

NOTE

THE PRESIDENT TOLD ME TO: THE PUBLIC AUTHORITY DEFENSE IN THE TRUMP ERA

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After hundreds were charged in connection with the events of January 6, 2021, several defendants argued they were only doing what President Trump told them to. More specifically, they raised the public authority defense as articulated in the U.S. Court of Appeals for the District of Columbia Circuit's Watergate-era case United States v. Barker. The defense involves a claim that an individual was authorized to engage in otherwise unlawful activity by a government official. But the D.C. Circuit was split on whether the government official in question must have the authority to make such an authorization, or if the defendant's belief in the official's apparent authority would suffice. The D.C. Circuit never clarified the standard, and now that President Trump has pardoned the January 6 defendants, the court is once again unable to do so. Nevertheless, the January 6 case is a prime test to determine the proper standard, and this is the prime time to do so, given the possibility of future prosecutions of current Trump Administration associates who may want to claim reliance on President Trump's direction.

This Note makes four contributions: First, it describes the public authority defense case law, beginning with the actual-versus-apparent authority debate in Barker and its progeny. Second, this Note argues that the actual authority standard is correct based on existing law and policy. Third, it applies the actual and apparent authority standards to the January 6 case, illustrating how only the actual authority standard provides a workable rule. This conclusion makes clear that the public authority defense must fail for the January 6 defendants, but not for the

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reason courts thought. Fourth, this Note elucidates additional implications for the public authority defense and for those President Trump directs to take unlawful action during his second term. Ultimately, individuals cannot rely on a president's orders to escape criminal culpability.

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INTRODUCTION

President Trump's approach to his second administration is best captured in his own tweet: "He who saves his Country does not violate any Law."¹ Newly emboldened in his second term by broad criminal immunity,² President Trump has made clear with his words that he believes he is above the law and will act accordingly. It is less clear, however, what happens to those the President instructs to undertake unlawful action at his behest.³ Perhaps these individuals have an

¹ Donald J. Trump (@realDonaldTrump), X (Feb. 15, 2025, 1:32 PM), <https://x.com/realDonaldTrump/status/1890831570535055759> [<https://perma.cc/Z9L5-VV6V>].

² See *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024). The president is also immune from civil liability for official actions taken while in office. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

³ The *Trump* opinion only addressed the president, and it relied on the president's unique position to hold that he is entitled to immunity. See *Trump v. United States*, 144 S. Ct. at 2327,

affirmative defense: that the President told them to act unlawfully, and by virtue of his position as President of the United States, he legally authorized their otherwise criminal conduct. This defense is not merely hypothetical; it was raised by several of the individuals charged for their involvement with the January 6 attack on the U.S. Capitol. Although the January 6 rioters have all received pardons,⁴ revisiting their cases is a vital exercise to understand how such a defense works in anticipation of similar prosecutions that may arise from conduct engaged in during President Trump's second term.

Throughout the various January 6 legal proceedings, several defendants pointed to President Trump's incendiary language to argue that he ordered them to "stop the steal."⁵ During the presidential debate back in September 2020, in response to a question about whether he would condemn the far-right militia group the Proud Boys, President Trump told the group to "stand back and stand by."⁶ In the months leading up to January 6, he repeatedly espoused the claim that the presidential election was stolen from him.⁷ On the evening before the attack, President Trump again emphasized the election had been stolen and that his supporters had to do something to stop President-elect Joe Biden from taking office.⁸ Finally, in a speech at the rally on the National Mall on January 6, 2021, just before the attack on the Capitol began, he made the following remarks:

Our country has had enough. We will not take it anymore and that's what this is all about. And to use a favorite term that all of you people really came up with: We will stop the steal. . . . And fraud breaks up everything, doesn't it? When you catch somebody in a fraud, you're allowed to go by very different rules. . . . And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country

2330–31. Furthermore, absolute presidential immunity from civil suit does not extend to the president's aides, so it is unlikely that criminal immunity would. See *Harlow v. Fitzgerald*, 457 U.S. 800, 808–13 (1982).

⁴ Proclamation No. 10,887, 90 Fed. Reg. 8331 (Jan. 29, 2025).

⁵ See *infra* notes 92–93.

⁶ Kathleen Ronayne & Michael Kunzelman, *Trump to Far-Right Extremists: 'Stand Back and Stand By,'* AP News (Sept. 30, 2020, 2:52 PM), <https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f> [<https://perma.cc/LR78-FCNV>].

⁷ H.R. Rep. No. 117-663, at 195, 213–16 (2022).

⁸ Donald J. Trump (@realDonaldTrump), X (Jan. 5, 2021, 5:05 PM), <https://x.com/realDonaldTrump/status/1346578706437963777> [<https://perma.cc/TK9L-UAP6>].

anymore. . . . So we're going to . . . walk down Pennsylvania Avenue. . . . And we're going to the Capitol, and we're going to try and give . . . them the kind of pride and boldness that they need to take back our country. So let's walk down Pennsylvania Avenue.⁹

Defendants used this language to argue that President Trump legally authorized their break-in of the Capitol Building. For example, defendant and Proud Boys member William Chrestman argued the following in a motion requesting release on bail:

Trump's incitement and enablement of this insurrectionary riot weighs heavily against the weight of the evidence prong, because the mob was given explicit permission and encouragement by the former President to do what they did. The American head of state directed a specific action; the Due Process Clause says that those who obeyed him have a viable defense against criminal liability.¹⁰

Similarly, defendant Alexander Sheppard argued the following in his response to the government's motion in limine:

Never before in our nation's history has a sitting United States President, alongside other prominent elected officials, invited, encouraged, and condoned the public to engage in criminal conduct. . . . [T]he federal government now opposes Mr. Sheppard's right to present a viable defense.¹¹

This is the public authority defense. As described by the Department of Justice, such a defense is available where a government official authorized the defendant to engage in otherwise unlawful conduct.¹² This

⁹ Transcript of Trump's Speech at Rally Before US Capitol Riot, AP News (Jan. 13, 2021, 9:11 PM) [hereinafter Trump January 6 Speech Transcript], <https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27>. President Trump was impeached for inciting insurrection based in part on this language. H.R. Res. 24, 117th Cong., at 3 (2021). Incitement does not necessarily equate to authorization, but the fact that this language was considered incitement by Congress nonetheless helps explain the effect President Trump's words had on his supporters.

¹⁰ Detention Memorandum at 11, *United States v. Chrestman*, 521 F. Supp. 3d 1107 (D. Kan. 2021) (No. 21-mj-08023) [hereinafter Detention Memorandum, *Chrestman*].

¹¹ Defendant's Reply to Government's Opposition to Notice of Public Authority Defense at 3–4, *United States v. Sheppard*, No. 21-cr-00203, 2022 WL 17978837 (D.D.C. Dec. 28, 2022) [hereinafter Defendant's Reply to Government's Opposition, *Sheppard*].

¹² U.S. Dep't of Just., Crim. Res. Manual § 2055, <https://www.justice.gov/archives/jm/criminal-resource-manual-2055-public-authority-defense> [<https://perma.cc/85ZN-SK34>].

defense has its origins in a Watergate-era case, *United States v. Barker*.¹³ There, the U.S. Court of Appeals for the District of Columbia Circuit held that the trial court should have allowed the defendants to raise the defense that they broke into a psychiatrist's office to steal information about the person who leaked the Pentagon Papers only because a White House official told them to.¹⁴ But the judges disagreed on how the defense should work. Judge Robert Merhige wrote that the defense required that the defendant receive authorization from someone who had the actual authority to make such an authorization.¹⁵ Judge Malcolm Wilkey wrote separately that the defendant's belief in the official's apparent authority would suffice.¹⁶ That split has never been resolved.

The U.S. District Court for the District of Columbia decided that the public authority defense was unavailable in the January 6 cases.¹⁷ While that conclusion is correct, the court's reasoning is unpersuasive. The court did not clarify the correct standard for the defense and failed to wrestle with the factual comparisons to *Barker*.¹⁸ To foreshadow, the court concluded that the public authority defense fails because President Trump never gave an affirmative authorization; however, *Barker* and its progeny do not impose such a strict requirement.¹⁹ Engaging with the public authority defense case law reveals that the defense fails for the January 6 defendants not because President Trump never authorized their conduct, but because the President does not have the *power* to do so.

This Note is the first to give an in-depth treatment to the public authority defense case law, apply it to the January 6 defendants, and use this application to argue for the correct standard for the defense.²⁰ Part I

¹³ 546 F.2d 940 (D.C. Cir. 1976) (per curiam).

¹⁴ Id. at 943, 954 (Wilkey, J.).

¹⁵ Id. at 955 (Merhige, J.).

¹⁶ Id. at 949 (Wilkey, J.).

¹⁷ *United States v. Chrestman*, 525 F. Supp. 3d 14, 29, 33 (D.D.C. 2021).

¹⁸ See *infra* Section I.C.

¹⁹ *Infra* Section I.C.

²⁰ The literature that addresses the public authority defense largely focuses instead on the related defense of entrapment by estoppel. See generally, e.g., John T. Parry, Culpability, Mistake, and Official Interpretations of Law, 25 Am. J. Crim. L. 1 (1997). But see generally Matthew Babb & Lauren Emmerich, Official Misrepresentations of the Law and Fairness, 17 Crim. L. & Phil. 83 (2023) (addressing both the entrapment by estoppel and public authority defense). A law review article from 1978 by attorney Stephen Kristovich addressed the apparent-versus-actual authority debate in *Barker* in its immediate wake and argued for the actual authority standard, but it did not have the benefit of analyzing the decades of case law following *Barker*. See generally Stephen M. Kristovich, *United States v. Barker: Misapplication of the Reliance on an Official Interpretation of the Law Defense*, 66 Calif. L.

explores the public authority defense case law, beginning with the diverging opinions in *United States v. Barker* that created the debate between actual and apparent authority. Part I then looks to other courts of appeals to draw out more precise contours of the defense. Part I concludes by examining how the January 6 defendants used this defense and why it was rejected.

Part II argues that the actual authority standard is the proper test for the public authority defense based on the weight of circuit-level authority, comparisons to the related doctrines of entrapment by estoppel and superior orders in military law, and public policy concerns. Part III then uses the January 6 defendants as a test case to further establish that only the actual authority standard produces a workable rule and legitimate outcome. This conclusion makes clear that the D.C. District Court had the right answer that the public authority defense should fail for the January 6 defendants, but for the wrong reason.

Part IV addresses implications of the January 6 case. First, the case draws out an additional limit on the defense beyond the actual authority standard, such that it should not work where there is a broad, public authorization. Second, the case suggests that the public authority defense is limited to specific factual circumstances and that *Barker* itself might be an exception rather than the rule. In conclusion, it is clear that in the event of future prosecutions of Trump Administration officials and associates, a defense that President Trump authorized their conduct is likely to fail.

