UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 1:21-cr-00708-RCL-1**
	:	
LEO CHRISTOPHER KELLY,	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS COUNTS TWO AND THREE OF THE INDICTMENT

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to defendant Leo Christopher Kelly's Motion to Dismiss Counts Two and Three of the Indictment, ("Def. Mot."), ECF 52. Kelly principally contends that Counts Two and Three of the Indictment, which charge him with Entering and Remaining in a Restricted Building in violation of 18 U.S.C. § 1752(a)(1), and Disorderly and Disruptive Conduct in a Restricted Building in violation of 18 U.S.C. § 1752(a)(2), should be dismissed because the Indictment fails to state an offense because only the U.S. Secret Service can restrict areas under section 1752, and section 1752 is unconstitutionally vague as applied to him.

As an initial matter, the legal challenges that Kelly argues in his motion have been considered and rejected by numerous other judges in this district.[1] As explained herein, this Court should deny the motion for the reasons articulated in those decisions.

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[1] *E.g.*, *United States v. Griffin*, 549 F. Supp. 3d 49, 52-58 (D.D.C. 2021) (denying motion to dismiss charge of violating 18 U.S.C. § 1752(a)(1)); *United States v. Mostofsky*, 21-cr-138 (JEB), 2021 WL 6049891, at *8-13 (D.D.C. Dec. 21, 2021) (18 U.S.C. § 1752(a)(1)); *United States v. Nordean*, 21-cr-175 (TJK), 2021 WL 6134595, at *4-12, *14-19 (D.D.C. Dec. 28, 2021) (18 U.S.C. § 1752(a)(1)); *United States v. Andries*, 21-cr-93 (RC), 2022 WL 768684, at *3-17 (D.D.C. Mar. 14,

FACTUAL BACKGROUND

At 1:00 p.m. EST on January 6, 2021, a Joint Session of the United States Congress convened in the United States Capitol building. The Joint Session assembled to debate and certify the vote of the Electoral College of the 2020 Presidential Election. With the Joint Session underway and with Vice President Mike Pence presiding, a large crowd gathered outside the U.S. Capitol. At approximately 2:00 p.m., certain individuals in the crowd forced their way through, up, and over erected barricades. The crowd, having breached police officer lines, advanced to the exterior façade of the building. Members of the U.S. Capitol Police attempted to maintain order and keep the crowd from entering the Capitol; however, shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol. At approximately 2:20 p.m., members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to—and did—evacuate the chambers.

Defendant Leo Christopher Kelly is a 37-year-old resident of Cedar Rapids, Iowa. After attending the "Stop the Steal" rally on January 6 in Washington, D.C., Kelly made his way to the U.S. Capitol with scores of other rioters. He joined as rioters made their way through barriers and police lines, and he eventually climbed scaffolding to reach the Capitol building. Minutes after rioters shattered a glass windowpane in the Senate Fire Door, opened the door, and rushed inside, Kelly joined the mob and hurried into the Capitol, while recording his actions on his cell phone. While inside the building, Kelly breached a Senate office and then joined other rioters in a

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2022) (18 U.S.C. §§ 1752(a)(1) and (a)(2)); *United States v. Puma*, 21-cr-454 (PLF), 2022 WL 823079, at *4-19 (D.D.C. Mar. 19, 2022) (18 U.S.C. § 1752(a)(1) and (a)(2)); *United States v. Sargent*, No. 21-cr-258 (TFH), 2022 WL 1124817, at *9 (D.D.C. Apr. 14, 2022) *United States v. Bingert*, 21-cr-91 (RCL), 2022 WL 1659163, at *3-11, *12-15 (D.D.C. May 25, 2022) (18 U.S.C. § 1752(a)(1)).

confrontation with Capitol Police officers. Although the officers attempted to prevent the rioters from advancing farther into the Capitol, Kelly and the other rioters overwhelmed the officers and made their way onto the Senate floor, where Congress had been convened shortly before to fulfill their constitutional obligation to certify the results of the presidential election. Once inside the Senate chamber, Kelly stood on the Senate dais and used his cellphone to record himself examining papers on the desk. He also took pictures of Senate material. Eventually, police officers were able to gain control of the Senate chamber and expel Kelly and the other rioters. Shortly thereafter, Kelly finally made his way out of the Capitol building.

