UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-CR-234-CJN**
	:	
JOSEPH W. FISCHER,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS

The government's oppositions to Counts Four and Five of the Superseding Indictment, which alleges violations of 18 U.S.C. §§ 1752(a)(1) and (2), have noted that excluding the U.S. Capitol from locations that the Vice President may "temporarily visit" leaves an arbitrary gap in the law. ECF 57 at 38-49; ECF 67 at 6-7. Defendant now responds that Title 40 U.S.C. § 5104(e)(2) ("Section 5104") fills that gap. ECF 70 at 3.[1] It does not.

By defendant's logic, a Secret Service protectee cannot "temporarily visit" a location where he or she has a dedicated office (or a residence other than the White House or the Vice President's "official residence," which are covered under 18 U.S.C. § 1752(c)(1)(A)). In defendant's view, therefore, Section 1752 applies only where, for example, (1) the Vice President's family visits the Capitol (not when the Vice President does), or (2) the Vice President visits other locations (as long as those other locations do not contain an office or other space dedicated to her use). Defendant

1 Defendant's reply also argues that it is "awkward" to say that the Vice President can "temporarily visit" a place where he has an office space. ECF 70 at 2. The government's previous submissions address this issue, explaining why, consistent with the decisions of several other judges in this district, its interpretation of "temporarily visit" is correct, reflecting dictionary definitions of the term, the common-sense understanding of what it means to "temporarily visit" a place, statutory purpose and history. Affixing the subjective label "awkward" to the government's interpretation does not present a new challenge to these arguments. This reply accordingly focuses solely on defendant's argument about Section 5104, which defendant has not previously raised.

suggests no reason why these arbitrary gaps should exist. These gaps, moreover, are substantially broader than Section 5104's coverage. Section 5104 is limited to the Capitol (and some provisions, such as 40 U.S.C. § 5104(e)(2)(G), with which defendant is charged, are further limited, applying only to the Capitol Buildings, not to Capitol Grounds). The gaps created by defendant's interpretation, meanwhile, encompass locations such as Camp David or anywhere else Secret Service protectees might maintain spaces dedicated to their use (such as offices in their home states). Section 5104 provides no remedy for violations occurring in these areas.

For additional reasons, Section 5104 is not a substitute for Section 1752. It does not cover merely entering and remaining in a restricted area, as Section 1752(a)(1) criminalizes. It instead requires some additional intent or conduct (*see, e.g.,* 40 U.S.C. § 5104(e)(2)(C), requiring "intent to disrupt the orderly conduct of official business"; 40 U.S.C. § 5104(e)(2)(D), criminalizing "loud, threatening, or abusive language, or engag[ing] in disorderly or disruptive conduct") with the exception of entry into a limited number of specific areas, such as the floor or gallery of the House or Senate—areas that Secret Service protectees have no ostensible reason to visit. 40 U.S.C. § 5104(e)(2)(A)-(B).[2]

Violations of Section 5104 also cannot fully substitute for violations of Section 1752

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[2] There are other mismatches too. Section 5104's general disorderly or disruptive conduct provision, 40 U.S.C. § 5104(e)(2)(D), requires the intent to disrupt a Congressional session or hearings or committee deliberations, whereas the intent required under Section 1752(a)(2) (which also applies to disorderly conduct) is different, and broader, applying to the intent to impede or disrupt "the orderly conduct of Government business or official functions." Section 5104(e)(2)(D) thus could not substitute for Section 1752 where, for example, the disorderly conduct is intended to impede the protection of the Vice President or other official functions of the Vice President at the Capitol that are not Congressional sessions – frustrating the central purpose of Section 1752, which is to protect the Vice President and Secret Service protectees. Section 5104 also contains no provision that would cover the conduct criminalized by Section 1752(a)(5), which prohibits operating an unmanned aircraft system within or above a restricted building or grounds.

because their maximum penalties are only half as severe. Section 1752(a) violations carry a maximum penalty of one year in prison, followed by a year of supervised release. 18 U.S.C. § 1752(b)(2). Violations committed with a weapon or causing serious injury carry sentences of up to ten years. 18 U.S.C. § 1752(b)(1). Violations of most provisions of Section 5104(e), by contrast, are petty offenses, with six-month maximum penalties and no supervised release. 40 U.S.C. § 5109(b). Even the enhanced-penalty provision (for a violation of Section 5104(e)(1), which criminalizes using or carrying weapons in the Capitol, among other acts), again carries only half the penalty of the enhanced violation of Section 1752(a): five years. 40 U.S.C. § 5109(a). One reason the criminal justice system imposes more severe penalties for certain offenses is to achieve a greater deterrent effect. Section 5104 offenses, with lesser potential penalties, are therefore inadequate substitutes for Section 1752 crimes. Nor, as a matter of penal policy, does it make sense that a defendant who engages in disorderly conduct when the Vice President's family visits the Capitol should be punished more severely than if the Vice President were there.

In summary, Section 5104 does not fill the arbitrary enforcement gap that defendant's interpretation of Section 1752 creates: some conduct would go unpunished, and other acts, even if committed inside the Capitol, would be subject to only half the penalties as under Section 1752. For the reasons stated in the government's opposition to defendant's motion to dismiss and in its response to the Court's March 15 order, moreover, there need be no arbitrary gap in the first place. The plain meaning of "temporarily visit," the statute's structure, purpose, and history, and the fact that the Capitol is not the Vice President's regular workplace all support the government's interpretation of Section 1752. The Vice President may temporarily visit the Capitol. The Court should deny defendant's motion.

Respectfully submitted,

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