I. THE PUBLIC AUTHORITY DEFENSE

The typical public authority defense scenario occurs where a government official tells someone to do something for which the individual is later charged.²¹ The general idea behind the defense is that it is unfair for the government to punish someone for doing something the

Rev. 809 (1978). Professor Alfredo Garcia explored the applicability of the public authority defense to a military officer turned January 6 defendant and concluded the public authority defense could not justify the January 6 conduct, but he neither established the precise contours of the defense nor explained why the elements laid out in either *Barker* opinion were not met. See generally Alfredo Garcia, The Public Authority Defense, January 6, 2021, and the Following Orders Defense: A Juxtaposition, in *Human Flourishing: The End of Law* 955 (W. Michael Reisman & Roza Pati eds., 2023). This Note pulls all the cases and doctrines together to argue for one articulation of the public authority defense using the January 6 test case to do so.

²¹ See, e.g., *United States v. Barker*, 546 F.2d 940, 946 (D.C. Cir. 1976) (Wilkey, J.).

government told them to do in the first place.²² Because the government both gives the directive and later prosecutes for adhering to that directive, we might conceptualize the defense as a form of estoppel. Indeed, the closely related entrapment by estoppel defense shares similar doctrinal underpinnings.²³ For that reason, although they are technically two separate defenses, January 6 defendants raised both.²⁴ The Supreme Court has recognized entrapment by estoppel on three occasions, and the defense has received comprehensive attention in legal scholarship.²⁵ It clearly fails for the January 6 defendants because the defense is only available where the defendant did not know the directed conduct was unlawful.²⁶ The January 6 defendants knew their conduct was unlawful,

²² Parry, *supra* note 20, at 57. See generally Babb & Emmerich, *supra* note 20 (discussing the importance of holding an individual criminally responsible only for actions that they know are unlawful).

²³ Entrapment by estoppel allows a defendant to avoid culpability when a government official mistakenly advises the defendant about what the law permits. U.S. Dep't of Just., *supra* note 12; *Cox v. Louisiana*, 379 U.S. 559, 571 (1965). The difference from the public authority defense is that in entrapment by estoppel, the mistake is on the official, whereas in public authority, the mistake is on the defendant who believes they were authorized. U.S. Dep't of Just., *supra* note 12.

²⁴ *United States v. Grider*, No. 21-cr-00022, 2022 WL 3030974, at *1 (D.D.C. Aug. 1, 2022); *United States v. Easterday*, No. 22-cr-00404, 2023 WL 6646384, at *2–3 (D.D.C. Oct. 12, 2023) (mem.); *United States v. Bru*, No. 21-cr-00352, 2023 WL 4174293, at *2 (D.D.C. June 26, 2023); *United States v. Baez*, 695 F. Supp. 3d 94, 105–06 (D.D.C. 2023); *United States v. Navarro*, 651 F. Supp. 3d 212, 240–41 (D.D.C. 2023); *United States v. Eicher*, No. 22-cr-00038, 2023 WL 3619417, at *4 (D.D.C. May 23, 2023); *United States v. Sheppard*, No. 21-cr-00203, 2022 WL 17978837, at *7–9 (D.D.C. Dec. 28, 2022) (mem.); *United States v. Carpenter*, No. 21-cr-00305, 2023 WL 1860978, at *2–3 (D.D.C. Feb. 9, 2023) (mem.). The confusion over whether these are two separate defenses is so pervasive that even courts within the District Court for the District of Columbia are split on the question. See *United States v. Bingert*, No. 21-cr-00091, 2023 WL 3203092, at *5 n.2 (D.D.C. May 2, 2023).

²⁵ *Raley v. Ohio*, 360 U.S. 423, 425–26 (1959); *Cox*, 379 U.S. at 571; *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 670 (1973); Parry, *supra* note 20, at 37–47; Babb & Emmerich, *supra* note 20, at 86–87; Sean Connelly, *Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law*, 48 U. Mia. L. Rev. 627, 630 (1994); John W. Lundquist, “They Knew What We Were Doing”: The Evolution of the Criminal Estoppel Defense, 23 Wm. Mitchell L. Rev. 843, 847–49 (1997).

²⁶ Chrestman’s argument, as articulated in the introduction, more closely reflects an entrapment by estoppel theory than a public authority theory because of his reliance on due process. The Supreme Court grounded entrapment by estoppel in due process because it would be fundamentally unfair to convict someone for relying on a government official’s erroneous interpretation of law. *Raley*, 360 U.S. at 425–26; *Cox*, 379 U.S. at 571; *Pa. Indus. Chem. Corp.*, 411 U.S. at 674. However, the district court concluded entrapment by estoppel must fail in Chrestman’s case because he could have been under no illusions about the illegality of his conduct. *United States v. Chrestman*, 525 F. Supp. 3d 14, 30, 32 (D.D.C. 2021). This elucidates an important limit on entrapment by estoppel: it is available only when a defendant

but they believed they were nonetheless authorized by President Trump.²⁷ For those reasons, this Note focuses only on the public authority defense.

The Supreme Court has never recognized the public authority defense; instead, the primary citation is to *United States v. Barker*.²⁸ However, the public authority defense was incorporated into the Federal Rules of Criminal Procedure in 1988 after *Barker*.²⁹ Rule 12.3 requires that a defendant who wishes to avail herself of the public authority defense at trial notify the government in writing in advance, and the government then has a chance to respond.³⁰ This requirement leads to litigation over the use of the defense, and from such litigation we can learn how the defense is meant to be applied. Interestingly, Rule 12.3 recognizes both the actual and apparent authority standards established in the *Barker* opinions without taking a view on either.³¹ In any event, that the defense is recognized by the Federal Rules of Criminal Procedure grants it the imprimatur of the Supreme Court's authority.³² So even though the Supreme Court has not yet ruled on the public authority defense, the inclusion of the two standards as articulated in *Barker* adds additional legitimacy to the defense and to the dueling *Barker* opinions.

deals with a complex or ambiguous question of law, such as what “near” a courthouse means. See *Cox*, 379 U.S. at 568–69. This reflects a concern in the literature too that entrapment by estoppel does not apply to *mala in se* crimes. See Parry, *supra* note 20, at 24–26; Babb & Emmerich, *supra* note 20, at 105. The illegality of breaking into the Capitol Building should have been obvious to January 6 defendants. See *Chrestman*, 525 F. Supp. 3d at 32 (referring to the “police barricades, police lines, and police orders restricting entry at the Capitol”). Thus, the January 6 defendants were not seeking advice from President Trump as to what conduct was lawfully permitted; they knew the conduct was unlawful, and so entrapment by estoppel was unavailable to them. The better argument for their facts was that the President *authorized* their unlawful conduct.

²⁷ Defendant's Reply to Government's Opposition, *Sheppard*, *supra* note 11, at 7; Defendant's Response to the Government's Omnibus Motion in Limine to Preclude Improper Defense Arguments & Evidence at 5–6, 15, *Easterday*, No. 22-cr-00404, 2023 WL 6646384 [hereinafter Defendant's Response to the Government's Omnibus Motion in Limine, *Easterday*].

²⁸ 546 F.2d 940 (D.C. Cir. 1976) (per curiam).

²⁹ Fed. R. Crim. P. 12.3.

³⁰ *Id.* For a discussion of the constitutionality of the rule, see Mary Patricia Jones, Note, Proposed Rule 12.3: Prosecutorial Discovery and the Defense of Federal Authority, 72 Va. L. Rev. 1299, 1307–16 (1986).

³¹ Fed. R. Crim. P. 12.3(a)(1).

³² The Supreme Court originally adopted the rules in 1944, and the rules have been amended by Congress since. Federal Rules of Criminal Procedure, Admin. Off. of the U.S. Cts., <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-criminal-procedure> [<https://perma.cc/2YGM-8ZBG>] (last visited Mar. 10, 2025).

A. United States v. Barker: Apparent Versus Actual Authority

Barker hails from the Watergate era. Defendants Bernard Barker and Eugenio Martinez (along with Felipe de Diego, John Erlichman,³³ and G. Gordon Liddy) were convicted of conspiring to violate the Fourth Amendment rights of Dr. Louis Fielding.³⁴ Dr. Fielding was the psychiatrist for Daniel Ellsberg, the individual who leaked the Pentagon Papers.³⁵ On the instructions of E. Howard Hunt, a senior White House official, Barker and Martinez broke into and searched Dr. Fielding's office for information on Ellsberg, who was believed to be a Soviet spy.³⁶ Hunt, a former CIA agent, had recruited Barker and Martinez, also former CIA agents, for the operation, telling them that it was a national security matter and that he was working for the White House, which had "greater jurisdiction than the FBI and the CIA."³⁷

After being convicted at trial, Barker and Martinez argued on appeal that Hunt authorized the operation and that the district court improperly prevented them from presenting evidence to support their public authority defense.³⁸ The D.C. Circuit agreed and accordingly reversed and remanded the convictions.³⁹ However, in separate opinions receiving only one vote each, two judges disagreed on how the defense should be articulated on remand. Judge Wilkey concluded that the defendants should have been able to show their "good faith, reasonable reliance on Hunt's apparent authority."⁴⁰ Judge Merhige, sitting by designation from the Eastern District of Virginia, concluded that the defense required a showing of an "'official' source" for the mistaken authorization.⁴¹ In other words, belief in an official's authority is not enough; there must be a showing of an official source for that authority. This is the apparent-versus-actual authority debate, which remains unresolved to this day, and so the reasoning underlying each approach warrants close examination.

³³ John Ehrlichman's appeal was taken up separately and decided by the D.C. Circuit on the same day as *Barker*. *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976).

³⁴ *United States v. Barker*, 546 F.2d 940, 944 (D.C. Cir. 1976) (Wilkey, J.).

³⁵ *Id.* at 943.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 944.

³⁹ *Id.* at 954.

⁴⁰ *Id.* at 946.

⁴¹ *Id.* at 955 (Merhige, J.).

Taking Judge Wilkey's apparent authority standard first, he understood this defense as an exception to the maxim *ignorantia juris non excusat*.⁴² The defendant mistakenly believes he was lawfully authorized to engage in the otherwise unlawful conduct. The rationale for the exception to the mistake of law doctrine is that the "gap (both real and perceived) between a private citizen and a government official with regard to their ability and authority to judge the lawfulness of a particular governmental activity is great."⁴³ Because a government official knows more about the law's content than the average citizen, it might be unreasonable to expect the citizen to object when an official purports to authorize their otherwise unlawful conduct.⁴⁴

To succeed with this defense under Judge Wilkey's approach, the defendant must show that their reliance on the apparent authority of the official was objectively reasonable under the circumstances and also present a legal theory that imparts a reasonable belief that the official possessed such authority.⁴⁵ For Barker and Martinez, there was good reason to view their reliance as objectively reasonable under the circumstances: they were former CIA operatives recruited by another former CIA operative turned White House official for a national security operation.⁴⁶ It is less clear what Judge Wilkey meant by a "legal theory on which to base a reasonable belief" in Hunt's authority, but Judge Wilkey suggested that it was "by no means inconceivable" that the president might have the authority "to confer upon a group of aides in the White House 'more authority than the FBI or CIA.'"⁴⁷

⁴² Id. at 947–48 (Wilkey, J.). Of course, "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek v. United States*, 498 U.S. 192, 199 (1991). Exceptions exist, however. *Cheek* itself provides one: the Supreme Court identified a mistake of law defense in the willfulness requirement for criminal tax code violations because the tax code is so complex. Id. at 201–02. Another example is when a law is unconstitutionally vague because it would be impossible for the defendant to know what the law required. Babb & Emmerich, *supra* note 20, at 99.