LEGAL STANDARD

A defendant may move to dismiss an indictment for failure to state a claim prior to trial. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). "An indictment must be viewed as a whole and the allegations must be accepted as true in determining if an offense has been properly alleged." *United States v. Bowdin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). The operative question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.* An indictment must contain every element of the offense charged, if any part or element is missing, the indictment is defective and must be dismissed." *See United States v. Hillie*, 227 F. Supp. 3d 57, 70 (D.D.C. 2017).

Federal Rule of Criminal Procedure 7(c)(1) governs the "Nature and Contents" of an indictment. The rule states, in relevant part, that "[t]he indictment … must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

ARGUMENT

I. The Court Should Deny Defendant's Motion to Dismiss Counts Two and Three, Alleging Violations of 18 U.S.C. § 1752

Counts Two and Three of the Indictment charge violations of Section 1752 of Title 18, which prohibits the unlawful entry into and disruptive or disorderly conduct in a "restricted buildings or grounds." A "restricted building or grounds" is a "posted, cordoned off, or otherwise restricted area … where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(c)(1)(B).

Kelly advances two principal arguments in seeking to dismiss Counts Two and Three: (1) only the United States Secret Service, and not the Capitol Police, can designate "restricted areas" under the statute, and the Government does not allege that the Secret Service restricted the Capitol Grounds on January 6, 2021, Def. Mot. at 11-14; and (2) Section 1752 is unconstitutionally vague as applied to Kelly, Def. Mot. at 14-20. Both of these arguments lack merit, as this Court concluded in *United States v. Bingert*, 21-cr-91, 2022 WL 1659163, *15 (D.D.C. May 25, 2022) (Lamberth, J).

When Defendant entered the U.S. Capitol on January 6, 2021, the Vice President, who was protected by the Secret Service, was present, which is all the statute requires to render the Capitol a restricted area. Defendant's conduct accordingly falls within the Section 1752's plain sweep because he unlawfully entered a restricted building while the Vice President was "temporarily visiting," as alleged in the indictment.

A. 18 U.S.C. § 1752 Does Not Require The Government To Prove That The Restricted Area Was Restricted At The Secret Service's Direction

Kelly suggests that because the Capitol Police, not the Secret Service, barricaded the area around the Capitol, he should not be charged with violating 18 U.S.C. § 1752(a)(1) and (2). *See*

Def. Mot. at 14. Courts in this district have rightly rejected this contention. *See United States v. Griffin*, 549 F. Supp. 3d 49, 45-57 (D.D.C. 2021); *Mostofsky*, 2021 WL 6049891, at *12–*13; *Nordean,* 2021 WL 6134595, at *18; *McHugh,* 21-cr-453, ECF No. 51, at 38-40; *United States v. Bingert*, 21-cr-91, 2022 WL 1659163, *15 (D.D.C. May 25, 2022) (Lamberth, J).

Subsection 1752(c) defines the phrase "restricted buildings or grounds" as

> any posted, cordoned off, or otherwise restricted area—
>
> of the White House or its grounds, or the Vice President's official residence or its grounds;
>
> of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting; or
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> 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). It then defines the term "other person protected by the Secret Service" 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." 18 U.S.C. § 1752(c)(2).

By its plain terms, then, Section 1752 prohibits the unlawful entry into a restricted or otherwise cordoned off area where "a person protected by the Secret Service is or will be temporarily visiting." *Wilson v. DNC Servs. Corp.*, 417 F. Supp. 3d 86, 98 (D.D.C. 2019), *aff'd* 831 F. App'x 513 (D.C. Cir. 2021). Section 1752 therefore "focuses on perpetrators who knowingly enter a restricted area around a protectee, not on how it is restricted or who does the restricting." *Griffin*, 549 F. Supp. 3d at 54-55.

