UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **BRUNO JOSEPH CUA**	**Criminal Action No. 21-00107 (RDM)** **Honorable Randolph D. Moss** **Trial: February 13, 2023**

BRUNO CUA'S MOTION TO DISMISS COUNTS FOUR, FIVE, AND SIX OF THE SECOND SUPERSEDING INDICTMENT

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Defendant Bruno Cua, through his counsel, files this motion to dismiss Counts Four, Five, and Six of the Second Superseding Indictment ("SSI"), pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure.

INTRODUCTION

The SSI charges Mr. Cua in Counts Four, Five, and Six, with violating sections 1752(a)(1), (a)(2), and (a)(4) of Title 18. Each of those counts also includes an alleged violation of 1752(b)(1)(A) for using or carrying a deadly or dangerous weapon during and in relation to the offense. Those charges should be dismissed because section 1752 criminalizes the unlawful entry into an area and certain actions in such an area restricted for the protection of U.S. Secret Service (USSS) protectees. Statutory text, legislative history, and common sense all point to the conclusion that the sole agency with jurisdiction to restrict such areas is the one that is charged with protecting those individuals, i.e., the USSS. An opinion by DOJ's Office of Legal Counsel agrees. But here, the government contends that Cua violated section 1752 because he allegedly interfered with a plainclothes *Capitol Police Officer*. But the Capitol Police do not guard USSS protectees, and Officer G.L. certainly was not doing so.

On all these grounds, the Court should dismiss Counts Four, Five, and Six.

STATUTORY HISTORY AND FACTUAL BACKGROUND

I. Section 1752 and the U.S. Secret Service

A. The legislative history of § 1752

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). Later Congresses would amend section 1752, but like its current iteration, the 1970 statute provided that it was "unlawful for any person . . . (1) willfully and knowingly to enter or remain in . . .(ii) any posted, cordoned off, or otherwise restricted area of a building or grounds where the President is or will be

temporarily visiting. . .” 84 Stat. 1891-92. The statute made clear which entity “prescribed regulations” governing the “posted, cordoned off, or otherwise restricted areas where the President is or will be temporarily visiting”: the Treasury Department, of which the USSS was then part. § 1752(d)(2); 84 Stat. 1892.

In 1969, Senators Roman Lee Hruska and James Eastland designed S. 2896, which would later be codified at section 1752. The very purpose of the bill was to give the Secret Service the power to restrict areas for temporary visits by the president, a power which no other federal agency then possessed. S. Rep. No. 91-1252 (1970). The Senate Judiciary Committee report accompanying S. 2896 made clear that in 1970, “[a]lthough the Secret Service [was] charged with protecting the person of the President . . . there [was], at the present time, no Federal statute which specifically authorize[d] *them to restrict entry to areas* where the President maintains temporary residences or offices.” *Id.* at 7 (emphasis added).

Similarly, during floor debate on the bill, senators explained that the key purpose of the legislation that would become section 1752 was to vest the Secret Service in particular with the authority to set restricted areas, cutting through the patchwork of existing State laws and local ordinances and freeing the Secret Service from reliance on other government agencies. Senator McClellan stated:

> Protecting the President . . . is a formidable task for the Secret Service, which is charged with safeguarding the personal life of the President. As difficult as this task is, however, it is rendered even more difficult because the Secret Service’s present powers are somewhat limited. Title 18, section 3056 of the United States Code authorizes the Secret Service to protect the life of the President, but does little more. *Consequently, the Service must rely upon a patchwork of State laws and local ordinances and local officers to clear areas for security perimeters, to provide for free ingress and egress when the President is visiting, and to protect the President’s private homes from trespassers*.

116 Cong. Rec. 35,651 (1970) (statement of Sen. McClellan) (emphasis added).

Similarly, Senator Hruska explained that S. 2896 was needed to empower the Secret Service to set restricted areas:

> It would be unconscionable not to recognize the obvious fact that the President's vulnerability is maximized when he is traveling or residing temporarily in another section of the country. It would be unconscionable not to recognize the obvious fact that *the Secret Service does not presently possess adequate Federal authority during these most vulnerable occasions.* This body cannot ignore the obvious responsibility and duty it has at this moment to *create the needed* protection and *authority*.

116 Cong. Rec. 35,653 (statement of Sen. Hruska) (emphasis added).

Following enactment, Treasury promulgated regulations governing restricted areas under § 1752 in Chapter IV, part 408 of title 31 of the Code of Federal Regulations. 31 C.F.R. §§ 408.1-408.3. Section 408.1 stated that "the regulations governing access to such restricted areas where the President or any other person protected by the Secret Service is or will be temporarily visiting are promulgated pursuant to the authority vested in the Secretary of the Treasury by 18 U.S.C. § 1752." 31 C.F.R. § 408.1. Part 408 provided many examples of the USSS, and no other agency, exercising its power under § 1752 to set and define restricted areas. § 408.2(a)-(c). As for gaining lawful access to areas restricted under section 1752, Part 408 was clear that authorization must be obtained from the Secret Service. § 408.3. No other federal agency was mentioned in Part 408.

