

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

BRUNO JOSEPH CUA

Criminal Action No. 21-00107 (RDM)

**MOTION TO ADOPT, CONFORM, AND SUPPLEMENT MOTIONS TO DISMISS  
COUNTS ALLEGING VIOLATION OF 18 U.S.C. § 1512(C)(2)**

Bruno Joseph Cua, through undersigned counsel, respectfully requests that he be permitted to adopt, conform, and have the benefit of certain motions filed by other defendants before this Court to dismiss counts alleging violations of 18 U.S.C. § 1512(c)(2), as applicable to Count 2 of the superseding indictment against Mr. Cua. *See* ECF No. 32 at 2. In particular, Mr. Cua asks to adopt in his own case the motion, oral argument, and related briefing by the defendants in *United States v. Montgomery, et al.*, Case No. 1:21-cr-00046-RDM. Mr. Cua also requests leave to conform to his case and particular circumstances, and supplement, the arguments, points, and authorities provided by the defendants in *Montgomery*, as stated herein. *See, e.g., Montgomery*, ECF Nos. 39, 48, 59, 60, 66. *See also id.*, ECF No. 53 (transcript of Aug. 3, 2021 hearing).

In addition to arguments already submitted by counsel for the defendants in *Montgomery*, and adopted by this motion, Mr. Cua requests that the Court consider certain additional legislative history that further elucidates the meaning of “official proceeding,” as used in section 1512(c)(2). Specifically, such legislative history supports an interpretation of “official proceeding” as limited to proceedings in which evidence is taken, whether before a court,

Congress, or government agency. Under such a definition, the proceedings before Congress on January 6, 2021, would not qualify as official proceedings under the statute.

Section 1512 was originally passed into law as part of the Victim and Witness Protection Act of 1982. *See* Pub. L. 97-291 § 4 (1982). As indicated in the Report of the Senate Judiciary Committee accompanying the bill, “the terms [of section 1512(a)(1)] are similar to those used by the National Commission on Reform of Federal Criminal Laws,” published in 1971.<sup>1</sup> S. Rep. 97-532, at \*16 & n.7 (1982) (citing Final Report of the National Commission on Reform of Federal Criminal Laws (1971), *available at* <https://www.ndcourts.gov/Media/Default/Legal%20Resources/legal-research/criminal-code/FinalReport.pdf> (hereinafter, “Commission Report”)).

In particular, as shown in the comparison table on the next page, it is apparent that two sections in the Commission Report, sections 1321 and 1322, both under the heading “Obstruction of Justice,” served as models for the original section 1512(a) enacted in 1982.

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<sup>1</sup> The National Commission on Reform of Federal Criminal Laws was a presidential advisory committee established in 1966 to study, formulate, and recommend legislation to Congress to improve the federal criminal justice system. *See* <https://www.nixonlibrary.gov/finding-aids/fg-172-national-commission-reform-federal-criminal-laws-white-house-central-files>. The Commission consisted of twelve legislators, judges, and lawyers. *See id.*; *see also* Report at v. The Report itself was subtitled “A Proposed New Federal Criminal Code (Title 18, United States Code),” and consisted of a “proposed revision of Title 18, United States Code as a work basis upon which the Congress may undertake the necessary reform of the substantive federal criminal laws.” *Id.* at i.

Commission Report Sections 1321 & 1322	Original Section 1512(a) (1982)
<p>Section 1321(1):</p> <p>(1) Tampering. A person is guilty of a Class C felony if he uses force, threat, deception or bribery:</p> <p>(a) with intent to influence another's testimony in an <i>official proceeding</i>; or</p> <p>(b) with intent to induce or otherwise cause another:</p> <p>(i) to withhold any testimony, information, document or thing from an <i>official proceeding</i>, whether or not the other person would be legally privileged to do so;</p> <p>(ii) to violate section 1323 (Tampering with Physical Evidence);<sup>2</sup></p> <p>(iii) to elude legal process summoning him to testify in an <i>official proceeding</i>; or</p> <p>(iv) to absent himself from an <i>official proceeding</i> to which he has been summoned.</p> <p>Section 1322(1):</p> <p>(1) Offense. A person is guilty of a Class C felony if, believing another may have information relating to an offense, he deceives such other person or employs force, threat or bribery with intent to <i>hinder, delay or prevent communication of such information to a law enforcement officer. . . .</i></p> <p>Commission Report, §§ 1321(1), 1322(1), at 113-14, 116 (emphasis added).</p>	<p>Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—,</p> <p>(1) influence the testimony of any person in an <i>official proceeding</i>;</p> <p>(2) cause or induce any person to—,</p> <p>(A) withhold testimony, or withhold a record, document, or other object, from an <i>official proceeding</i>;</p> <p>(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an <i>official proceeding</i>;</p> <p>(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an <i>official proceeding</i>; or</p> <p>(D) be absent from an <i>official proceeding</i> to which such person has been summoned by legal process; or</p> <p>(3) <i>hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings</i>;</p> <p>shall be fined not more than \$250,000 or imprisoned not more than ten years, or both.</p> <p>Pub. L. 97-291 § 4(a) (1982) (emphasis added).</p>