⁴³ *Barker*, 546 F.2d at 948–49 (Wilkey, J.).

⁴⁴ This tracks the Supreme Court's conclusion that the entrapment by estoppel defense is an exception to the mistake of law doctrine where it is unfair to require an individual to disobey the voice of the state most presently speaking to them. See *Raley v. Ohio*, 360 U.S. 423, 439 (1959); *Cox v. Louisiana*, 379 U.S. 559, 571 (1965); see also Babb & Emmerich, *supra* note 20, at 94–101 (arguing that where the official misrepresentation precludes knowledge of the law's actual permissions, it is unfair to require the defendant to know more than they can know in an epistemic sense).

⁴⁵ *Barker*, 546 F.2d at 949 (Wilkey, J.).

⁴⁶ Id.

⁴⁷ Id. (emphasis omitted).

Judge Merhige agreed that the defense served as an exception to the mistake of law doctrine, but he took a stricter approach to the defense's requirements:

[T]he defense is available if, and only if, an individual (1) reasonably, on the basis of an objective standard, (2) relies on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field.⁴⁸

This formulation does away with Judge Wilkey's legal theory confusion and requires the defendant to show that the official *actually* had some legal authority. Applied to Barker and Martinez's case, it was clear that Hunt had given them a conclusion of law: they were supposed to break into the psychiatrist's office, which presumably meant they could do so without repercussion.⁴⁹ On the actual authority question, Judge Merhige, like Judge Wilkey, pointed to the national security angle and the fact that the order came from the White House: "[D]ecisions of [executive branch] officials on the extent of their legal authority deserve some deference from the public."⁵⁰ But it is not clear how this differs from Judge Wilkey's approach, and the Watergate prosecutions prevented any clarification on remand.

If actual authority is the correct standard, Judge Merhige's opinion left unanswered questions: (1) How clear must the conclusion or statement of law be? (2) What is the relevant legal field in which the official must be responsible for interpretation, administration, and/or enforcement? (3) When Judge Merhige said "authority," did he mean authority in general or authority to issue the alleged directive?

Unfortunately, the D.C. Circuit never answered these questions, and neither opinion is binding since each opinion received only one vote. The

⁴⁸ Id. at 955 (Merhige, J.).

⁴⁹ Id. For an argument that the defendants in *Barker* actually failed Judge Merhige's test as a matter of law because the order came from a White House official rather than the President himself, see Kristovich, *supra* note 20, at 835–36. Interestingly, Ehrlichman argued that the President and Attorney General had authorized the break-in, so it counted as a permissible warrantless search of the psychiatrist's office according to the national security exception under the Fourth Amendment. *United States v. Ehrlichman*, 546 F.2d 910, 925–26 (D.C. Cir. 1976). However, the court rejected the defense on the grounds that Ehrlichman could not show that the President, or the Attorney General, had actually authorized the conduct. Id. at 926–27.

⁵⁰ *Barker*, 546 F.2d at 957 (Merhige, J.).

D.C. Circuit had another opportunity to decide the proper test for the public authority defense over a decade later, but the court could not find “any coherent principle” from either *Barker* opinion.⁵¹ Instead, the court noted that “following orders, without more, can’t transform an illegal act into a legal one.”⁵² But the D.C. Circuit never took up the question of what “more” could allow the defense to work. Other circuits, however, have expanded upon *Barker* to answer the questions the D.C. Circuit did not, and much can be learned from them.

B. Post-Barker: A Circuit Split?

Following the *Barker* decision, defendants across the country attempted to take advantage of the “reasonable reliance on apparent authority” defense articulated by Judge Wilkey. One such case was *United States v. Duggan* in the Second Circuit.⁵³ The defendants were allegedly members of the Provisional Irish Republican Army (“IRA”) and were convicted of several charges associated with smuggling weapons and explosives to the IRA in Northern Ireland.⁵⁴ Among other arguments, they claimed they had reasonably relied on the apparent authority of one Michael Hanratty, who had represented himself as an agent of the CIA.⁵⁵ Because entrapment by estoppel did not apply,⁵⁶ the defendants relied on Judge Wilkey’s decision in *Barker*.⁵⁷ However, the court rejected Judge Wilkey’s approach because it “received but one vote and cannot be viewed as the rationale of the court.”⁵⁸ Even so, the court held that the defendants’ case failed to meet even Judge Wilkey’s lighter standard; the only evidence the defendants had that Hanratty was a CIA agent was that he presented a laminated card that said “Central Intelligence Agency” on

⁵¹ *United States v. North*, 910 F.2d 843, 880–81 (D.C. Cir. 1990). Because the facts did not merit any sort of reasonable reliance, the court did not expand on the defense. *Id.*

⁵² *Id.* at 881.

⁵³ 743 F.2d 59 (2d Cir. 1984).

⁵⁴ *Id.* at 64–65.

⁵⁵ *Id.* at 83.

⁵⁶ The court did not say why, but it would seem to be because this was a claim of authorization of illegal conduct, as opposed to mistaken advice on what is lawful. The entrapment by estoppel defense does not work where the defendants would clearly have known the advised conduct was unlawful. Parry, *supra* note 20, at 24–26; Babb & Emmerich, *supra* note 20, at 105. Instead, the better course of action is to argue that they believed they were authorized to engage in the unlawful conduct.

⁵⁷ *Duggan*, 743 F.2d at 83.

⁵⁸ *Id.* at 84.

it and that they had “checked [him] out.”⁵⁹ They also did not have a theory as to how a CIA agent could authorize this conduct. In particular, one of the defendants admitted he knew of other CIA agents who had been charged with the same weapon-smuggling conduct as they were, so there was no basis for a theory that the CIA could authorize others to carry out such conduct.⁶⁰ It appears, then, that even under Judge Wilkey’s standard, there must be some evidence to support a reasonable belief in apparent authority.

The Eleventh Circuit soon followed suit in rejecting Judge Wilkey’s approach in *United States v. Rosenthal*, but it also explicitly endorsed Judge Merhige’s actual authority approach.⁶¹ In so doing, the court elaborated on what the defendants needed to show to succeed under the actual authority approach. The defendants were convicted on charges associated with their roles in a large cocaine smuggling ring.⁶² Two defendants argued the trial court erred in not allowing them to present their defense that a CIA agent authorized their conduct as “part of an intelligence operation undertaken in pursuit of national security objectives.”⁶³ Applying Judge Merhige’s actual authority standard, the court found this defense must fail as a matter of law because the CIA does not have the authority to authorize conduct that would violate narcotics laws.⁶⁴ Thus, to succeed on Judge Merhige’s view of the public authority defense, a defendant needs to have actual evidence that the public official can authorize the unlawful conduct in question.

At first blush, it seems like the public authority defense, under Judge Merhige’s view, can never work because public officials cannot authorize carte blanche violations of criminal law. However, the Eleventh Circuit has addressed this issue. In *United States v. Alvarado*, the court concluded that the public officials in question did have the authority to authorize the conduct, but the defense nonetheless failed where there was no evidence such authorization ever occurred.⁶⁵ The defendant Alvarado had been

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 793 F.2d 1214, 1235 (11th Cir. 1986); see also *United States v. Anderson*, 872 F.2d 1508, 1515–16 (11th Cir. 1989) (affirming the decision in *Rosenthal* that actual authority is the correct standard and finding it did not apply).

⁶² *Rosenthal*, 793 F.2d at 1222–23.

⁶³ *Id.* at 1235.

⁶⁴ *Id.* at 1236 (citing Exec. Order No. 12,333, 3 C.F.R. § 200 (1982), *reprinted as amended* in 50 U.S.C. § 3001).

⁶⁵ 808 F.3d 474, 489–90 (11th Cir. 2015).

working as an informant for the Drug Enforcement Agency (“DEA”) in Central and South America to help uncover a drug smuggling ring.⁶⁶ He had apparently been working for the DEA for some time, but in 2009, the relationship broke down, and Alvarado stopped reporting his activities.⁶⁷ He then got involved in the drug conspiracy for which he was convicted.⁶⁸ The court noted there was “no dispute” that the DEA agents Alvarado had worked for could have authorized his participation in the drug conspiracy.⁶⁹ The problem was the lack of evidence of authorization.⁷⁰ The DEA thought Alvarado was no longer working for them, and Alvarado likely knew this as well, since he did not keep his handling agents apprised of the developments in the drug conspiracy.⁷¹ Still, the court made sure to clarify that it was “not holding” that the “authorization must be so specific that an informant will be required to seek out and receive instruction for each discrete act that he takes.”⁷²

Alvarado provides important clarifications on how the actual authority approach to the public authority defense works.⁷³ First, it is possible to show that a government official has actual authority to authorize violations of the law. Importantly, the officials worked for the DEA, and the crime charged was a drug crime. In *Rosenthal*, the claim was that the CIA authorized a drug law violation, but the CIA does not have enforcement authority over drug crimes like the DEA.⁷⁴ This implicates Judge Merhige’s requirement that the public official have actual authority in the “relevant legal field,”⁷⁵ providing some indication of what “relevant legal field” means. It cannot just mean the criminal law; every time this defense is used, it is predicated on the claim that a public official authorized a violation of the criminal law. At that level of abstraction, the defense would never work—it would be too difficult to show that a public

⁶⁶ Id. at 490.

⁶⁷ Id. at 490–91.

⁶⁸ Id.

⁶⁹ Id. at 489.

⁷⁰ Id. at 489–90.

⁷¹ Id. at 490–91.

⁷² Id. at 492.

⁷³ Of course, *Alvarado* is only binding in the Eleventh Circuit. But given the dearth of opinions that analyze the issue, *Alvarado* remains instructive.

⁷⁴ *United States v. Rosenthal*, 793 F.2d 1214, 1236 (11th Cir. 1986) (citing Exec. Order No. 12,333, 3 C.F.R. § 200 (1982), *reprinted as amended in* 50 U.S.C. § 3001); *Who We Are*, U.S. Drug Enf’t Admin., <https://www.dea.gov/who-we-are> [<https://perma.cc/D7H6-6LFV>] (last visited Apr. 10, 2025).

⁷⁵ *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) (Merhige, J.).

official, even a law enforcement officer, had blanket power to authorize violations of criminal law. Instead, we must think more specifically about the *type* of crime committed and the *type* of law the official interprets, enforces, or authorizes. In *Barker*, it was not just that Hunt worked in the White House and likely reported directly to President Nixon. It was that the executive branch has particular discretion with respect to the enforcement of national security. “Relevant legal field” thus requires a close nexus between the crime charged and the area of law governed by the agency where the public official is based. After all, that agency will have discretion as to how those specific criminal laws are enforced.