B. The current § 1752

In its current version, section 1752 criminalizes "knowingly enter[ing] or remain[ing] in any restricted building or grounds without lawful authority to do so." 18 U.S.C. § 1752(a)(1). It also criminalizes,

> knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engag[ing] in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions. . .

§ 1752(a)(2). Finally, for present purposes, it criminalizes "knowingly engag[ing] in any act of physical violence against any person or property in any restricted building or grounds[.]" § 1752(a)(4).

"Restricted building or grounds" is statutorily defined:

> (1) the term "restricted building 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)(1).

The first two subparts of section 1752(c)(1) concern individuals protected by the USSS. In subpart (A), those individuals are the President (at the White House) and the Vice President (at his or her official residence). In subpart (B), the individual protected by the Secret Service is the President or "other person protected by the Secret Service." Members of Congress are not protected by the Secret Service. 18 U.S.C. § 3056(a) (setting forth persons USSS is "authorized to protect"). Protection of congressmen and senators is the role of a separate federal agency, the United States Capitol Police. The Capitol Police do not provide for the protection of Secret Service protectees. *See* United States Capitol Police: Our Mission, available at: https://www.uscp.gov/; § 3056(a).

The final section 1752(c)(1), subpart (C) concerns "a building or grounds so restricted in conjunction with an event designated as a special event of national significance." Major federal government or public events that are considered to be nationally significant may be so "designated" by the President—or his representative, the Secretary of the Department of

Homeland Security (DHS)—as National Special Security Events (NSSE). 18 U.S.C. § 3056(e)(1). Section 3056 designates the USSS as the lead federal agency responsible for coordinating, planning, exercising and implementing security for NSSEs. *Id.*[1] Accordingly, all three subparts of 18 U.S.C. § 1752(c)(1) concern decision-making authority or action by the Secret Service.

Section 3056 sets forth the "Powers, authorities, and duties of United States Secret Service." 18 U.S.C. § 3056. Subsection (d) criminalizes interfering with agents "engaged in the protective functions authorized by this section *or by section 1752 of this title. . .*" 18 U.S.C. § 3056(d) (emphasis added). Subsection (g) stresses the independence of the Secret Service's mission. "The United States Secret Service shall be maintained as a distinct entity within the Department of Homeland Security. . . 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." 18 U.S.C. § 3056(g).

II. Counts Four, Five, and Six of the Second Superseding Indictment

The SSI charges Cua with the felony offense of unlawfully and knowingly entering "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 temporarily visiting," in violation of § 1752(a)(1), engaging in disorderly and disruptive conduct with intent to impede and disrupt the orderly conduct of Government business and official functions, that in fact disrupted the orderly conduct of government business while in that restricted area, in violation of § 1752(a)(2), and engaging in an act of physical violence against a person or

[1] The joint session of Congress that met at the U.S. Capitol on January 6, 2021, to open, certify, and count the November 2020 presidential election votes was not designated an NSSE. National Special Security Events: Fact Sheet, Jan. 11, 2021, p. 1, Congressional Research Service, available at: https://fas.org/sgp/crs/homesec/R43522.pdf.

property while in that restricted area, in violation of § 1752(a)(4). All three counts allege that Mr. Cua "did use and carry a deadly and dangerous weapon, that is, a baton," during the offenses, in violation of § 1752(b)(1)(A).

ARGUMENT

I. Standard for a Rule 12(b) motion to dismiss an indictment

Rule 7 of the Federal Rules of Criminal Procedure provides that "the indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . ." Fed. R. Crim. P. 7(c)(1). This rule performs several constitutionally required functions, including protecting against prosecution for crimes based on evidence not presented to the grand jury, as required by the Fifth Amendment. *See*, *e.g.*, *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999). Rule 12 provides that a defendant may move to dismiss the pleadings on the basis of a "defect in the indictment or information," including a "lack of specificity" and a "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(iii),(v). It also permits such a motion on the basis of a "defect in instituting the prosecution," including "an error in the grand-jury proceeding." Fed. R. Crim. P. 12(b)(3)(A)(v). *Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (an indictment must "fairly inform[] a defendant of the charge against which he must defend" and "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged").

II. The Section 1752 counts should be dismissed.

A. The second superseding indictment fails to state an offense because only the U.S. Secret Service restricts areas under § 1752.

