. 3d at 33 (holding that a president "cannot, in keeping with his constitutional function and his responsibilities under Article II, lawfully permit actions that directly undermine the Constitution," such as "direct[ing] an assault on the coequal Legislative branch of government").

not aware cannot possibly have had any effect on their state-of-mind and is inadmissible as irrelevant under Federal Rule of Evidence 401.

While defendants certainly have “the right to introduce evidence as to [their] intent,” Mitchell’s Opp’n at 2, evidence of law enforcement inaction is admissible only if defendants can establish their awareness of the alleged inaction by officers—which they can do in any number of ways, such as a good faith proffer or using other evidence to show that defendant was sufficiently nearby the alleged inaction at the correct time to have perceived and understood such inaction as implicitly endorsing his decision to enter the Capitol. *See* Mem. & Order at 3, *United States v. Mels*, Case No. 21-cr-184 (BAH), ECF No. 66. The photographs of Bender appearing near law enforcement officers is a start in this direction, but still photographs do not sufficiently demonstrate that the officers were in fact inactive; a proffer would still be required for Bender to meet this burden. *See* Bender’s Opp’n at 5–6. Short of that, defendants cannot present a defense to avoid criminal liability for otherwise unlawful conduct due to inaction by law enforcement officers at the U.S. Capitol.

II. ORDER

For the foregoing reasons, it is hereby

ORDERED that the government’s Motion *in Limine* to Preclude Improper Defense Arguments and Evidence About Law Enforcement, ECF No. 46, is **GRANTED**.

SO ORDERED.

Date: November 22, 2022

BERYL A. HOWELL
Chief Judge