Second, *Alvarado* clarifies that the authorization need not be explicit as to every single act. It would be absurd to require a defendant to check every single time she acts, especially in the case of a large-scale operation. The authorization can also be inferred from earlier communications where the official and the defendant had an ongoing relationship.⁷⁶ The earlier communications just cannot be too remote or else contradicted by later communications suggesting the authorization had ended. The conduct undertaken by the defendant also cannot exceed the scope of the authorization if she wishes to avail herself of the public authority defense.⁷⁷

The Second and Eleventh Circuits are squarely in the Judge Merhige camp, but the Ninth Circuit adopted Judge Wilkey’s apparent authority standard on at least one occasion, creating a possible circuit split. In *United States v. Bear*, the Ninth Circuit reversed a conviction for conspiracy to manufacture and distribute methamphetamine where the district court failed to instruct the jury on the defendant’s public authority defense.⁷⁸ The facts were similar to those in *Alvarado*. Defendant Bear had been working as a confidential informant for a deputy in the Los Angeles County Sheriff’s Office, who in turn was working with the DEA, and Bear believed she was still an informant when she committed the crimes in question.⁷⁹ The trial court did not buy the argument and thus did not instruct the jury on it.⁸⁰ In reversing the conviction, the Ninth Circuit found that “Bear’s testimonial support for a finding that she acted with a *reasonable belief of public authority*—especially considering that it was

⁷⁶ *Alvarado*, 808 F.3d at 492.

⁷⁷ *Id.* (citing *United States v. Abcasis*, 45 F.3d 39, 43–44 (2d Cir. 1995)).

⁷⁸ 439 F.3d 565, 567 (9th Cir. 2006).

⁷⁹ *Id.* at 567–68.

⁸⁰ *Id.* at 568.

her sole theory of defense—is not overwhelmed by the contrary evidence.”⁸¹ Earlier in its opinion, the court emphasized the fact that the sheriff’s deputy, working with the DEA, “either had or *reasonably appeared to have* the power to authorize Bear’s illegal acts.”⁸² That is the apparent authority test created by Judge Wilkey: a reasonable belief in an official’s apparent authority coupled with a legal theory to support that belief.⁸³

With an understanding of how the public authority defense works, I turn now to the arguments made by several January 6 defendants.

C. The January 6 Defendants

In response to the government’s attempt to prevent him from giving evidence of the public authority defense, defendant Isreal Easterday claimed he had a right to present the defense at trial according to *Barker*.⁸⁴ In fact, he articulated the actual authority standard for the defense:

Just as a civilian authorized to conduct a controlled drug purchase at the behest of a rogue police officer could assert a public authority defense, so too can a protester who evaded barriers to the otherwise public areas on Capitol Grounds assert that such conduct was authorized by the statements made by the former President.⁸⁵

Easterday argued that during his speech on January 6, President Trump communicated his approval of forcibly entering the Capitol Building.⁸⁶ He also argued that the President has the authority to authorize that conduct because the executive branch has jurisdiction over federal property like the Capitol Building.⁸⁷

⁸¹ Id. at 570 (emphasis added).

⁸² Id. at 569 (emphasis added).

⁸³ *United States v. Barker*, 546 F.2d 940, 949 (D.C. Cir. 1976) (Wilkey, J.). More recently, the Ninth Circuit tried to clarify the *Bear* opinion as not standing for an adoption of the apparent authority standard. *United States v. Doe*, 613 F. App’x 625, 627 (9th Cir. 2015). Instead, the court suggested actual authority was required for the defense. Id. But the opinion is unpublished and not binding, leaving some uncertainty as to the correct standard in the Ninth Circuit.

⁸⁴ Defendant’s Response to the Government’s Omnibus Motion in Limine, *Easterday*, supra note 27, at 6 (citing *Barker*, 546 F.2d at 947 n.21 (Wilkey, J.)).

⁸⁵ Id. at 15.

⁸⁶ Id.

⁸⁷ Id. at 12–13. Of course, jurisdiction over federal property does not equate to a power to permit damage to that property. See *infra* Section III.B.

Despite Easterday's reliance on it, the court did not address *Barker*. Instead, the court concluded the defense was unavailable because Easterday did not point to a statement wherein President Trump authorized the unlawful conduct or articulate how President Trump had authority to "waive" the relevant criminal laws.⁸⁸ But as just discussed, Easterday did attempt to make such arguments. Engagement with those arguments, regardless of their merit, could have settled *Barker's* uncertainty.⁸⁹

The district court only addressed *Barker* in one case: the case against Alexander Sheppard.⁹⁰ Sheppard relied heavily on *Barker* in his notice of the public authority defense.⁹¹ He claimed to rely on President Trump's speech at the Ellipse on January 6 for authorization:

We must stop the steal and then we must ensure that such outrageous election fraud never happens again. . . . And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore So we're going to, we're going to walk down Pennsylvania Avenue . . . And we're going to the Capitol, and we're going to try and give them the kind of pride and boldness that they need to take back our country. . . . So let's walk down Pennsylvania Ave.⁹²

Sheppard argued these statements by the President authorized him and others to enter the Capitol Building and physically stop the certification process.⁹³ Unlike Easterday, Sheppard articulated the defense as Judge Wilkey did, arguing that belief in the President's apparent authority to authorize what would otherwise be trespass or breaking and entering should suffice. But again, the district court declined to address which is the proper standard.⁹⁴ The court rejected the defense altogether because

⁸⁸ *United States v. Easterday*, No. 22-cr-00404, 2023 WL 6646384, at *3 (D.D.C. Oct. 12, 2023).

⁸⁹ For reasons discussed in Section III.B, Easterday's argument that there was in fact an authorization holds water, but his argument that the president has the power to so authorize because of jurisdiction over federal property does not.

⁹⁰ *United States v. Sheppard*, No. 21-cr-00203, 2022 WL 17978837, at *7–8 (D.D.C. Dec. 28, 2022); see also *United States v. Carpenter*, No. 21-cr-00305, 2023 WL 1860978, at *2–3 (D.D.C. Feb. 9, 2023) (adopting the reasoning in *Sheppard* to reject the same defense); *Easterday*, 2023 WL 6646384, at *2–3 (same).

⁹¹ *Sheppard*, 2022 WL 17978837, at *7.

⁹² *Id.* at *9 (alterations in original) (emphasis omitted) (quoting Defendant's Reply to Government's Opposition, *Sheppard*, supra note 11, at 7).

⁹³ Defendant's Reply to Government's Opposition, *Sheppard*, supra note 11, at 7.

⁹⁴ *Sheppard*, 2022 WL 17978837, at *8.

the words upon which Sheppard relied, in the court's view, did not constitute an authorization. According to the court, President Trump's statements neither directly stated nor clearly implied that breaking into the Capitol Building would be lawfully permitted.⁹⁵ At best, the court held, his words encouraged followers to go to the Capitol Building and protest, and even if his statements could be construed as instructions to forcibly enter the Capitol and stop the certification process, such words did not suggest that such conduct would be lawful.⁹⁶

One might argue, however, that this was the same in *Barker*. Hunt recruited Barker and Martinez for the operation and told them they would be breaking into the psychiatrist's office to look for information on Daniel Ellsberg.⁹⁷ There is no doubt that Hunt never said, "Such conduct shall be lawful." Rather, the implication was that because of Hunt's position, the conduct would be authorized.⁹⁸ Furthermore, *Alvarado* made clear that the authorization need not be explicit.⁹⁹ It is therefore unclear why that same reasoning did not apply to the January 6 defendants. Perhaps it was due to the highly publicized nature of the event or the political stakes; nevertheless, *Barker* remains unsettled.

Now that President Trump has pardoned the January 6 defendants, the D.C. Circuit is once again deprived of an opportunity to clarify the proper standard. This Note endeavors to do so because President Trump's second term thus far signals possible illegal action undertaken at the President's

⁹⁵ *Id.* at *9.

⁹⁶ *Id.*; see also *United States v. Carpenter*, No. 21-cr-00305, 2023 WL 1860978, at *2–3 (D.D.C. Feb. 9, 2023) (finding that defendant could not claim the public authority or entrapment by estoppel defense because she failed to provide evidence that President Trump's statements "plainly state or imply that entering the Capitol or interfering with the electoral certification would be lawful"); *United States v. Easterday*, No. 22-cr-00404, 2023 WL 6646384, at *3 (D.D.C. Oct. 12, 2023) (concluding that defendant could not claim the public authority defense because he "does not point to any statement or action by President Trump that he relied upon or that could render his actions lawful"); *United States v. Eicher*, No. 22-cr-00038, 2023 WL 3619417, at *4 (D.D.C. May 23, 2023) (determining that defendant could not rely on President Trump's speech at the Ellipse for his public authority defense).

⁹⁷ *United States v. Barker*, 546 F.2d 940, 943–44 (D.C. Cir. 1976) (Wilkey, J.).

⁹⁸ Easterday made this point as well, citing *Alvarado* for the proposition that all that is needed is official approval of the conduct at issue, but he mistakenly claimed that a conclusion of law is not needed. Defendant's Response to the Government's Omnibus Motion in Limine, *Easterday*, *supra* note 27, at 12. However, official approval of otherwise illegal conduct is a conclusion of law; that is, the official concludes whether or not the conduct was lawfully authorized.

⁹⁹ *United States v. Alvarado*, 808 F.3d 474, 492 (11th Cir. 2015).

behest.¹⁰⁰ I argue that Judge Merhige had it right in *Barker*. Related doctrines such as entrapment by estoppel and the superior orders defense in military law suggest that actual authority is the correct standard, as do public policy concerns. Applying the apparent authority and actual authority standards to the January 6 defendants further shows that only the actual authority standard produces a workable rule and legitimate outcome.

II. IN DEFENSE OF ACTUAL AUTHORITY

As a threshold matter, I assume the public authority defense is at least proper in some form. The issue of whether the public authority defense should exist at all is beyond the scope of this Note and has been addressed elsewhere.¹⁰¹ For present purposes, the question at issue is how and when the defense can succeed.

A. Current Law

To begin, the weight of authority supports an actual authority standard. A majority of the circuits that have addressed the question have held that the public authority defense requires actual authority.¹⁰² Although the Ninth Circuit has suggested favor for the apparent authority standard on one occasion, it has on at least one other occasion repudiated that view.¹⁰³

¹⁰⁰ See *infra* notes 191–202 and accompanying text.

¹⁰¹ See generally Parry, *supra* note 20; Babb & Emmerich, *supra* note 20.

¹⁰² *United States v. Duggan*, 743 F.2d 59, 83 (2d Cir. 1984); *Alvarado*, 808 F.3d at 484; see also *United States v. Cao*, 471 F.3d 1, 4 (1st Cir. 2006) (“The defense applies where the conduct of the defendant was undertaken at the behest of a government official with the power to authorize the action”); *United States v. Pitt*, 193 F.3d 751, 758 (3d Cir. 1999) (finding that the public authority defense applies “where the government agent in fact had the authority to empower the defendant to perform the acts in question”); *United States v. Passaro*, 577 F.3d 207, 220 (4th Cir. 2009) (concluding that the defendant “must prove that someone with *actual authority* sanctioned an otherwise unlawful act”); *United States v. Sariles*, 645 F.3d 315, 316 (5th Cir. 2011) (determining that the public authority defense “requires a law enforcement officer who engages a defendant in covert activity to possess actual, rather than only apparent, authority”). The Sixth, Seventh, Eighth, and Tenth Circuits have not conclusively held one way or another. The Tenth Circuit has, however, described its rule for entrapment by estoppel much in the same way as Judge Merhige described the public authority defense, requiring that the official have actual administrative, interpretative, or enforcement authority. See *United States v. Cox*, 906 F.3d 1170, 1191 (10th Cir. 2018).