Counts Four, Five and Six contend that Cua violated different subsections of section 1752 by undertaking different acts in or around the Capitol Building, which the SSI characterizes as a "restricted building and grounds," as that phrase is defined in section 1752. However, it does not

allege that the U.S. Secret Service (USSS) restricted that area under the statute. The government's position that any government entity may set a restricted area under section 1752 finds no support in the statutory text, the case law, or the legislative history.

Penal statutes are strictly construed. *United States v. Moore*, 613 F.2d 1029, 198 U.S. App. D.C. 296 (D.C. Cir. 1979). The plain meaning of section 1752 unequivocally indicates that the USSS alone sets restricted areas. As shown above, all three definitions of "restricted building or grounds" in § 1752(c)(1) concern the authority and actions of the USSS and not any other federal agency. Section 3056, concerning the "powers, authorities, and duties of United States Secret Service," confirms that section 1752 is a statute directed to the USSS and not any other federal agency. 18 U.S.C. § 3056(d).

Section 1752 defines "restricted building or grounds" to mean "any posted, cordoned off, or otherwise restricted area" in any of three scenarios set forth in the statute. § 1752(c)(1). If an area is to be "restricted," § 1752(c)(1), some government person or entity must do the restricting. That statutory phrase's neighboring provisions, and common sense, reveal exactly which entity does the restricting. That government agency is the USSS because each of the three types of "restricted areas" are patrolled and managed by that specific agency and no other. § 1752(c)(1)(A)-(C).

That is why what little § 1752 precedent there is supports Mr. Cua, while none supports the government's interpretation. To be clear: before January 6, the government never prosecuted a section 1752 case where the "restricted area" was set by any entity other than the USSS. Instructive is *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005). There, Bursey entered an area restricted by the USSS in advance of a political rally in South Carolina held by the President. *Id.* at 304. Reviewing the trial record, the Fourth Circuit observed that "the Secret Service designated an area near [the rally] as a restricted area." *Id.* It also noted that the

"authorized persons" admitted into the area all "wore lapel pins issued by the Secret Service," meaning that the USSS was the entity that granted "lawful access" to the area. *Id.* Intending to protest the Iraq war, Bursey approached the restricted area with a megaphone. A Secret Service Agent advised him he could not remain in that area. He was repeatedly advised thereafter of the same by multiple law enforcement agents over a twenty to twenty-five minute period. *Id.* Bursey was charged and convicted under § 1752(a)(1).

One sufficiency argument Bursey raised on appeal was that, as a matter of *mens rea*, "he was never advised that the area was a federally restricted zone, *so designated by the Secret Service.*" 416 F.3d at 308 (emphasis added). The Fourth Circuit rejected this argument. But not on the ground that § 1752 restricted areas need not be so restricted by the USSS. Instead, trial evidence showed that Bursey "understood the restriction to have been created by the Secret Service (as opposed to state or local law enforcement)." *Id.* Added the Fourth Circuit, "[T]here was ample evidence that Bursey understood the area to have been restricted by the Secret Service, *and thus a federally restricted zone*." *Bursey*, 416 F.3d at 309 (emphasis added). The import of the Fourth Circuit's logic is clear. Had the Fourth Circuit even contemplated the idea that entities other than the USSS could restrict areas under § 1752, the above reasoning would lack sense.

The government's anyone-may-restrict interpretation yields absurd results. *See United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) ("When [one possible statutory] meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act."). Consider a Secret Service protectee who is "temporarily visiting" a place. § 1752(c)(1)(B). The Secret Service sets a "restricted area" of one block around the protectee's presence. Under the government's construction, any local police unit could decide to extend the "restricted area" to 20 blocks, without authorization from the Secret Service: the agency charged

with protecting the person for whose sake the area is restricted in the first place. If any person were to enter the expanded area without "lawful authority" (from the local police? The Secret Service?) the same government that deemed the area limited to one block could also prosecute a person for entering block 20. The statute has simply never worked that way.

At the very least, the *government's* interpretation is not unambiguously correct on the face of the statute. In that case, the Court would look to legislative history. As shown above, that history could hardly be clearer: the entire purpose of section 1752 was to vest a specific federal agency with area-restricting authority which no agency then possessed: the USSS. A Senate Judiciary Committee report explicitly states that the purpose of § 1752 was to vest the Secret Service specifically with the power to set federal restricted areas. S. Rep. No. 91-1252 (1970), at 7 ("[a]lthough the Secret Service [was] charged with protecting the person of the President . . . there [was], at the present time, no Federal statute which specifically authorize[d] *them to restrict entry to areas* where the President maintains temporary residences or offices.") (emphasis added).