To determine the meaning of a statute, the Court "look[s] first to its language, giving the words used their ordinary meaning." *Levin v. United States*, 568 U.S. 503, 513 (2013) (quoting

Moskal v. United States, 498 U.S. 103, 108 (1990)); *see also Pub. Investors Arbitration Bar Ass'n v. S.E.C.*, 930 F. Supp. 2d 55 (D.D.C. 2013) (Howell, J.) ("a reviewing court must accord first priority in statutory interpretation to the plain meaning of the provision in question"). Here, the plain text of the statute is "unambiguous," so the "judicial inquiry is complete." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020). Section 1752's text is clear. It proscribes certain conduct in and around "any restricted building or grounds." *See* 18 U.S.C. § 1752(a). The statute provides three definitions for the term "restricted buildings and grounds," *see* § 1752(c)(1), including "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," § 1752(c)(1)(B). Through a cross-reference, Section 1752 makes clear—and the defendant does not appear to dispute—that "person[s] protected by the Secret Service" include the Vice President and the Vice President-elect. § 1752(c)(2); *see* § 3056(a)(1). The proscribed conduct within a "restricted building or grounds" includes, as relevant here, knowingly and unlawfully entering or remaining, § 1752(a)(1), and knowingly and with intent to impede or disrupt government business, engaging in "disorderly or disruptive conduct" that "in fact, impedes or disrupts" government business," § 1752(a)(2).

That straightforward analysis has a straightforward application to the facts alleged in the defendant's case. The Indictment alleges that, on January 6, 2021, a protected person was present inside the Capitol building or on the Capitol grounds, and that some portion of the Capitol building and grounds was posted, cordoned off, or otherwise restricted—making it a "restricted building or grounds" under § 1752(c)(1). The Indictment further alleges that the defendant knowingly and without lawful authority entered and remained in that restricted buildings and grounds. It also alleges that the defendant, knowingly and with the intent to impede or disrupt government

business, engaged in disorderly conduct that resulted in a disruption to government business. In short, the allegations closely track the statutory language.

Kelly nonetheless urges the Court to import an extra-textual requirement that the Secret Service be required to designate the restricted area. That is so, Kelly claims, because the definitions of "restricted building or grounds" concern "the authority and actions" of the Secret Service, and thus is directed at the Secret Service. Def. Mot. at 11. Those arguments fail on the merits. Section 1752 is directed not at the Secret Service, but at ensuring the protection of the President and the office of the Presidency. *See* S. Rep. 91-1252 (1970); *see also* Elizabeth Craig, *Protecting the President from Protest: Using the Secret Service's Zone of Protection to Prosecute Protesters*, 9 J. Gender Race & Just. 665, 668–69 (2006). "Indeed, the only reference in the statute to the Secret Service is to its protectees. Section 1752 says nothing about who must do the restricting." *Griffin*, 549 F. Supp. 3d at 54-55; *see also Mostofsky*, 2021 WL 6049891 at *13 ("The text plainly does not require that the Secret Service be the entity to restrict or cordon off a particular area."). "If Congress intended a statute designed to safeguard the President and other Secret Service protectees to hinge on who outlined the safety perimeter around the principal, surely it would have said so." *Griffin,* 549 F. Supp. 3d at 57. Kelly's reading would have the Court create a "potentially massive procedural loophole" from the statute's "silence." *McHugh*, 21-cr-453, ECF No. 51, at 40. The Court should not do so.

Additionally, the statute's history undercuts Kelly's argument. *See Griffin*, 549 F. Supp. 3d at 55-56 (explaining how Congress has consistently "*broadened* the scope of the statute and the potential for liability"). An earlier version of the statute explicitly incorporated regulations promulgated by the Department of the Treasury (which at the time housed the Secret Service) governing restricted areas. *See United States v. Bursey*, 416 F.3d 301, 306-07 (4th Cir. 2005)