¹⁰³ Compare *United States v. Bear*, 439 F.3d 565, 569–71 (9th Cir. 2006) (appearing to endorse the apparent authority standard for the public authority defense), with *United States v. Doe*, 613 F. App’x 625, 627 (9th Cir. 2015) (endorsing the actual authority standard for the public authority defense).

Furthermore, the Model Penal Code recognizes a public authority defense when based on “an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense” in question.¹⁰⁴ This is reminiscent of Judge Merhige’s standard with its emphasis on actual interpretative, administrative, or enforcement authority.

On the other hand, Federal Rule of Criminal Procedure 12.3 seems to suggest apparent authority suffices. In relevant part, it states, “If a defendant intends to assert a defense of actual *or believed* exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government”¹⁰⁵ Nonetheless, the courts of appeals that have held in favor of actual authority have done so in the face of this language. And this rule is a procedural one that is not intended to lay out the proper parameters of the defense. It requires only that a defendant give notice that she intends to rely on apparent authority; it does not state that such authority constitutes a viable defense. The law post-*Barker*, therefore, supports the actual authority standard.

B. Analogous Doctrines

Doctrines similar to the public authority defense likewise require a form of actual authority. In the interest of doctrinal consistency, the public authority defense should too.

1. Entrapment by Estoppel

Entrapment by estoppel is the closest doctrinal analogue to the public authority defense. Arguably, there is no meaningful difference between the two defenses.¹⁰⁶ For present purposes, however, I treat them separately, in large part because even the U.S. District Court for the District of Columbia is inconsistent about whether they are the same or different.¹⁰⁷ We can think of these two defenses this way: entrapment by estoppel involves an official advising someone ignorant of what the law requires or permits in a certain situation as to that very question, but doing

¹⁰⁴ Model Penal Code § 2.04(3)(b) (Am. L. Inst. 1985).

¹⁰⁵ Fed. R. Crim. P. 12.3(a)(1) (emphasis added).

¹⁰⁶ Babb & Emmerich, *supra* note 20, at 103.

¹⁰⁷ United States v. Bingert, No. 21-cr-00091, 2023 WL 3203092, at *5 n.2 (D.D.C. May 2, 2023) (mem.).

so incorrectly.¹⁰⁸ For example, in *Cox v. Louisiana*, Cox was convicted of protesting near a courthouse, but only after a police officer told him that protesting across the street from the courthouse was permissible.¹⁰⁹ The Court held it would be fundamentally unfair to maintain his conviction because of the trust citizens place in police officers to know the law, particularly when the law is unclear.¹¹⁰ The officer got the law wrong, and the defendant should not be punished for it. By contrast, the public authority defense involves a public official *instructing* someone to do something otherwise illegal, leading the defendant to mistakenly believe that they have received authorization to undertake the directed action.¹¹¹ Although the mistake of law operates differently, both defenses turn on reliance on government officials.

Notably, entrapment by estoppel cases suggest the defense can only succeed where the defendant relies upon the misrepresentation of an actual public official tasked with enforcing or advising on the specific legal question at issue. In *Cox*, it was a police officer telling the defendant that he could protest across the street from the courthouse.¹¹² In *Raley v. Ohio*, it was a state legislator who was in the process of questioning the defendants before telling them that they had the privilege against self-incrimination when they did not.¹¹³ And in *United States v. Pennsylvania Industrial Chemical Corp.*, it was the Army Corps of Engineers, administrators of certain environmental regulations, advising on how to comply with the relevant regulations.¹¹⁴ Not only did each official have actual authority over the relevant area of law, but the question of law in each case was at least somewhat ambiguous, leaving room for the official to reasonably get it wrong. Likewise, the actual authority standard for the public authority defense would leave room for the defendant to mistakenly believe they have been authorized, but only where the official would have the authority to so authorize in the first place, making this reliance defense all the more reasonable.

Such limitations are particularly important given that both entrapment by estoppel and the public authority defense are exceptions to the maxim

¹⁰⁸ U.S. Dep't of Just., *supra* note 12.

¹⁰⁹ *Cox v. Louisiana*, 379 U.S. 559, 560, 564, 569–70 (1965).

¹¹⁰ *Id.* at 571. The defense fails for the January 6 defendants because it requires the question of law to be ambiguous. See *supra* note 26 (discussing *United States v. Chrestman*).

¹¹¹ U.S. Dep't of Just., *supra* note 12.

¹¹² *Cox*, 379 U.S. at 569.

¹¹³ 360 U.S. 423, 425, 432 (1959).

¹¹⁴ 411 U.S. 655, 657 (1973).

ignorantia juris non excusat, rooted in notions of fundamental fairness.¹¹⁵ At least one scholar has noted that for the Supreme Court to conclude that some fundamental unfairness in fact occurred in each entrapment by estoppel case, the government agent needed to be a state actor for the Due Process Clause to attach.¹¹⁶ For the public authority defense to likewise succeed as a mistake of law defense rooted in due process concerns of fundamental fairness, it too must require a state actor with actual authority over the area of law in question such that the defendant can be affirmatively misled as to what the law permits. This must be the standard for the public authority defense; otherwise it risks usurping entrapment by estoppel and Supreme Court precedent.

2. Military Law and the Superior Orders Defense

Another relevant comparison to the public authority defense is the superior orders defense in military law.¹¹⁷ The most infamous articulation of this defense is also the strongest argument against its existence: many of the Nazi officers in the Nuremberg Trials after World War II claimed they only did what Hitler and other German commanders told them to.¹¹⁸ That defense largely failed; the Allied Powers adopted a rule governing the tribunals which specified that the fact of following orders could mitigate, but it could not justify or excuse.¹¹⁹

For at least one hundred years, that was also the rule in American military law.¹²⁰ However, the American rule today is more liberal. The Manual for Courts-Martial provides, “It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding

¹¹⁵ *Raley*, 360 U.S. at 437–39; *United States v. Barker*, 546 F.2d 940, 954–55 (D.C. Cir. 1976) (Merhige, J.).

¹¹⁶ Connelly, *supra* note 25, at 633.

¹¹⁷ See *Garcia*, *supra* note 20, at 959. One January 6 defendant who was also a retired military officer attempted to raise the superior orders defense given that the president is also the commander in chief, but such defense fails because the defendant was acting as a civilian at the time and would have struggled to show that he was legally obligated to obey. *Id.* at 959, 961; Notice of Entrapment by Estoppel Defense at 1–2, *United States v. Garcia*, No. 21-cr-00129, 2022 WL 2904352 (D.D.C. July 22, 2022).

¹¹⁸ See Yoram Dinstein, *The Defence of ‘Obedience to Superior Orders’ in International Law* 130, 165 (reprt. ed. 2012).

¹¹⁹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

¹²⁰ *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851).

would have known the orders to be unlawful.”¹²¹ International criminal law also follows a similar rule now, notwithstanding the Nuremberg rule. The Rome Statute, which grants jurisdiction to the International Criminal Court, provides,

The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.¹²²

The general idea behind the superior orders defense is similar to that underlying the public authority defense. The subordinate relies upon the superior to give lawful orders and does not necessarily have the opportunity to double-check that the order is lawful.¹²³ If nothing about the order would stand out to a reasonable person as unlawful (say, “[a]n order to kill infants and unarmed civilians”¹²⁴), then the subordinate can avail themselves of this defense.

The current standard for the superior orders defense represents a compromise between two extreme views: absolute liability on one hand and *respondeat superior* on the other.¹²⁵ The former would always hold the subordinate responsible, which would encourage personal responsibility for one’s actions. However, it would incentivize the

¹²¹ Joint Serv. Comm. on Mil. Just., U.S. Dep’t of Def., Manual for Cts.-Martial r. 916(d) (2024); see also *United States v. Calley*, 22 C.M.A. 534, 542–44 (1973) (noting that the American rule for the superior orders defense was based on a person’s “ordinary sense and understanding,” not the “commonest understanding,” although neither would work for Lieutenant Calley).

¹²² Rome Statute of the International Criminal Court art. 33(1), July 17, 1998, 2187 U.N.T.S. 90, 108 [hereinafter Rome Statute]. That article goes on to clarify that “orders to commit genocide or crimes against humanity are manifestly unlawful.” Id. art. 33(2).

¹²³ See *Calley*, 22 C.M.A. at 543–44 (quoting *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) (No. 8,673)); see also James B. Insko, Defense of Superior Orders Before Military Commissions, 13 Duke J. Compar. & Int’l L. 389, 391–92 (2003); Mark J. Osiel, Obeying Orders: Atrocity, Military Discipline, and the Law of War, 86 Calif. L. Rev. 939, 966 (1998).

¹²⁴ *Calley*, 22 C.M.A. at 544.

¹²⁵ See Osiel, *supra* note 123, at 961–62.

subordinate to disobey orders they thought were wrong but nonetheless lawful and to obey orders the subordinate did not know, and could not know, were unlawful, risking court-martial in both situations.¹²⁶ The latter would always hold the superior officer responsible for the subordinate's actions while the subordinate would not be responsible at all. This would correct the disobedience and unfairness problem of absolute liability but would lead to blind obedience, resulting in a military whose officers do not take responsibility for their actions, a surely undesirable outcome for the rule of law.¹²⁷ Thus, the defense, with its "manifest illegality" standard, works a middle ground that recognizes that a subordinate will not always be able to know an order is unlawful while also maintaining personal responsibility for crimes committed pursuant to obviously unlawful orders.¹²⁸

The public authority defense with an actual authority standard strikes a similar balance. Although a government official's directive is not obligatory the way a military order is, the public authority defense nonetheless recognizes that society expects members of the public to listen to public officials and government leaders, and that the public should be able to trust officials to tell them the right things to do. At the same time, we do not want to encourage such blind trust in public officials and government leaders that members of the public are incentivized not to know the law and to use this defense as a means of escaping responsibility, particularly in egregious cases. If only apparent authority were needed to avail oneself of the defense, the risk of blind trust and abuse of the defense to cover one's tracks would be greater. All one would need is to articulate some legal theory that the person giving them instructions could lawfully authorize their conduct. By contrast, the actual authority standard limits the use of the defense to those situations where a defendant claims authorization by someone with the actual authority to provide it, thereby giving legitimacy to the instruction, much like the superior in the military context.

¹²⁶ See *id.* at 962.

¹²⁷ See *id.* at 961.

¹²⁸ See *Insko*, *supra* note 123, at 393–94 (discussing the "Golden Mean" of the manifest illegality principle).