This is not just Mr. Cua's view. It is also the view of the Office of Legal Counsel ("OLC") of the Department of Justice. *See Citizens for Responsibility & Ethics in Wash. v. United* States, 922 F.3d 480, 483 (D.C. Cir. 2019) ("The authority of the OLC is nearly as old as the Republic itself."). In May 1995, the Secretary of the Treasury requested a legal opinion from the OLC on whether the Secretary had authority to restrict traffic on a segment of Pennsylvania Avenue in order to protect the President. *Authority of the Secretary of the Treasury to Order the Closing of Certain Streets Located Along the Perimeter of the White House*, 19 Op. Off. Legal Counsel 109 (1995). In crafting this opinion, OLC painstakingly examined the text of § 1752 and its legislative history. *Id.* at 109-122. OLC determined that section 1752 did, in fact, specify which government entity restricts areas under that statute. It is the Secret Service *via* the

Treasury Department: "Section 1752 plainly grants *the [Treasury] Secretary* authority to limit ingress and egress to an area where the President will be visiting *to create a security perimeter*." Op. Off. Legal Counsel, p. 113 (emphasis added). If any government entity could set section 1752 restricted areas, there was no reason for OLC to conduct the analysis in the first place. Accordingly, Counts Four, Five, and Six should be dismissed because the government does not allege the "restricted area" in which Mr. Cua acted was set by the USSS (the government concedes it was not).

B. If the government's interpretation of § 1752 is applied, it is unconstitutionally vague as to Mr. Cua.

If the Court concludes that the SSI properly charges Cua with violating § 1752 by taking certain actions within a boundary set by an agency other than the USSS, the statute is unconstitutionally vague as applied to him. Assuming the truth of the government's allegations, Cua saw police restricting access to the U.S. Capitol. But if the text, legislative history and common sense inform an "ordinary person" that he violates § 1752 by entering an area the Secret Service has restricted, there is no notice in the statute that being on the wrong side of a police barricade is, independent of the Secret Service, in violation of that statute. The concern about vagueness-enabled arbitrary enforcement is evident. Generally, the government's enforcement of section 1752 against Mr. Cua is arbitrary because, prior to January 6, it had never prosecuted a violation of that statute with the allegation that the accused entered an area restricted by some government agency other than the USSS. Accordingly, the government's election to put a new interpretation on the statute for a select group of related cases raises questions about discriminatory law enforcement, heightened in the context of Mr. Cua's rights to political speech, assembly, and to petition the government for a redress of grievances. U.S. Const. amend I; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 500 (1982). Perhaps more serious is the specific arbitrariness, hundreds or perhaps thousands of

other protesters "entered" the same "restricted area" as Cua on January 6. Yet, many of those people have not been charged under § 1752 like him. Mr. Cua was singled out for reasons that do not concern the animating purpose of the Secret Service statute. Insofar as they both allege that Mr. Cua entered and remained in a "restricted area" set by an agency nowhere identified in the statute, Counts Four, Five and Six are unconstitutionally vague.

C. The rule of lenity dictates that ambiguities in section 1752 be resolved in Mr. Cua's favor.

Even if the Court decides that the government's interpretation of section 1752 is correct—i.e., that any entity may set restricted areas under subsection 1752(c)—it is plainly not unambiguously so. That is shown by the lack of any references in section 1752 to agencies other than the USSS; the statute's legislative history, which similarly focuses exclusively on the USSS; the clear role that the USSS plays in all three definitions of "restricted buildings or grounds" in subsection 1752(c); the indication in section 3056 that the USSS enforces restricted areas in section 1752; the lack of any case law supporting the government's position; and the common sense notion that if the USSS patrols and guards the restricted areas in section 1752, it also sets them. Because the government's interpretations are not unambiguously correct, the Court is required to resolve any ambiguities in Mr. Cua's favor by dismissing Counts Four, Five, and Six. *United States v. Granderson*, 511 U.S. 39, 54 (1994); *United States v. Santos*, 553 U.S. 507, 515 (2008).

D. The novel construction principle dictates against the government's interpretation, which would operate as an *ex post facto* law.

Because no court before January 6 ever construed section 1752 to mean that agencies other than the USSS may set restricted areas under the statute, such a construction would be retroactively applied to Mr. Cua and would constitute an *ex post facto* law in violation of the Due Process Clause of the Fifth Amendment. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

CONCLUSION

For all the foregoing reasons, Mr. Cua respectfully requests that the Court dismiss Counts Four, Five, and Six of the Second Superseding Indictment.

Respectfully submitted,

DATED: December 5, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2022, I filed the foregoing with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system and served a copy of it by electronic mail on counsel for the United States, Assistant United States Attorneys Kaitlin Klamann, Carolina Nevin, and Kimberly Paschall.

Dated: December 5, 2022

/s/ William E. Zapf
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