(noting that definition of restricted area required interpreting Treasury regulations); *see* Pub. L. 91-644, Title V, Sec. 18, 84 Stat. 1891-92 (Jan. 2, 1971). Congress subsequently struck subsection (d) and did not replace it with language limiting the law enforcement agencies allowed to designate a restricted area. Pub. L. 109-177, Title VI, Sec. 602, 120 Stat. 192 (Mar. 9, 2006). Congress was clearly aware that the prohibitions in 18 U.S.C. § 1752 could turn on decisions made by the Secret Service but chose not to include that in the revised statute. But Congress's decision in 2006 to eliminate reference to regulations indicates that the statute no longer depends (if it ever did) on whether the Secret Service has defined an area as "restricted."[2]

Kelly's reading of the statute, which would require the Secret Service to "cordon off" a private residence "no matter how secure the location or how imposing the preexisting walls" leads to "pressing absurdities." *Griffin,* 549 F. Supp. 3d at 57. Section 1752 sets clear limitations on where restricted areas may be established. As relevant here, the statute only criminalizes entry into a restricted area "of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting . . . ." The statute does not criminalize an individual who enters an area in a building or grounds separate from where a Secret Service protectee is present, regardless of restrictions placed by law enforcement or anyone asserting themselves as law enforcement.

[2] The fact that the legislative history refers to the Secret Service does not help his argument because Section 1752 is not a "regulatory statute." *Griffin*, 2021 WL 2778557, at *4. In any event, because Section's statutory text is clear, "there is no reason to resort to legislative history." *Id.* (quoting *United States v. Gonzales*, 520 U.S. 1, 6 (1997)).

B. 18 U.S.C. § 1752 Is Not Unconstitutionally Vague

Kelly next argues that, if the Court adopts the government's interpretation of Section 1752, then Section 1752 is unconstitutionally vague as applied to him, and that both the rule of lenity and novel construction principle require dismissal of Counts Two and Three. Def. Mot. at 14-20. Kelly is wrong, and his argument borders on the frivolous. *See United States v. Caputo*, 201 F. Supp. 3d 65, 68 (D.D.C. 2016) (argument that Section 1752(a)(1) is void for vagueness "border[s] on the frivolous" because "the unlawfulness of entering the White House grounds without permission is unambiguous to the average citizen").

A statute is vague where it (1) fails to give ordinary people fair notice of the conduct it punishes or (2) is so standardless that it invites arbitrary enforcement. *Johnson v. United States*, 576 U.S. 591 (2015). Neither applies to Section 1752.

As described above, Section 1752 prohibits the defendant from knowingly engaging in certain conduct in "any posted, cordoned off, or otherwise restricted area, of . . . grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(a), (c)(1)(B). "[Section] 1752 is clear, gives fair notice of the conduct it punishes, and does not invite arbitrary enforcement." *United States v. Bozell*, No. 21-CR-216 (JDB), 2022 WL 474144, at *9 (D.D.C. Feb. 16, 2022) (cleaned up). Likewise, prosecuting Kelly for entering the U.S. Capitol Building with a mob of rioters, breaching a police line, and reaching the Senate floor and rustling through papers does not unexpectedly broaden the statute. *See id.*

Kelly relatedly contends that the government is relying on an ambiguous phrase—"within such proximity to"—in Section 1752(a)(2). That contention misunderstands the charged crime. Kelly is not alleged to have engaged in unlawful disruption because he was within proximity to

the Capitol building. Instead, he was squarely within the Capitol building itself, a fact that he admitted in an interview immediately afterward.

Kelly also invokes the rule lenity. Def. Mot. at 20-21. The rule of lenity "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010); see *Shular v. United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). There is no grievous ambiguity here. As noted above, Section 1752 prohibits certain conduct within restricted zone established to ensure the protection of certain individuals such as the Vice President. No guess work is required.

Finally, Kelly asserts that the "novel construction principle" requires dismissal of Counts Two and Three of the Indictment. Def. Mot. at 21-22. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). As with Kelly's other arguments, this claim is rooted in the faulty premise that the statute requires that the Secret Service designate the restricted area. Because Section 1752's plain language includes no such requirement—and encompasses the precise conduct that Kelly is alleged to have committed—the novel construction principle has no application here.

CONCLUSION

For the foregoing reasons, the motion to dismiss Counts Two and Three of the Indictment should be denied.

Respectfully submitted,

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