

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA (WASHINGTON, DC)

UNITED STATES OF AMERICA

V.

CAUSE NO. 1:21-cr-00599-RBW

THOMAS HARLEN SMITH

MOTION TO DISMISS COUNTS TEN, ELEVEN, AND TWELVE

Defendant Thomas Smith, by and through counsel, respectfully requests that this Honorable Court dismiss Counts Ten, Eleven, and Twelve of the Superseding Indictment pursuant to Fed. R. Crim. P. 12(b). For the reasons discussed below, these counts fail to state an offense and fail to give proper notice to the defendant. Further, the counts are multiplicitous.

Count Ten charges Mr. Smith under 18 U.S.C. § 1752(a)(1)

On or about January 6, 2021, within the District of Columbia, THOMAS HARLEN SMITH did knowingly enter and remain in a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was and would be temporarily visiting, without lawful authority to do so, and, during and in relation to the offense, did use and carry a deadly and dangerous weapon, that is, a flagpole and pole-like metal object.

Count Eleven charges Mr. Smith under 18 U.S.C. § 1752(a)(2)

On or about January 6, 2021, within the District of Columbia, THOMAS HARLEN SMITH did knowingly, and with intent to impede and disrupt the orderly conduct of Government business and official functions, engage in disorderly and disruptive conduct in and within such proximity to, a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was and would be temporarily visiting, when and so that such conduct did in fact impede and disrupt the orderly conduct of Government business and official functions, and during and in relation to the offense, did use and carry a deadly and dangerous weapon, that is, a flagpole and pole-like metal object.

Count Twelve charges Mr. Smith under 18 U.S.C. § 1752(a)(4)

On or about January 6, 2021, within the District of Columbia, THOMAS HARLEN SMITH did knowingly engage in any act of physical violence against any person and property in a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was and would be temporarily visiting, and, during and in relation to the offense, did use and carry a deadly and dangerous weapon, that is, a flagpole and pole-like metal object.

Mr. Smith understands that many of these issues have already been litigated at the District Court level and that many district court judges have denied similar motions to dismiss over the past year.¹

The arguments made below mirror the ones raised in *United States v. McHugh*, 21-cr-453 (JDB), *United States v. Andries*, 21-cr-93 (RC), *United States v. Puma*, 21-cr-454 (PLF), and *United States v. Bingert*, 21-cr-91 (RCL), and are outlined to preserve the record.

18 U.S.C. §1752 fails to state an offense

a. The United States Secret Service is the Entity that May Designate “Restricted Areas” Under the Statute, Not the United States Capitol Police.

Mr. Smith is charged with three counts of violating 18 U.S.C. § 1752 for conduct occurring “in a Restricted Building or Grounds.” *See* Superseding Indictment [51]. When this statute was

¹ *See United States v. Griffin*, 549 F. Supp. 3d 49 (D.D.C. 2021); *United States v. Sandlin*, 2021 WL 5865006 (D.D.C. Dec. 10, 2021); *United States v. Caldwell*, 2021 WL 6062718 (D.D.C. Dec. 20, 2021); *United States v. Mostofsky*, 2021 WL 6049891 (D.D.C. Dec. 21, 2021); *United States v. Montgomery*, 2021 WL 6134591 (D.D.C. Dec. 28, 2021); *United States v. Nordean*, 2021 WL 6134595 (D.D.C. Dec. 28, 2021); *United States v. McHugh*, 2022 WL 296304 (D.D.C. Feb. 1, 2022); *United States v. Grider*, 2022 WL 392307 (D.D.C. Feb. 9, 2022); *United States v. Bozell*, 2022 WL 474144 (D.D.C. Feb. 16 2022); *United States v. Robertson*, 2022 WL 969546 (D.D.C. Feb. 25, 2022); *United States v. Andries*, 2022 WL 768684 (D.D.C. Mar. 14, 2022); *United States v. Puma*, 2022 WL 823079 (D.D.C. Mar. 19, 2022); *United States v. Sargent*, 2022 WL 1124817 (D.D.C. Apr. 14, 2022); *United States v. McHugh*, 2022 WL 1302880 (D.D.C. May 2, 2022); *United States v. Bingert*, 2022 WL 1659163 (D.D.C. May 25, 2022); *United States v. Fitzsimmons*, 2022 WL 1698063 (D.D.C. May 26, 2022); *United States v. Williams*, 21-cr-618 (ABJ).

enacted, it is clear that the purpose was to designate the United States Secret Service (“USSS”) to restrict areas for temporary visits by the President. *See* S. Rep. No. 91-1252 (1970). At the time of enactment, the USSS was part of the Treasury. Section 1752 grants the Treasury Secretary the authority to “designate by regulations the buildings and grounds which constitute the temporary residences of the President.” 18 U.S.C. § 1752(d)(1). It also allows the Secretary to “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.” § 1752(d)(2). There is nothing in the legislative history (or the statutory language) to suggest that anyone other than the USSS has the authority to so restrict the areas surrounding the Capitol building.