C. Public Policy Concerns

In the international criminal law context, scholars and courts have justifiably been concerned with a superior orders defense that is so broad as to permit use of the defense to excuse egregious crimes.¹²⁹ The same concern translates to the civilian context with the public authority defense, and so there must be a limit. One way to provide one is through the reasonableness requirement. Reliance might, for instance, be unreasonable when the directed action is something like murder. But the reasonableness requirement is not enough; it exists in both the apparent and actual authority standards articulated by Judges Wilkey and Merhige.¹³⁰ Under Judge Wilkey's standard, all that is needed to succeed is some legal theory to support reasonable reliance.¹³¹ One could imagine a legal theory that might nonetheless support a conclusion of reasonable reliance even in cases of egregious acts. Professor Ekow Yankah argues that deputization is a form of legal empowerment for groups of people, particularly white people, to enact violence against racial minorities, particularly Black people, in the name of law enforcement.¹³² More specifically, violence by law enforcement against Black people has led white civilians to believe they are implicitly authorized to do the same, leading them to act as vigilante law enforcers.¹³³ In a similar vein, Professor Farah Peterson has argued that violence itself is baked into our constitutional order; that is, American freedom was achieved through bloodshed, and the idea that Americans should physically fight for their freedom is one that continues in political discourse today.¹³⁴ January 6, of course, is but one example. In this way, it is not difficult to imagine a legal theory that justifies acts of violence when purportedly directed by a government official.

¹²⁹ See *Calley*, 22 C.M.A. at 544 (holding that regardless of the fact that the defendant's superior had ordered his actions, the defense could not apply where the defendant killed infants and unarmed civilians); Osiel, *supra* note 123, at 963–64. See generally Rome Statute, *supra* note 122, art. 33 (laying out the framework for the superior orders defense and articulating its limits, including that “orders to commit genocide or crimes against humanity are manifestly unlawful”).

¹³⁰ *United States v. Barker*, 546 F.2d 940, 949 (D.C. Cir. 1976) (Wilkey, J.); *id.* at 955 (Merhige, J.).

¹³¹ *Id.* at 949 (Wilkey, J.).

¹³² See generally Ekow N. Yankah, *Deputization and Privileged White Violence*, 77 *Stan. L. Rev.* 703, 715–18 (2025) (discussing the racial nuances of deputization).

¹³³ *Id.* at 709, 712–13, 767.

¹³⁴ See Farah Peterson, *Our Constitutionalism of Force*, 122 *Colum. L. Rev.* 1539, 1548–50 (2022).

The actual authority standard does away with the lenient legal theory standard. Instead, the defendant has to show that the official in question had the requisite authority to authorize the conduct, and there must be reasonable reliance on top of that.¹³⁵ It is much more difficult to show that the official had the requisite authority, particularly where the crime charged is a violent crime and the official in question has general enforcement authority.¹³⁶ Consider, for example, a federal prosecutor who no doubt has broad authority over enforcement of federal criminal law. If a defendant claims the prosecutor authorized her to kill someone, she will have a difficult time articulating the close nexus between the prosecutor's general authority and the crime charged. The prosecutor may have broad authority with regard to enforcement of criminal law, but not to authorize others to commit murder.¹³⁷ This argument is relevant with respect to the President in the January 6 case as well.¹³⁸ In that way, the actual authority standard prevents the use of the defense to justify widespread deputization of people to engage in widespread violence. I turn now to that test case.

III. THE JANUARY 6 DEFENDANTS AS A TEST CASE

Against this backdrop of arguments for the actual authority standard, the January 6 defendants provide a test case to show how only the actual authority standard produces a workable rule and reaches the right outcome, as compared with the apparent authority standard.

A. Apparent Authority

Beginning with the apparent authority standard, we can apply Judge Wilkey's test as articulated in *United States v. Barker*. The defendant must show their reliance on the apparent authority of the official was objectively reasonable under the circumstances and present a legal theory that imparts a reasonable belief that the official possessed such

¹³⁵ *Barker*, 546 F.2d at 955 (Merhige, J.).

¹³⁶ See *infra* notes 155–58 and accompanying text.

¹³⁷ Reliance is likely objectively unreasonable in such a case as well. But the point here is that the actual authority standard heightens the standard beyond the reasonableness requirement. Furthermore, there is an argument that law enforcement officers, despite their power to enforce the criminal law, do not have any broad, inherent authority to issue commands to other people. Rachel Harmon, *Law and Orders*, 123 Colum. L. Rev. 943, 980–84 (2023). Regarding police in particular, much of the command authority they do have is incident to their authority to arrest and search. *Id.* at 991.

¹³⁸ See *infra* Section III.B.

authority.¹³⁹ Beginning with reasonable reliance under the circumstances, the defendants themselves made their arguments clear. Although in the entrapment by estoppel context, Chrestman argued he followed President Trump's language in the months leading up to January 6 closely and heard his "stand back and stand by" comment as a call to action and to arms.¹⁴⁰ Sheppard argued that he heard the "stop the steal" language as a call to action to stop the certification of a fraudulent election result.¹⁴¹ He likewise argued that the language that he "should" go to the Capitol Building to "stop the steal" sufficed for an implied authorization.¹⁴² Further, President Trump stated that if the rally attendants did not go to the Capitol to "stop the steal" and "fight like hell," they were "not going to have a country anymore."¹⁴³ It is entirely possible a jury would find reliance on those words reasonable.¹⁴⁴

Next is the legal theory requirement. Judge Wilkey's opinion in *Barker* seems to suggest that so long as defendants provide a cognizable legal theory, it is enough. In *Barker*, it was an iteration of the unitary executive theory—that because the orders came from the White House and touched on national security concerns, it was reasonable for the defendants to think the orders came from someone with authority to permit this conduct.¹⁴⁵ The January 6 defendants made similar arguments. Sheppard argued he "relied on the highest ranking official in the Executive Branch, the President There is no reason to believe that the President is not vested with such authority to declare once restricted grounds no longer restricted."¹⁴⁶ He went on to conclude that "[i]t is difficult to imagine how the President and Commander in Chief is not an official that is charged with the enforcement of the law."¹⁴⁷ This is effectively the argument in Judge Wilkey's opinion in *Barker*.¹⁴⁸ If Judge Wilkey's opinion in *Barker* is to be taken seriously, then the January 6 defendants should have been allowed to make this defense to the jury. A jury could find their conduct

¹³⁹ *Barker*, 546 F.2d at 949 (Wilkey, J.).

¹⁴⁰ Detention Memorandum, *Chrestman*, supra note 10, at 5 (quoting Kathleen Belew, Why 'Stand Back and Stand By' Should Set Off Alarm Bells, N.Y. Times (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/opinion/trump-proud-boys.html>).

¹⁴¹ Defendant's Reply to Government's Opposition, *Sheppard*, supra note 11, at 14.

¹⁴² *Id.* (emphasis omitted).

¹⁴³ *Id.* at 7 (emphasis omitted) (quoting Trump January 6 Speech Transcript, supra note 9).

¹⁴⁴ See *Garcia*, supra note 20, at 966.

¹⁴⁵ *United States v. Barker*, 546 F.2d 940, 949 (D.C. Cir. 1976) (Wilkey, J.).

¹⁴⁶ Defendant's Reply to Government's Opposition, *Sheppard*, supra note 11, at 9.

¹⁴⁷ *Id.* at 10.

¹⁴⁸ See *Barker*, 546 F.2d at 949 (Wilkey, J.).

and reliance perfectly reasonable. And if that is the case, then the law will sanction militia groups' violence where the president orders it.

B. Actual Authority

Judge Merhige's test is more demanding. Defendants need to show they "(1) reasonably, on the basis of an objective standard, (2) relie[d] on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field."¹⁴⁹ As with Judge Wilkey's test, there must be objectively reasonable reliance, but Judge Merhige makes clear that such reliance must be on a conclusion or statement of law. Additionally, the conclusion or statement of law must come from someone with actual authority in the relevant legal field, which, according to the courts that addressed this question after *Barker*, means authority to interpret, administer, or enforce the particular subset of criminal laws implicated by the directive.

Assuming reliance is reasonable, just as it was under Judge Wilkey's approach, the first issue is whether the defendants relied upon a conclusion or statement of law from President Trump. The district court in Sheppard's and Easterday's cases concluded that President Trump's statements on January 6 did not amount to sufficient authorization.¹⁵⁰ While recognizing that the conclusion or statement of law requirement can be satisfied through implication, the court nonetheless concluded that President Trump's statements did not even imply that their actions would be lawful. In the court's view in Sheppard's case, the statements at most suggested that the protesters go to the Capitol, not enter.¹⁵¹ However, saying they should go to the Capitol Building and "stop the steal" and "fight like hell" to "take back our country" could reasonably be interpreted as an authorization to enter and engage in violence at the Capitol Building, particularly the "fight like hell" language. This is particularly likely given that President Trump was impeached for inciting insurrection based in part on this very language.¹⁵² This case then looks a lot like *Barker*, where a White House official told the defendants to break

¹⁴⁹ Id. at 955 (Merhige, J.).

¹⁵⁰ United States v. Sheppard, No. 21-cr-00203, 2022 WL 17978837, at *8 (D.D.C. Dec. 28, 2022); United States v. Easterday, No. 22-cr-00404, 2023 WL 6646384, at *3 (D.D.C. Oct. 12, 2023).

¹⁵¹ *Sheppard*, 2022 WL 17978837, at *9.

¹⁵² H.R. Res. 24, 117th Cong. (2021).

into the psychiatrist's office and steal information.¹⁵³ That was enough to be a "conclusion of law" because it implied, given the source of the instruction, that the conduct would be lawful.¹⁵⁴ Because there is a cognizable argument for a conclusion of law here, the final question to ask is whether the President had the authority to authorize the January 6 defendants to forcibly enter the Capitol Building, assault police officers and media members, and destroy property along the way.

The answer must be no. To be precise, the actual authority question asks whether the president has interpretative, administrative, or enforcement authority in the area of criminal law implicated by the order to actually give such an authorization. In a case involving the president of the United States, the question of what his authority covers is at base a constitutional question and might also be a statutory question, depending on congressional delegations of authority. As the head of the executive branch, the president has broad enforcement authority, but it is limited by Congress, which writes the laws that the president enforces.¹⁵⁵ The president, and the executive branch more broadly, can choose when to prosecute crimes and when not to.¹⁵⁶ Importantly, the president must "take Care that the Laws be faithfully executed."¹⁵⁷ The president is therefore not like a DEA agent who has narrow enforcement authority over the federal drug laws and could, in some situations, authorize their abrogation. The president has a much more general authority, which makes it much more difficult to identify the close nexus between the president's authority and the type of crime committed as is required of this defense by the principles set out in *Barker* and its progeny.¹⁵⁸

Easterday argued that the executive branch's jurisdiction over federal property, including the Capitol Building, meant that the President could authorize someone to enter that property and not be guilty of trespass.¹⁵⁹ But as even Easterday recognized, the Capitol Police, who have law

¹⁵³ *Barker*, 546 F.2d at 943–44 (Wilkey, J.).

¹⁵⁴ See *id.* at 955 (Merhige, J.).

¹⁵⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

¹⁵⁶ U.S. Dep't of Just., Just. Manual § 9-27.110 cmt. (2023), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.110> [<https://perma.cc/G5C9-Z7CP>].

