UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ERIK HERRERA, Defendant.	Case No. 1:21-CR-00619-BAH

ERIK HERERRA'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS COUNTS ONE, TWO, AND THREE OF THE INDICTMENT

I. INTRODUCTION

Defendant Erik Herrera moved to dismiss counts one, two and three of the Indictment pursuant to Fed. R. Crim. P. 12(b). The government opposes this motion. The government's opposition is without merit and this Court should grant the motion to dismiss.

II. ARGUMENT

1. Count One's Alleged Violation of 18 U.S.C. § 1512(c)(2) Fails to State an Offense and the Government's Contention Otherwise is Specious.

In his motion to dismiss Mr. Herrera argues count one of the indictment should be dismissed for three reasons (1) the electoral count on January 6, 2021, was not an official proceeding as contemplated by § 1512(c), (2) § 1512(c)(2) is unconstitutionally vague on its face and as applied in this case, and (3) this court should adopt the reasoning in *United States v. Miller* and similarly dismiss the alleged violation of § 1512(c)(2). In their opposition the government, taking Mr. Herrera's arguments out of order, counters by asserting (1) the congressional vote somehow amounts to an "official proceeding" as contemplated by the statute, (2) that section 1512 (c)(2) applies to Mr. Herrera's conduct, a response to Mr. Herrera's *Miller* argument, and (3)

section 1512(c)(2) is not unconstitutionally vague. Mr. Herrera address the governments positions below in the order outlined in the government's opposition.

a. The Electoral Count on January 6, 2021, was not an "Official Proceeding" as contemplated by § 1512(c) and the Government's Attempt to Argue Otherwise are Unpersuasive.

The government first argues for a broad definition of "proceeding," as "'[t]he carrying on of an action or series of actions; action, course of action; conduct, behavior.'" ECF No. 40 at 10. This definition, however, is overbroad and unsupported by the standard legal definition. *See* Black's Law Dictionary, "Proceeding" (11th ed. 2019) ("[t] he business conducted by a court or other official body; a hearing"). Recognizing this, the government all but accepts what they refer to as the "narrower definition," but what is in fact the legal definition, stating "even under this narrower definition, Congress's Joint Session to certify the Electoral College vote – business conducted by an official body, in a formal session – would easily qualify." ECF No. 40 at 11. The government is mistaken.

Section 1512(c)(2)'s legislative history, and the ordinary legal meaning of the term "proceeding" that is contained in the statute, supports dismissal of this count. Section 1512(c)(2)'s legislative history shows that its abiding purpose is protecting the integrity of hearings before tribunals by preventing witness tampering and destruction of evidence. Likewise, the ordinary legal meaning of "proceeding" is:

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. *The business conducted by a court or other official body; a hearing*. 5. *Bankruptcy*. A particular dispute or matter arising within a pending case – as opposed to the case as a whole.

Black's Law Dictionary, "proceeding" (11th ed. 2019) (emphasis added). The legal definition of "proceeding" plainly describes the word to mean "a hearing" and "hearing" means "the hearing of

the arguments of the counsel for the parties upon the pleadings, or pleadings and proofs; corresponding to the trial of an action at law." *Id.* (definition of hearing). These legal definitions, together with the legislative history, strongly support the conclusion that there must be some kind of adjudicative hearing – i.e., an "official decision about who is right in (a dispute)." (Merriam-Webster.com Dictionary, definition of "adjudicate" (2021)). *See also United States v. Dunn*, 434 F. Supp. 2d 1203, 1207 (M.D. Ala. 2006)) (investigation conducted by Bureau of Alcohol, Tobacco, and Firearms not an "official proceeding" because the term encompasses "events that are best thought of as hearings (or something akin to hearings").

Here, there was no adjudicative, investigative, or legislative purpose to the gathering of Congress to certify the electoral vote. The event on January 6, 2021, was a ceremonial meeting of both houses of Congress. The outcome was already determined. Any objections or speeches were purely political performances that could have no impact on the outcome. No "proceeding before the Congress" took place, because there was nothing towards which to "proceed."

In an unpersuasive effort to transform the Joint Session on January 6, the government notes that the Joint Session is a deliberative body where objections are permitted and a decision must be made pursuant to the procedures set forth in 3 U.S.C. §15. *See* ECF No. 40 at 12-13. However, the courts interpret "official proceeding" more narrowly. It is not enough to be a deliberative body where decisions are made. There also must be characteristics of a hearing, such as findings of fact, and the power to issue subpoenas. *See, e.g., United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) (explaining that agency investigations may qualify as "proceedings" under 18 U.S.C. §1505 if those investigations involve "some adjudicative power" such as the power to issue subpoenas, and compel sworn testimony in conjunction with an investigation). In other words, it is not enough that a decision is made in a formal environment, but rather that the characteristics surrounding the

event must be "akin to a hearing." *Id.* *See also United States v. Sandlin*, 21-CR-88 (DLF), Dkt. No. 63, Memorandum Opinion at 7 (ruling that an "official proceeding" under §1512(c)(2) does not include any and all series of actions before Congress; rather, the proceeding must be akin to a formal hearing).

