UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. JAMES ALLEN MELS, Defendant.	Criminal Case No. 21-184 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM AND ORDER

Defendant James Allen Mels faces trial on August 1, 2022, on four misdemeanor counts and has moved pre-trial to dismiss, *inter alia*, Counts One and Two, alleging violations of 18 U.S.C. §§ 1752(a)(1) and (a)(2), respectively. Def.'s Mot. Dismiss Counts One and Two ("Def.'s Mot."), ECF No. 43. Both of these charges stem from defendant's alleged presence in "a restricted building and grounds" where "the Vice President was and would be temporarily visiting" on January 6, 2021. Amended Information at 1–2, ECF No. 59. [1] Specifically, Count One alleges that defendant "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 Two 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 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). Amended Information at 1–2.

[1] An amended information, filed on July 1, 2022, added the language, "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," to describe the "restricted building or grounds" that plaintiff is alleged to have knowingly and unlawfully entered. Amended Information at 1–2.

Defendant argues that Counts One and Two should be dismissed because the Capitol cannot have been a "restricted building or grounds" on January 6, 2021, as then-Vice President Pence was not "temporarily visiting." Def.'s Mot. at 7–19. For the reasons explained below, this argument is meritless. Defendant's motion to dismiss Counts One and Two is denied, in line with the previous rulings of this Court and every other Judge on this Court to have considered these arguments.

I. DISCUSSION

Defendant argues that § 1752 does not apply because then-Vice President Pence was not, in defendant's view, "temporarily visiting" the Capitol on January 6, 2021. *See* Def.'s Mot. at 7–14. As support for his strained reading of this fairly straightforward phrase, defendant raises two challenges to Counts One and Two, asserting, first, that "Vice President Pence was *not* 'temporarily visiting' the Capitol when fulfilling his constitutional obligations" on January 6, 2021, but instead "was simply going to work," as "[t]he Constitution obligates the Vice President to be physically present in the Senate with some frequency," and "[t]he Vice President has had an office in Congress . . . since nearly the Founding." *Id.* at 9 (emphasis in original). Defendant further argues that considering the Vice President to be "temporarily visiting" the Capitol "would transform that phrase into a mere 'physically present' requirement," and if Congress had "wanted to define 'restricted building or grounds' to encompass anywhere the President or a Secret Service protectee is or will be physically present, then it would have done so," by omitting the phrase "temporarily visiting." *Id.* at 10. Second, defendant asserts that to the extent the phrase "temporarily visiting" is ambiguous, "[p]rinciples of lenity" and the doctrine of constitutional avoidance "demand that the court adopt a narrower construction." *Id.* at 15–16. Every Judge on this Court, including the undersigned, to consider these same challenges has rejected these

exercises in wordsmithing and fabricating ambiguity, and no persuasive reason is presented here to deviate from this uniform and consistent denial of the arguments raised by defendant.

Common sense easily resolves these challenges to Counts One and Two. Despite having a limited role as President of, and tiebreaker for, the Senate, U.S. CONST. art. I, § 3, cl. 4, the Vice President is generally regarded as an executive branch officer, *see id.* art. II, § 1, cl. 1, and generally works in locations other than the Capitol. The fact that the Vice President has a space set aside in the Capitol for occasional use—notably, not the location where Vice President Pence was working inside the Capitol on January 6, 2021—makes this official no less a "visitor" and no less "temporary" when making an occasional appearance on the premises of the Capitol. Nor does the Vice President's presence for official duties by presiding over a session of Congress make him or her any less of a temporary visitor because a government official can clearly appear somewhere temporarily and still be doing official work in the process.

Defendant cites to several cases where a President or Vice President was deemed to be "temporarily visiting" at rallies or out-of-town functions held at airport hangars and parks, *see* Def.'s Mot. at 11, but the fact that those situations clearly qualify does not mean that the relevant situation on January 6 cannot count as well. As the government rightly notes, "[w]hen Vice President Pence traveled to the U.S. Capitol on January 6 to oversee the Joint Session of Congress, he was 'visiting' the building," and given that he "intended to leave at the close of the session, this visit was 'temporary.'" Gov't's Resp. Def.'s Mot. Dismiss Counts One and Two ("Gov't's Opp'n") at 7, ECF No. 47 (internal alterations omitted).

The phrase "temporarily visiting" carries no ambiguity and thus the principles of lenity and constitutional avoidance do not apply. *See Maracich v. Spears*, 570 U.S. 48, 76 (2013) (finding "no room for the rule of lenity" where the statute's text and structure make clear that

defendant's preferred interpretation would produce absurd results); *United States v. Nordean*, No. 21-cr-175 (TJK), 2021 WL 6134595, at *19 (D.D.C. Dec. 28, 2021) (rejecting argument that § 1752 is unconstitutionally vague because "[t]he text is clear and gives fair notice of the conduct it punishes, and it is not standardless enough to invite arbitrary enforcement"); *United States v. Griffin*, 549 F. Supp. 3d 49, 57 (D.D.C. 2021) (Section 1752 "is no trap awaiting the unwary."). Under § 1752, certain conduct is criminalized in certain sensitive areas around both the President and the Vice President. The residences of both, whether the occupant is present or not, are covered at all times. 18 U.S.C. § 1752(c)(1)(A). When either the President or Vice President is "temporarily visiting" some other location, a *de facto* bubble follows the official and affords similar protection. *Id.* § 1752(c)(1)(B). All of this makes sense, and creates no notice problems: a person would violate Section 1752(a) "at a minimum, whenever, with the requisite *mens rea*, he enters or remains in (or engages in disorderly or disruptive conduct in) a posted, cordoned off, or otherwise restricted area around the President or Vice President." Gov't's Opp'n at 9. Defendant's interpretation, however, would inexplicably pop that bubble for an ill-defined set of destinations where the President or Vice President's presence is sufficiently "frequent" or the reason for their presence sufficiently "official." The Court declines to introduce such needless ambiguity into a simple statutory phrase.

Finally, defendant gives no reason to stray from the decisions of this Court rejecting these arguments, along with every other Judge on this Court to have considered various permutations of these claims. *See United States v. McHugh*, No. 21-cr-453, 2022 WL 296304, at *20–21 (D.D.C. Feb. 1, 2022) (Bates, J.); *United States v. Bozell*, No. 21-cr-216, 2022 WL 474144, at *8 (D.D.C. Feb. 16, 2022) (Bates, J.); *United States v. Andries*, No. 21-cr-93, 2022 WL 768684, at *16–17 (D.D.C. Mar. 14, 2022) (Contreras, J.); *United States v. Fischer*, No. 21-cr-234, 2022

WL 782413, at *4–5 (D.D.C. Mar. 15, 2022) (Nichols, J.); *United States v. Puma*, No. 21-cr-454, 2022 WL 823079, at *16–19 (D.D.C. Mar. 19, 2022) (Friedman, J.); *United States v. Bingert*, No. 21-cr-91, 2022 WL 1659163, at *15 (D.D.C. May 25, 2022) (Lamberth, J.); *United States v. Anthony Robert Williams*, No. 21-cr-377, ECF No. 88 (D.D.C. June 8, 2022) (Howell, C.J.); *United States v. Riley Williams*, No. 21-cr-618, 2022 WL 2237301, at *20 (D.D.C. June 22, 2022) (Jackson, J.).

II. ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant's Motion to Dismiss Counts One and Two, ECF No. 43, is **DENIED**.

SO ORDERED.

Date: July 21, 2022

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BERYL A. HOWELL
Chief Judge