¹⁵⁷ U.S. Const. art. II, § 3.

¹⁵⁸ The district court recognized this in *Chrestman* as well, although it was in the entrapment by estoppel context. *United States v. Chrestman*, 525 F. Supp. 3d 14, 32–33 (D.D.C. 2021).

¹⁵⁹ Defendant's Response to the Government's Omnibus Motion in Limine, *Easterday*, *supra* note 27, at 12–14.

enforcement authority in and around the Capitol Building, had erected barriers and attempted to prevent people from entering.¹⁶⁰ The Capitol Police are governed by the legislative branch, not the executive.¹⁶¹ The President could not necessarily authorize otherwise unlawful entrance to the Capitol, and any power with regard to federal property would certainly not extend to the destruction of that property.¹⁶²

To the extent that *Barker* suggests the president can abrogate the criminal law in the national security context, whether or not that is true, such a rule would not apply here. Like in *Barker*, individuals broke into a building at the behest of a White House official inspired by national concern. But instead of concerns about a Soviet spy, it was a concern that Congress was certifying a fraudulent election. One could argue that this is a national security issue, since a fraudulent election could make the country appear vulnerable on the world stage. But that is a few steps removed from a true national security concern. Additionally, the authorization in *Barker* involved a search of Dr. Fielding's office for documents, and the president might be able to authorize a warrantless search.¹⁶³ But that is not what was happening on January 6: President Trump was trying to stop Congress from certifying the election, a proceeding over which the president has no power.¹⁶⁴ Thus, he could not authorize obstructing that proceeding. Beyond that, he could not authorize the destruction of government property or assault of police officers any more than President Nixon could because of the president's duty under the Take Care Clause.¹⁶⁵

*Trump v. United States*¹⁶⁶ poses an interesting wrinkle. Even if the President did not have authority to authorize the January 6 conduct, perhaps that calculus has changed since the Supreme Court decided

¹⁶⁰ *Id.* at 13–15.

¹⁶¹ Ida A. Brudnick, Cong. Rsch. Serv., IN11570, The U.S. Capitol Police: Brief Background 1 (2023), <https://crsreports.congress.gov/product/pdf/IN/IN11570> [<https://perma.cc/98HQ-MNN2>].

¹⁶² See U.S. Const. art. II, § 3. Similarly, although Congress has delegated some protection of public property powers to the Department of Homeland Security, the legislation does not speak of the president specifically. His authority remains broader than that of Homeland Security agents. See 40 U.S.C. § 1315.

¹⁶³ Kristovich, *supra* note 20, at 833 n.101.

¹⁶⁴ See 3 U.S.C. § 15 (providing that only Congress has the power to certify the result of a presidential election).

¹⁶⁵ See *supra* notes 155–57.

¹⁶⁶ 144 S. Ct. 2312 (2024).

presidents have presumptive immunity for all official acts.¹⁶⁷ The Court did not decide whether President Trump's statements on January 6 were official acts,¹⁶⁸ but the January 6 defendants appear to have assumed that they were.¹⁶⁹ The question is then whether President Trump's presumptive immunity for his statements, which might themselves be incitements of violence, or his presumptive immunity for having stormed the Capitol himself had he done so,¹⁷⁰ turns into a power to authorize others to do such conduct.

Once again, the answer must be no. First, there is considerable space between having the power to do *X* in the first instance and being prohibited from doing *X* but nonetheless immune from subsequent prosecution. If the President were to have broken into the Capitol Building to stop the certification process himself, perhaps he would be immune, but that does not mean he would have had the *power* to do it in the first place.¹⁷¹ Second, even though the President might be immune for such conduct, that does not mean those individuals he directs would also be immune. Nothing in *Trump* indicates that he could transfer his immunity to them.¹⁷² Finally, even if the act of speaking is an official act, the content of his speech might not accurately reflect presidential power. He could lie about having the power to authorize certain criminal conduct. While the *Trump* decision granted the president a *privilege* of immunity, it did not change the president's substantive legal *powers*, which are what matter for Judge Merhige's actual authority standard.

In this way, the immunity decision further counsels in favor of the actual authority standard. Under the much more lenient apparent authority

¹⁶⁷ See *id.* at 2327.

¹⁶⁸ *Id.* at 2340.

¹⁶⁹ See Detention Memorandum, *Chrestman*, *supra* note 10, at 11 ("The American head of state directed a specific action . . ."); Motion of Defendant, Jacob Anthony Chansley, for Pretrial Release at 21, *United States v. Chansley*, 525 F. Supp. 3d 151 (D.D.C. 2021) (No. 21-cr-00003) ("[T]he Defendant, like thousands of others, felt they were lawfully answering the call of the President . . . and did that which the President asked them to do."); Defendant's Reply to Government's Opposition, *Sheppard*, *supra* note 11, at 14 ("When the President . . . tells someone that they *should* go to the Capitol building that is implying [that it would be] legal to go because the President has authorized it himself.").

¹⁷⁰ See *Trump*, 144 S. Ct. at 2334 (concluding that an action cannot be found to be unofficial simply because it was in violation of a generally applicable law).

¹⁷¹ See *id.* at 2331 ("The President, charged with enforcing federal criminal laws, is not above them.").

¹⁷² The rationale behind the *Trump* decision rests on the unique position of the president so that he might "execute the duties of his office fearlessly and fairly." *Id.* That would not seem to extend immunity to anyone beyond his office.

standard, it would not be “inconceivable”¹⁷³ for a January 6 defendant to think that because the President has immunity for the actions he told her to take, he must have been able to authorize her to do the same. But when one considers the actual law on immunity, it becomes clear that the President would not be able to authorize someone else to do something just because he would not be prosecuted for doing it.¹⁷⁴

Therefore, under the actual authority standard, the January 6 defendants’ public authority defense would certainly fail as a matter of law. And the analysis shows that only the actual authority standard provides a workable rule for this defense, however narrow that rule might be. The apparent authority standard is incredibly lenient, allowing the defendant to avail herself of the defense so long as she can come up with *some* legal theory. With no real guidance as to what counts as a sufficient theory, anything could work. The defense then devolves into a mere “he told me to” defense, which, to analogize to the military law context, falls too heavily on the side of *respondeat superior* as opposed to personal responsibility. By contrast, the actual authority standard sets out principles that can be applied consistently and protects against abuse of the defense. Judge Merhige had it right.

IV. IMPLICATIONS

The January 6 case makes clear that the actual authority standard is the correct standard for the public authority defense. In so establishing, the case also draws out additional limitations of the defense. First, there is a serious factual distinction between the January 6 case and *Barker* and its progeny. On January 6, President Trump spoke to a crowd of thousands, whereas in *Barker* and the cases that followed, the authorizations were given in private. Perhaps the defense is not meant to apply to such broad, public authorizations. Second, if the defense does not work in the January 6 case, it is not clear what exactly is left of *Barker*; it might be that *Barker*

¹⁷³ *United States v. Barker*, 546 F.2d 940, 949 (D.C. Cir. 1976) (Wilkey, J.).

¹⁷⁴ Just because the official would not be prosecuted for certain conduct does not mean that they had the power to do that conduct. On the civil liability side, a law enforcement officer might be entitled to qualified immunity for unlawful actions, meaning actions they had no power to take, so long as the law was not clearly established. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982). If the law enforcement officer does not have the power to do something, then that officer certainly does not have the power to order someone else to do it. See *Harmon*, *supra* note 137, at 980–85 (rejecting the inherent authority of police to issue commands).

remains limited to its own facts. Finally, just as the public authority defense failed for the January 6 defendants, so too will it fail for those currently associated with the Trump Administration who face prosecution down the line for any crimes President Trump tells them to commit.

A. The Public-Private Distinction

While *Barker* and its progeny involved allegations that a government agent spoke privately with an individual to recruit that individual for a specific plan,¹⁷⁵ the January 6 case involved public speech. President Trump had been speaking to a crowd of thousands of people and tweeting to the general public.¹⁷⁶ Even if the statements themselves were an authorization to do something otherwise unlawful, it is possible that the public authority defense is not meant to apply in such situations. Such a rule would make good sense. Considering the potential for deputization of people to engage in violence previously discussed in Section II.C, it is valuable to limit this defense to those narrow factual situations where an individual is being recruited for a government operation as opposed to permitting a government official to authorize broad swaths of people to do something otherwise unlawful.¹⁷⁷ The January 6 case is a prime example of such a situation. The President told a crowd of thousands to break into the Capitol Building and stop the election certification. In doing so, the crowd committed numerous acts of violence and property destruction. We might think of similar scenarios where instead of the President, perhaps the local police chief speaks to a crowd of townspeople who are concerned about an influx of undocumented immigrants, and the police chief tells the townspeople they should “fight like hell” to keep their town safe. It sounds like an authorization, but the public authority defense should not be used to deputize all those people to act like private immigration enforcers.

On the other hand, entrapment by estoppel appears to cover statements made to the general public. In *United States v. Pennsylvania Industrial Chemical Corp.*, the fact that the statement of law by the Army Corps of

¹⁷⁵ *Barker*, 546 F.2d at 943–44 (Wilkey, J.); *United States v. Duggan*, 743 F.2d 59, 65–66 (2d Cir. 1984); *United States v. Alvarado*, 808 F.3d 474, 478–79 (11th Cir. 2015); *United States v. Bear*, 439 F.3d 565, 567 (9th Cir. 2006).

¹⁷⁶ H.R. Rep. No. 117-663, at 577 (2022); Donald J. Trump (@realDonaldTrump), X (Jan. 5, 2021, 5:05 PM), <https://x.com/realDonaldTrump/status/1346578706437963777> [https://perma.cc/TK9L-UAP6].

¹⁷⁷ See *supra* Section II.C.

Engineers was published for anyone to access did not prevent the Supreme Court from holding that it was a permissible basis for the entrapment by estoppel defense.¹⁷⁸ Perhaps the published regulatory statement was sufficiently different from a public speech because the point of the publication was to clarify the Corps's interpretation of the regulation, and it was only going to be read by those who had a question about how the regulation applied. But this highlights an important doctrinal difference between the entrapment by estoppel and public authority defenses. Entrapment by estoppel protects those who relied upon legal advice when they were uncertain of what the law permitted or required.¹⁷⁹ Public authority protects those who reasonably believed they were lawfully authorized to act in a way they knew would be otherwise unlawful.¹⁸⁰ In a one-on-one situation with a government agent, particularly one with whom the individual has a personal or professional history, it is much more reasonable to believe they have been so authorized as opposed to when they are standing among a thousand-strong crowd. No court has yet articulated this limit on the public authority defense, but a fair reading of *Barker* and the cases that follow it, as well as the public policy concerns presented by broad application of this defense, suggest that this limitation should exist.

B. What Remains of Barker

The foregoing has argued for a narrow version of the public authority defense, as articulated by Judge Merhige in *Barker*. In so arguing, it has drawn out other limitations of the defense, including that the defense cannot work where there is a broad, public authorization,¹⁸¹ nor can it work where the directive is so egregious as to render reliance unreasonable.¹⁸² There is also some suggestion that the defense cannot work where the public official's authority is too broad.¹⁸³ Given those limits, it is hard to see when the defense can work.