Nor does the fact that 3 U.S.C. §15 provides Congress with the authority to lodge objections transform the Joint Session into a "hearing" or "official proceeding." Although the Electoral Count takes place in a "formal environment," has proscribed procedures, it is not a "hearing." It is, in the plain text of the statute, simply a "meeting" of both houses. 3 U.S.C. §15. And although 3 U.S.C. §15 provides for the lodging of objections; these "objections" are not the same type of objections that exist in a typical "proceeding before Congress," as contemplated in §1512. As explained in detail in the defendant's motion to dismiss, the Congress's "counting of the votes" is purely ceremonial; the count is predetermined because the Joint Session does not have the authority to change any of the votes that have been certified by the states. Congress makes no decision because there is no decision for Congress to make. Moreover, the vote count is neither investigative nor legislative. Simply put, the "counting function" of Congress does not have an "adjudicative," or "judicial" or "hearing" aspect to it. The "electoral vote is merely ministerial. Vasan Kesavan, "Is the Electoral Count Act Unconstitutional?" 80 North Carolina Law Review 1653, 2002, at page 258. Indeed, as R. Rarick stated, "[w]e are not election supervisors nor given the discretion to recompute the vote received from a sovereign state. The Constitution clearly proscribes our duty as to 'count the electoral votes,' the ministerial function of a central collecting agency and a tabulating point." *See* Kesavan at 1694, 2022 (emphases added). For all these reasons, the Electoral Count is not a proceeding akin to a formal hearing. Rather, it is a ceremonial meeting of both houses of Congress steeped in the tradition that decides nothing. It is a political performance conducted in order to give the country a feeling of finality over the already final election results. As a result, the Electoral Count does not qualify as an "official proceeding" and count one of the Indictment should be dismissed.

b. The District Court's Decision in *Miller* Support's Dismissal of Count One and This Court Should Adopt its Reasoning Despite the Government's Misplaced Arguments to the Contrary.

The government spends much of their opposition raising arguments rejected by the Court in *Miller*. *Compare* ECF No. 40 at 17-28 with *United States v. Miller*, No. 21-cr-119, 2022 WL 823070 (D.D.C. Mar. 7, 2022) (Nichols, J.). Just as the *Miller* court rejected many of these arguments, so too should this Court. The government them moves to take direct issue with the *Miller* case arguing against its reasoning. This argument is unpersuasive. The *Miller* decision, as discussed in the motion to dismiss, properly held that § 1512(c)(1) limits the scope of (c)(2) and "requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding. Because, just as in *Miller*, the government here does not make allegations related to Mr. Herrera taking action with respect to records or documents or other objects, count one of the indictment must fall.

In a strained attempt to salvage count one, the government argues that even under *Miller* this Court should not dismiss count one of the indictment because the indictment "did not need to more specifically allege that the obstruction took the form of taking some action with respect to a document." ECF No. 40 at 35. The government further explains this by saying "the indictment's allegations, by charging the operative statutory text, permissibly embrace two theories: (1) that the defendant obstructed an official proceeding by taking some action with respect to a document; and (2) that the defendant obstructed an official proceeding without taking some action with respect to a document." This argument could perhaps work had the government indicted on the narrower theory and not the broader. In other words, had the indictment alleged "defendant obstructed an official proceeding by taking some action with respect to a document" this argument could gain traction. But the indictment does no such thing and thus count one cannot survive.

Mr. Herrera respectfully urges this Court to adopt the analysis and reasoning set forth in *Miller* and find that count one fails to state an offense against him because there is no allegation that he took any action with respect to records or documents.

c. 18 U.S.C. is Unconstitutionally Vague on Its Face and As Applied in this Case.

In their response, the government contends that a provision is only impermissibly vague if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. ECF No. 40 at 37. That, however, is precisely the situation confronting Mr. Herrera here. In, *United States v. Williams*, the Supreme Court reversed a circuit court's finding of vagueness with regard to a pandering statute. 553 U.S. 285 (2008). *Id.* The Supreme Court reasoned that:

> "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but *rather the indeterminacy of precisely what that fact is*. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent" – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.

Id. at 306. (emphasis added). The reasoning in *Williams* is exactly what Mr. Herrera argues— that the language in §1512(c)(2) would leave a juror to doubt precisely what fact or facts are needed to make a decision. The word "corruptly" in §1512(c)(2) creates the same problem as the words "annoying" and "indecent" that the *Williams* court acknowledged were impermissibly vague in the pandering statute.

Despite best efforts, the government cannot successfully ignore the vagueness of the language of 18 U.S.C. §1512(c)(2). It cites to a series of cases to argue that "corruptly" is not vague and that the defendant's reliance on *United States v. Poindexter,* 951 F.2d 369, 379 (D.C. Cir. 1991) is misplaced. *See* ECF No. 40 at 37-39. It is the government, however, that misunderstands the crux of *Poindexter*.

