UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. ERIK HERRERA, Defendant.	Criminal Action No. 21-619 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM AND ORDER

Defendant Erik Herrera faces trial on August 15, 2022, on a five-count indictment and has moved pre-trial to dismiss, *inter alia*, Counts Two and Three, alleging violations of 18 U.S.C. §§ 1752(a)(1) and (a)(2), respectively. Def.'s Mot. Dismiss Counts One, Two, and Three of Indictment ("Def.'s Mot."), ECF No. 38.[1] Both challenged charges stem from defendant's alleged presence in "a restricted building and grounds" owing to the presence of the then-Vice President at the Capitol on January 6, 2021. Indictment at 2, ECF No. 8.[2] Specifically, Count Two alleges that defendant "unlawfully and knowingly enter[ed] and remain[ed] in" such "a restricted building and grounds," in violation of 18 U.S.C. § 1752(a)(1), while Count Three alleges that defendant "knowingly, and with intent to impede and disrupt the orderly conduct of Government business and official functions, engage[d] in disorderly and disruptive conduct in and within such proximity to, a restricted building and grounds . . . when and so that such

[1] Defendant also seeks to dismiss Count One, alleging violation of 18 U.S.C. § 1512(c)(2) and § 2, and resolution of that part of the pending motion is deferred until the pretrial conference scheduled on August 5, 2022.

[2] At the government's request and with defendant's consent, the indictment was amended on July 5, 2022, to strike erroneous language indicating that the "Vice President-elect" was also temporarily visiting the U.S. Capitol Building. Min. Order (July 5, 2022) (granting Unopposed Gov't's Mot. Strike Portions of Indictment, ECF No. 44).

conduct did in fact impede and disrupt the orderly conduct of Government business and official functions," in violation of 18 U.S.C. § 1752(a)(2), Indictment at 2.

Defendant argues that Counts Two and Three should be dismissed because, for a location to be "a restricted building and grounds," the U.S. Secret Service ("USSS") must so designate the location and, absent such formal designation by USSS with respect to the Capitol on January 6, 2021, § 1752 cannot apply to defendant's offense conduct. Def.'s Mot. at 12–13. As explained below, this argument is meritless. This Court therefore continues to join every other Judge on this Court to have considered—and consistently rejected—this argument, and defendant's motion to dismiss Counts Two and Three is denied.

I. DISCUSSION

Defendant asserts that the Capitol building and grounds on January 6, 2021 did not constitute "a restricted building or grounds," a required element of 18 U.S.C. § 1752. Def.'s Mot. at 12–13. In support of this argument, defendant claims that "Section 1752 grants the Treasury Secretary the authority to 'designate by regulations the buildings and grounds which constitute the temporary residences of the President'" and to "'prescribe regulations governing ingress or egress to such buildings and grounds to be posted, cordoned off, or otherwise restricted areas where the President may be visiting,'" noting that when this statute was originally enacted, the USSS was part of the Department of the Treasury. *Id.* at 12 (purportedly quoting 18 U.S.C. § 1752(d)). From this statutory construction, defendant infers that for an area to be "restricted building or grounds" for purposes of § 1752, the area must be "designated" as such by the USSS. *See* Def.'s Mot. at 12–13. Since the USSS did not make such a designation, defendant insists the Capitol was not a "restricted building or grounds" and these two counts must be dismissed. *Id.*

The central problem with defendant's statutory interpretation argument is that the statutory language on which the argument is predicated was removed from the statute in 2006. When Congress passed the USA PATRIOT Improvement and Reauthorization Act of 2005 ("Reauthorization Act"), Pub. L. No. 109-177, 120 Stat. 192 (2006), Congress removed the authority (and responsibility) of the Secretary of the Treasury, the USSS, or anyone else to "designate" the "buildings and grounds which constitute the temporary residences of the President or other person protected by the Secret Service," 18 U.S.C. § 1752(d)(1) (2004), and instead defined the locations covered by § 1752 as "any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." Reauthorization Act § 602(a)(1)(A), 120 Stat. at 252 (codified at 18 U.S.C. § 1752(a)(1) (2008)). The statute was further reorganized in 2012 to proscribe certain conduct simply in "any restricted building or grounds" and then separately defining "restricted buildings or grounds" as including, *inter alia*, "any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." Federal Restricted Buildings and Grounds Improvement Act of 2011 § 2, Pub. L. No. 112-98, 126 Stat. 263, 263–64 (2012) (codified at 18 U.S.C. § 1752(a), (c)(1)(B)). That language remains in force.