The best cases for the defense remain sting operations like the one in *United States v. Alvarado*. The difficulty with that case and those like it was not the applicability of the defense itself, but in satisfying its various

¹⁷⁸ 411 U.S. 655, 674 (1973).

¹⁷⁹ See *supra* Subsection II.B.i.

¹⁸⁰ See *supra* Section I.A.

¹⁸¹ See *supra* Section IV.A.

¹⁸² See *supra* Section II.C.

¹⁸³ See *supra* notes 155–58 and accompanying text.

elements: the reliance was reasonable, the official had the requisite authority, and the official in fact authorized their conduct.¹⁸⁴ That the elements are difficult to prove also works to prevent abuse of the defense and permit it to work only where it truly should.

Further, because the defense originated in the Watergate era and involved claims of authorization by the White House, one might think the defense would also have continuing force in such cases. But it has not had this force in either *United States v. North*¹⁸⁵ or the January 6 case.¹⁸⁶ The development of the defense since *Barker* suggests that *Barker* is no longer the rule, but the exception.¹⁸⁷

If the defense works only in sting operations and perhaps where the president authorizes a national-security-motivated warrantless search, it might reasonably be suggested that the defense should not exist at all. So long as those factual situations exist, however, the defense should exist. Sting operations may involve the government using an agent to recruit someone to purposely violate the law to help law enforcement investigate criminal activity.¹⁸⁸ The recruit must be able to follow those orders without prosecution; otherwise, precisely the sort of due process problem the Supreme Court saw in *Raley v. Ohio*, *Cox v. Louisiana*, and *United States v. Pennsylvania Industrial Chemical Corp.* arises, where the government, intentionally or not, misleads the defendant into acting based on an erroneous legal interpretation.¹⁸⁹ Whether such sting operations should lawfully exist in the first place is another question. But they do, and at base, the public authority defense exists to protect those unfairly misled by government officials. And similarly, so long as the president can actually authorize warrantless searches in the aim of national

¹⁸⁴ *United States v. Duggan*, 743 F.2d 59, 84 (2d Cir. 1984) (rejecting the public authority defense where there was insufficient evidence to support a claim of reasonable reliance on an alleged CIA official's authority); *United States v. Rosenthal*, 793 F.2d 1214, 1235–36 (11th Cir. 1986) (rejecting the public authority defense where it was not shown that the CIA agent had the requisite authority); *United States v. Alvarado*, 808 F.3d 474, 489–90 (11th Cir. 2015) (rejecting the public authority defense where there was no authorization).

¹⁸⁵ 910 F.2d 843, 881 (D.C. Cir. 1990).

¹⁸⁶ *United States v. Sheppard*, No. 21-cr-00203, 2022 WL 17978837, at *9 (D.D.C. Dec. 28, 2022).

¹⁸⁷ It is possible a case could come up where the president authorizes a warrantless search pursuant to national security concerns where the defense could be viable as a closer comparison to *Barker*, although it would be a real test of the facts. See Kristovich, *supra* note 20, at 833 n.101 (discussing *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976)).

¹⁸⁸ See Graeme R. Newman, U.S. Dep't of Just., *Sting Operations 3* (2007), <https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p134-pub.pdf> [<https://perma.cc/3E4Q-LN44>].

¹⁸⁹ See *supra* Subsection II.B.i.

security,¹⁹⁰ the defense should also exist to protect those who get wrapped up in such operations.

CONCLUSION

In just the first month of President Trump's second term, he has tried to end birthright citizenship¹⁹¹ and freeze federal spending,¹⁹² has fired prosecutors¹⁹³ and inspectors general,¹⁹⁴ has effectively shut down several government agencies,¹⁹⁵ and has used Elon Musk and the newly created Department of Government Efficiency to comb through private data on government employees to cull the civil service.¹⁹⁶ His actions have been categorized as "rampant lawlessness."¹⁹⁷ Lower courts have agreed.¹⁹⁸

¹⁹⁰ See Kristovich, *supra* note 20, at 833 n.101.

¹⁹¹ Protecting the Meaning and Value of American Citizenship, Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025).

¹⁹² See, e.g., Reevaluating and Realigning United States Foreign Aid, Exec. Order No. 14,169, 90 Fed. Reg. 8619 (Jan. 30, 2025) (pausing funding to USAID).

¹⁹³ Hugo Lowell, Trump Personally Ordered Firings of Special Counsel Prosecutors, *The Guardian* (Feb. 4, 2025, 6:00 AM), <https://www.theguardian.com/us-news/2025/feb/04/trump-jack-smith-special-counsel-prosecutors-firings> [<https://perma.cc/N7A4-3J4Z>].

¹⁹⁴ David Nakamura, Lisa Rein & Matt Viser, Trump Defends Ousting at Least 15 Independent Inspectors General in Late-Night Purge, *Wash. Post* (Jan. 25, 2025), <https://www.washingtonpost.com/politics/2025/01/24/trump-fire-inspectors-general-federal-agencies/>.

¹⁹⁵ Reevaluating and Realigning United States Foreign Aid, *supra* note 192; Christopher Rugaber, Trump Administration Orders Consumer Protection Agency to Stop Work, Closes Building, *AP News* (Feb. 9, 2025, 3:56 PM), <https://apnews.com/article/trump-consumer-protection-cease-1b93c60a773b6b5ee629e769ae6850e9> [<https://perma.cc/E77F-ALA3>] (reporting that the Trump Administration ordered the CFPB to stop nearly all its work, effectively shutting down the agency); Gloria Oladipo, Trump and Musk Launch Mass Layoffs at Several US Federal Agencies, *The Guardian* (Feb. 13, 2025, 11:51 AM), <https://www.theguardian.com/us-news/2025/feb/13/elon-musk-doge-delete-agencies> [<https://perma.cc/594U-PU6N>] (describing other large-scale cuts to government agencies).

¹⁹⁶ Charlie Savage, Trump Brazenly Defies Laws in Escalating Executive Power Grab, *N.Y. Times* (Feb. 5, 2025), <https://www.nytimes.com/2025/02/05/us/trump-federal-law-power.html>; Rebecca Beitsch, DOGE Efforts to Access Private Data Spark Sharp Pushback, *The Hill* (Feb. 20, 2025, 6:00 AM), <https://thehill.com/homenews/administration/5154329-elond-musk-department-government-efficiency/> [<https://perma.cc/U93U-8J9V>].

¹⁹⁷ Savage, *supra* note 196 (quoting Professor Peter M. Shane).

¹⁹⁸ See, e.g., *Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, 775 F. Supp. 3d 100 (D.D.C. 2025) (granting a preliminary injunction to indefinitely block the Trump Administration from freezing federal grants and loans); *AIDS Vaccine Advoc. Coal. v. U.S. Dep't of State*, 768 F. Supp. 3d 26 (D.D.C. 2025) (prohibiting the Administration from stopping funding based on a general directive to suspend aid); *Am. Fed'n of Gov't Emps. v. U.S. Off. of Pers. Mgmt.*, No. 25-cv-01780, 2025 WL 660053 (N.D. Cal. 2025) (ruling that efforts by the Office of Personnel Management to direct the termination of certain government employees were unlawful).

Not only did President Trump pardon all those charged with crimes in connection with January 6,¹⁹⁹ but he also fired the prosecutors who worked on those prosecutions.²⁰⁰ Whatever these actions mean for the scope of executive power, it is clear the second Trump Administration is taking action that is likely unlawful, meaning President Trump is likely directing federal employees and associates to take unlawful action at his behest. And it is further possible those actions not only exceed the scope of executive branch authority, but also violate federal criminal law. If so, President Trump will not be prosecuted.²⁰¹ But those who act pursuant to his direction might be, and they might wish to raise the public authority defense.²⁰²

The purpose of this Note is to explore if and how the public authority defense should be available to those who conducted illegal action at the direction of the president. The public authority defense has been in limbo since its creation in two single-vote opinions in *Barker*. Literature has largely ignored the defense, focusing on or confusing the public authority defense with entrapment by estoppel. Defendants across the country tried to take advantage of Judge Wilkey's more lenient articulation of the public authority defense, but that approach continued to fail, and it was much harder for any defendant to succeed on the stricter actual authority approach. Thus, the defense appeared to fall out of favor. But then came January 6, and once again, defendants invoked the power of the executive branch to justify their reliance on directives to commit crimes. Only this time, unlike in *Barker*, they were explicit about relying on the President's words. The January 6 case was therefore the prime opportunity to test what remains of the public authority defense as articulated in *Barker*. But the district court got it wrong, and much like how Watergate got in the way of the D.C. Circuit clarifying *Barker*, President Trump's pardons have prevented the court from clarifying it yet again.

¹⁹⁹ Proclamation No. 10,887, *supra* note 4. Of course, this is constitutionally permissible. U.S. Const. art. II, § 2, cl. 1.

²⁰⁰ Savage, *supra* note 196.

²⁰¹ See *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024).

²⁰² Of course, President Trump might preemptively pardon those associated with his administration. Such a case might be a more difficult one than the January 6 case since the presumably private nature of the directive would bring the facts closer to the facts of *Barker*. But at the end of the day, what matters is whether the president has the authority to issue directives to violate general criminal law. He does not, and so the public authority defense must fail. And if President Trump again directs a crowd of people to break the law, even if supposedly done in the country's interests, the January 6 case is clear that the public authority defense will fail.

The district court was right that the defense ought to fail in these cases, but its reasoning was flawed. It was not that President Trump never specifically directed an action or that he never told the defendants their actions would be lawful. After all, he was impeached for inciting an insurrection, and the defendants have a cognizable argument that his language directed them to “fight like hell” to “stop the steal.” His position as president gave the indication of lawfulness, as in *Barker*. Instead, the defense should fail for a much simpler reason: the defense requires the public official to have actual authority in the area of law implicated by the crime charged to authorize such conduct. The president does not have the authority to authorize forcible entry into the Capitol Building or to authorize assault or destruction of property. In other words, the president cannot just authorize violations of general criminal law.

This straightforward conclusion is precisely why the actual authority standard is the correct one. It operates to limit the civilian’s just-following-orders defense to only those cases where the official truly could have authorized the conduct, thereby avoiding abuse of the defense and widespread deputization to engage in violence. This requirement aligns the defense with entrapment by estoppel and the superior orders defenses, both of which require actual authority by the one advising or ordering and both of which have adopted limits to prevent abuse. Bringing the public authority defense in line with those doctrines simplifies the universe of reliance defenses and sets forth clear principles for its applicability.²⁰³ Although *Barker* initially appeared promising to many defendants when it laid out a potentially lenient reliance standard, it is very likely limited to its facts. Should President Trump, or any other president, direct others to take unlawful actions, those individuals should heed the example of the January 6 defendants and know that a “following orders” defense will not be available to them. Instead, it is personal responsibility that will preserve the rule of law.

²⁰³ Open questions still remain, however, as to “who counts” as an official with the appropriate authority: What about a low-ranking civil servant? Will an official with general enforcement authority like a prosecutor or police officer ever be the basis for a public authority defense?