The USSS’s duties and responsibilities are outlined in 18 U.S.C. § 3056, which include:

(e)(1): When directed by the President, the United States Secret Service is authorized to participate, under the direction of the Secretary of Homeland Security, in the planning, coordination, and implementation of security operations at special events of national significance, as determined by the President.

(2) At the end of each fiscal year, the President through such agency or office as the President may designate, shall report to the Congress

(A) what events, if any, were designated special events of national significance for security purposes under paragraph (1); and

(B) the criteria and information used in making each designation.

§ 3056(e)(1)(2)(A)(B). The statute does not state that any other agency is permitted to designate events for security purposes and only explains that the USSS would be under the designation of the Department of Homeland Security instead of the Treasury Department. The statute makes the exclusive role of the USSS even clearer in § 3056(g), which states:

(g) The United States Secret Service shall be maintained as a *distinct entity* within the Department of Homeland Security and shall not be

merged with any other Department function. *No personnel and operational elements of the United States Secret Service shall report to an individual other than the Director of the United States Secret Service, who shall report directly to the Secretary of Homeland Security without being required to report through any other official of the Department.*

(emphases added).

b. The Prosecution Does Not Allege that the Secret Service Restricted the Capitol Grounds on January 6, 2021.

The Superseding Indictment charges Mr. Smith with remaining or entering “restricted building or grounds,” however it does not allege that the USSS designated that area as being restricted. Nor could it do so now because in *United States v. Griffen*, the prosecution conceded that it was the United States Capitol Police that attempted to designate the area as restricted that day and not the USSS. 21-CR-92 (TNM) at Dkt. No. 33. The court in *Griffen* (as well as other district courts) denied a motion to dismiss a § 1752 charge on the ground that the statute (Congress) did not specifically state who must designate the “restricted areas.” *Id.* at Dkt. No. 41.

However, the plain language of 18 U.S.C. § 1752(c)(B), defines “restricted building or grounds” as a “building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting.” Since it is the Secret Service who protects the President or “other person,” it is the Secret Service who must designate the area “restricted.” The legislative history bolsters this interpretation.²

² Congress enacted 18 U.S.C. § 1752 as part of the Omnibus Crime Control Act of 1970. Public Law 91-644, Title V, Sec. 18, 84 Stat. 1891-92 (Jan 2. 1971). At that time, the USSS was a part of the Treasury Department. The Senate Judiciary Committee report accompanying the current version of §1752 noted that there was no federal statute that specifically authorized the Secret Service to restrict areas where the President maintains temporary residences and the senators explained that the key purpose of the bill was to provide that authority to the Secret Service. S. Rep. No. 91-1252 (1970).

The court in *Griffen* also hypothesized that the President would be unable to give an to rely on the military fortification at Camp David already in existence when he visits that facility if the Secret Service was not the only entity with the statutory authority to restrict the area. *See Griffen* ECF Dkt. No. 41 at pg. 11. However, Camp David is a military installation and is not a “public forum” that needs an entity to “cordon off” areas and restrict them in light of a Presidential visit. Military bases have security and are not otherwise open to the public. And each military installation is subject to other laws that protect the facility, and those within it, from intruders. *See, e.g.*, 18 U.S.C § 1382 (barring any person from entering any military installation for any purpose prohibited by law). Military bases are heavily guarded and have entrance and exit points and are different than federal buildings that need sections to be “cordoned” off in order for the general public to know which area is restricted. For these reasons, the example offered by the *Griffen* court is inapposite and does not support the court’s decision.

Furthermore, if a deficiency in a statute creates an absurd result or creates arbitrary enforcement, it should not be enforced until it is amended to provide clarity and provide fair notice to a defendant. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The *Griffen* court’s reasoning creates a different kind of absurd result –viz, anyone claiming to be a part of law enforcement could post a sign designating an area as restricted and a criminal defendant could then be penalized for trespassing because they “willfully” ignored the sign.

c. Even if the Capitol Police were Authorized to Restrict the Grounds, 18 U.S.C. § 1752 is Not Applicable Because Former Vice President Pence Was Not “Temporarily Visiting” the Capitol Building on January 6, 2021.