In *Poindexter*, the Court ruled *specifically* that the adverb "corruptly" should be read "transitively" and requires that the defendant "corrupt" *another* into violating their legal duty. The reason that *Poindexter* reached a different outcome than *United States v. Morrison*, 98 F. 3d 619 (D.C. Cir. 1996) was because, in *Morrison*, the word "corruptly" was applied exactly as described in the statute, i.e., persuading another to violate their legal duty. *Id.* at 630. So, *Morrison* and *Poindexter* are not at odds as the government suggests. Rather, the cases go hand in hand to rule that the word "corruptly" is only clear when it is applied transitively to circumstances where one individual corrupts another to violate their legal duty. That is because the word "corruptly" in the statute at issue in *Poindexter* and *Morrison* is followed by another phrase that provides context and identifies the specific action required to violate the law. Such circumstances are absent in this case as §1512(c)(2) has no such requirement. Indeed, the phrase "corruptly influences" does not resolve the ambiguity – it heightens the unconstitutional vagueness of the statute – because "influence" alone is another vague word that may mean many things and lacks the definiteness of "influencing another to violate their legal duty" at issue in *Poindexter* and *Morrison*. *See also Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) (holding that a statute that criminalized "leading an immoral or profligate life" vague because "immoral" is synonymous with "corrupt, depraved, indecent, dissolute," all of which would result in "an almost boundless area for the individual assessment of another's behavior").

The government further questions Poindexter by citing to *Arthur Andersen v. United States*, 544 U.S. 696 (2005), a case that involved a jury instruction that failed to "convey the requisite consciousness of wrongdoing." Id. at 698. This holding is not inconsistent with Poindexter, which involved an entirely different dispute and has no bearing or effect on why the word "corruptly" was deemed vague in Poindexter. The cases the government cite from the 7th, 2nd, and 11th Circuits are inapposite for the same reason. *See* ECF No. 40 at 39. Poindexter remains good law and identifies one of the many problems that the word "corruptly" presents in the obstruction statute. It is impermissibly vague because it does not provide a discernable standard for what conduct is prohibited, thereby allowing for arbitrary or discriminatory enforcement as in this case. For this reason too, count one of the Indictment should be dismissed.

The government does not address the arguments related to section 1512(c)(2) acting as residual clause or that the term "official proceeding" further support a finding of unconstitutional vagueness. Mr. Herrera refers this Court to his motion to dismiss in support of his argument. *See* ECF No. 38 at 7-8.

2. 18 U.S.C. § 1752 Fails to State an Offense and Thus Counts Two and Three Should be Dismissed.

a. 18 U.S.C. § 1752 is at Best Ambiguous and the Legislative History Continues to Compel the Conclusion That the United States Secret Service is the Only Entity Designated to Restrict Areas Under the Statute.

The government argues that 18 U.S.C. §1752 is unambiguous and, therefore, there is no need to consider the legislative history of the statute. *See* ECF No. 40 at 41. The government is incorrect.

The language of §1752 is unclear. It states: "restricted building or grounds" means any posted, cordoned off, or otherwise restricted area." Yet, it does not identify who may do the restricting, and Congress could not possibly have intended that anyone could impose a restriction.

This lack of clarity and guidance to law enforcement or to the public as to who is authorized to impose restrictions under the statute makes the statute ambiguous. Given this ambiguity, the court should look to the legislative history to determine what Congress intended. *See U.S. v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (citing *Staples v. United States*, 511 U.S. 600, 605 (1994)).

The government is incorrect that the legislative history supports broad authority for any entity to restrict Congressional grounds. *See* ECF No. 40 at 42 (citing *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2015)). *Bursey*, however, involved in *what manner* the area is deemed restricted, holding that §1752 did not require a physical demarcation and that the presence of law enforcement was sufficient to mark the area as restricted. *Id.* at 308. *Bursey* actually supports Mr. Herrera's position, fully supported by the legislative history, that only the Secret Service is vested with the power to set federal restricted areas because, in *Bursey*, the Secret Service was the entity that designated an area at the Columbia airport as restricted. *Id.* at 304.

The government seeks to have the Court forego any consideration of the legislative history of §1752 even though the Senate Judicial Committee report unambiguously vests the Secret Service with the power to set federal restricted areas. S. Rep. No. 91-1252 (1970) at 7. If Congress did not intend to vest that authority with the Secret Service, it would not have named that agency specifically. Moreover, vesting this power with the Secret Service makes perfect sense, as it is the entity that is charged with protecting the President and Vice President.

The government contends that, because the current version of the statute does not specifically reference the Secret Service, that means Congress purposefully removed it to broaden the authority to other entities. This assumption is unfounded and the government cites to no legislative statement or other authority stating that this was intended as part of revising the statute.

In the absence of any such clear direction, the Court should not interpret §1752 to provide authority for any entity to restrict the grounds other than the entity that protects the President and Vice President and has historically had the sole authority to do so.

III. CONCLUSION

For the foregoing reason, the Court should (i) grant this motion; (ii) dismiss counts one, two, and three of the Indictment; and (iii) grant Mr. Herrera such other and further relief as the Court deems just and proper.

Respectfully submitted,

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/s/ Jonathan K. Ogata & Cuauhtemoc Ortega

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