The plain meaning of the current text of § 1752 contains no requirement that anyone, including the USSS, formally "designate the area 'restricted.'" Def.'s Mot. at 12–13. To be sure, the USSS is still relevant to the definition of "restricted building or grounds" given that the Vice President is not expressly named in the statute but rather is included by his indisputable status as a "person protected by the Secret Service." *See* 18 U.S.C. § 1752(c)(2) (defining such a person as "any person whom the United States Secret Service is authorized to protect under

section 3056 of this title or by Presidential memorandum, when such person has not declined such protection"); *id.* § 3056(a)(1) (authorizing USSS protection of the Vice President). Nevertheless, nothing about this text or any other authority supports defendant's leap to the conclusion that "[s]ince it is the Secret Service who protects the President or 'other person,' it is the Secret Service who must designate the area 'restricted.'" Def.'s Mot. at 12–13. If anything, the statutory history recounted above demonstrates a movement away from a formal "designation" process to one that operates automatically by virtue of the presence of a Secret Service protectee.

In any event, as the government correctly notes, it is not appropriate to look past the text and tease out an extra-textual requirement, because "the text itself is clear" and this is not a situation "where literal application of statutory language either results in an outcome that can truly be characterized as absurd or produces an outcome that is demonstrably at odds with clearly expressed Congressional intent." United States' Opp'n Def.'s Mot. Dismiss Counts One, Two & Three of Indictment ("Gov't's Opp'n") at 42–43, ECF No. 40. Furthermore, while defendant eventually acknowledges that "the current version of the statute does not specifically reference the Secret Service," he continues to rely only on *old* legislative history related to the initial enactment and tries to wish away the fact that Congress removed the Treasury Secretary's designation function in 2006, claiming the government offers "no legislative statement or other authority stating that this was intended as part of revising the statute." Def.'s Reply Supp. Mot. Dismiss Counts One, Two, & Three of Indictment ("Def.'s Reply") at 9, ECF No. 48. No such "statement or other authority" is required, however, because the unambiguous striking of the text relating to designation speaks for itself.[3]

[3] Defendant claims that *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005), supports his position because there, "the Secret Service was the entity that designated an area at the Columbia[, South Carolina] airport as

Finally, as already noted, Judges on this Court have consistently rejected arguments similar to that of defendant. *See United States v. McHugh*, No. 21-cr-453, 2022 WL 296304, at *18–20 (D.D.C. Feb. 1, 2022) (Bates, J.); *United States v. Bozell*, No. 21-cr-216, 2022 WL 474144, at *8–9 (D.D.C. Feb. 16, 2022) (Bates, J.); *United States v. Mostofsky*, No. 21-cr-138, 2021 WL 6049891, at *12–13 (D.D.C. Dec. 21, 2021) (Boasberg, J.); *United States v. Andries*, No. 21-cr-93, 2022 WL 768684, at *14–16 (D.D.C. Mar. 14, 2022) (Contreras, J.); *United States v. Puma*, No. 21-cr-454, 2022 WL 823079, at *13–16 (D.D.C. Mar. 19, 2022) (Friedman, J.); Mem. & Order at 2–5, *United States v. Williams*, No. 21-cr-377 (D.D.C. June 8, 2022), ECF No. 88 (Howell, C.J.); *United States v. Nordean*, No. 21-cr-175, 2021 WL 6134595, at *18–19 (D.D.C. Dec. 28, 2021) (Kelly, J.); *United States v. Grider*, No. 21-cr-022, 2022 WL 3016775, at *7 (D.D.C. July 29, 2022) (Kollar-Kotelly, J.); *United States v. Bingert*, No. 21-cr-91, 2022 WL 1659163, at *14 (D.D.C. May 25, 2022) (Lamberth, J.); *United States v. Griffin*, 549 F. Supp. 3d 49, 53–57 (D.D.C. 2021) (McFadden, J.); Omnibus Order at 3–4, *United States v. Caldwell*, No. 21-cr-28 (D.D.C. Sept. 14 2021), ECF No. 415 (Mehta, J.). Defendant makes no effort whatsoever to address or show any deficiency in the reasoning in any of these decisions—and this Court finds those decisions to remain persuasive.

restricted" in advance of a presidential visit. Def.'s Reply at 9 (citing *Bursey*, 416 F.3d at 304). Defendant commits the classic logical fallacy of confusing necessary and sufficient conditions. The USSS's ability to designate an area as restricted in conjunction with the presence of a protectee—a premise nobody contests—does not mean that the USSS (or anyone) *must* do so for § 1752 to apply.

II. ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant's Motion to Dismiss Counts One, Two, and Three, ECF No. 38, is **DENIED IN PART** with respect to Counts Two and Three.

SO ORDERED.

Date: August 4, 2022

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BERYL A. HOWELL
Chief Judge