Under the plain language of 18 U.S.C. § 1752, the statute does not apply here. Section 1752 prohibits conduct in or near “any restricted building or grounds.” The statute expressly defines the term “restricted buildings or grounds” as follows:

(1) the term “restricted buildings or grounds” means any posted, cordoned off, or otherwise restricted area—

(A) of the White House or its grounds, or the Vice President's official residence or its grounds;

(B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or

(C) of a building or grounds so restricted in conjunction with an event designated as a special event of national significance.

18 U.S.C. § 1752(c); *see United States v. Samira Jabr*, Criminal No. 18-0105, Opinion at 12, ECF No. 31 (May 16, 2019), *aff'd*, 4 F.4th 97 (D.C. Cir. 2021).

Counts Ten, Eleven, and Twelve of the Superseding Indictment charge Mr. Smith with conduct “in a restricted building and grounds, that is, any posted, cordoned-off and otherwise restricted area *within the United States Capitol and its grounds, where the Vice President was and would be temporarily visiting . . .*” *See* [8], (emphasis added). The government’s attempt to shoehorn Mr. Smith’s conduct into the statute fails. Accordingly, those two counts should be dismissed.

The “United States Capitol and its grounds” do not automatically constitute “restricted buildings or grounds” under any prong of § 1752(c)(1).

Nor did the Capitol grounds become “restricted grounds” on January 6, 2021, because of a “temporary vice-presidential visit,” as the government asserts in the Superseding Indictment.

The plain meaning of “temporary” is “lasting for a time only.” *Black’s Law Dictionary* (11th Ed. 2019). “Visiting” is defined as “invited to join or attend an institution for a limited time.” *Merriam-Webster* (2021). Together, the phrase “temporarily visiting” connotes temporary travel to a location where the person does not normally live or work on a regular basis.

The former Vice President was not “temporarily visiting” the Capitol on January 6, 2021. The Capitol is a federal government building in the District of Columbia, where he lived and worked. Moreover, he actually worked at the Capitol Building and grounds—it was his place of employment. In his official capacity as the “President of the Senate,” he had a permanent office “within the United States Capitol and its grounds.” The Vice President was not “visiting” the Capitol Building, he was working there, carrying out his sworn official duties to by “presiding,” over the vote count ceremony. *See* 3 U.S.C. § 15 (“Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall *meet* in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and *the President of the Senate shall be their presiding officer.*”) (emphasis added).

Past cases support this plain, common-sense reading of the statute, as they involve conduct in and near areas where the President and Vice President were clearly “temporarily visiting.” *See, e.g., United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005) (defendant entered and remained in a restricted area at an airport in South Carolina where the President was visiting for a political rally); *United States v. Junot*, 902 F.2d 1580 (9th Cir. 1990) (defendant pushed his way through a restricted area where then Vice President George Bush was speaking at a rally at a park in Los Angeles that was secured by United States Secret Service agents); *Blair v. City of Evansville, Ind.* 361 F. Supp.2d 846 (S.D. Indiana 2005) (defendant charged with 18 U.S.C. § 1752 at protest during then Vice President Richard Cheney’s visit to the Centre in Evansville, Indiana). These cases all involve the President and Vice President actually traveling outside of D.C., where they live and work, and “visiting” another location for a “temporary” purpose. As a result, those cases are entirely consistent with the plain meaning of section 1752(c)(1)(B).

Here, by contrast, former Vice President Pence was not traveling to a speaking event or a political rally. He was meeting with other government officials in a federal government building where he had a permanent office as part of fulfilling his official duties as Vice President/President of the Senate. Thus, he was not “temporarily visiting” the Capitol building as required by the plain language of 18 U.S.C. § 1752.

For the above reasons, Section 1752 does not apply as charged, and Counts Ten, Eleven, and Twelve of the Superseding Indictment should be dismissed.

CONCLUSION

For all of these reasons, and such others as may be advanced in further briefing on this motion, and a hearing on this matter, Mr. Smith respectfully requests that the Court grant this motion and dismiss Counts Ten, Eleven, and Twelve of the Superseding indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory S. Park, attorney for Defendant Thomas Harlen Smith, do hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which provided notification to all parties of record.

Dated this the 24th day of February, 2023.

/s/ Gregory S. Park
GREGORY S. PARK
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