<sup>2</sup> Section 1323 of the Commission Report provided in relevant part:

A person is guilty of an offense if, believing an official proceeding is pending or about to be instituted or believing process, demand or order has been issued or is about to be issued, he alters, destroys, mutilates, conceals or removes a record, document or thing with intent to impair its veracity or availability in such official proceeding or for the purposes of such process, demand or order.

Commission Report, § 1323(1).

As shown on the left side of the table above, section 1321 of the Commission Report, titled “Tampering With Witnesses and Informants in Proceedings,” Commission Report at 113, addressed obstruction of “official proceedings.” In contrast, section 1322(1), titled “Tampering with Informants in Criminal Investigations,” *id.* at 116, addressed obstruction in investigations and other proceedings *prior to* the institution of an official proceeding.

In parallel on the right side of the table, the first incarnation of subsection 1512(a) tracked the Commission’s proposals closely. Subsections 1521(a)(1) and (2) adopted the structure, substance, and much of the specific language of subsection 1321(1) from the Commission’s Report (addressing official proceedings), while subsection 1521(a)(3) tracked section 1322(1) (addressing investigations). Like the Commission’s proposed section 1321, section 1512(a)(1) and (2) first laid out certain *actus rei* (intimidation, physical force, threats, or misleading conduct), followed by a set of intended results that are nearly identical to the Commission’s proposed language. Section 1512(a)(3), in turn, includes the identical language addressing “hinder[ing], delay[ing], or prevent[ing] the communication [of relevant information] to a law enforcement officer” from the Commission’s proposal in section 1322, while omitting any mention of official proceedings. *Compare* Pub. L. 97-291 § 4 (1982), with Commission Report §§ 1321, 1322.

The definitions in the Commission Report confirm this intentional delineation between actions taken to obstruct official proceedings, on the one hand, and actions taken to obstruct investigations prior to the institution of an official proceeding, on the other. “Official proceeding” was defined by the Commission as a proceeding involving the taking of evidence:

a proceeding heard or which may be heard before any government agency or branch or public servant authorized to *take evidence under oath*, including any referee, hearing examiner, commissioner, notary or other

person taking testimony or a deposition in connection with any such proceeding

Commission Report, § 109(ad), at 9 (emphasis added).

In contrast, the Commission’s definition of “law enforcement officer,” as used in section 1322(1), confirms that that section addressed investigations prior to the institution of an official proceeding: “a public servant authorized by law or by a government agency or branch to *conduct or engage in investigations or prosecutions for violations of law.*” *Id.* § 109(w), at 8 (emphasis added).

Today, subsections 1512(a)(2) and (b) follow the same structure as the original subsection 1512(a), and sections 1321 and 1322 in the Commission Report, continuing to differentiate between official proceedings and investigations:<sup>3</sup>

(a)(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

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<sup>3</sup> Subsection 1512(a)(1) similarly differentiates between intent to obstruct an “official proceeding” versus an investigation with a slightly different structure:

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an *official proceeding*;

(B) prevent the production of a record, document, or other object, in an *official proceeding*; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

18 U.S.C. § 1512(a)(1) (emphasis added).

(A) influence, delay, or prevent the testimony of any person in an *official proceeding*;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an *official proceeding*;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an *official proceeding*;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an *official proceeding*; or

(iv) be absent from an *official proceeding* to which that person has been summoned by legal process; or

(C) *hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings*;

shall be punished as provided in paragraph (3).

....

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an *official proceeding*;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an *official proceeding*;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an *official proceeding*;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an *official proceeding*; or

(D) be absent from an *official proceeding* to which such person has been summoned by legal process; or

(3) *hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release [sic], parole,, [sic] or release pending judicial proceedings;*

shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(a)(2) & (b) (emphasis added).

This structure and language, as originally adopted from the Commission Report and carried through to the current statute, illustrates Congress’s intent to address obstruction of justice both in official proceedings at which evidence is taken and the gathering of information and evidence in investigations prior to the institution of an official proceeding. In such context, the word “official” is used to differentiate between the periods before and after an investigation has concluded and a formal case has been instituted. Prior to the institution of such an official proceeding, the provisions addressing investigations, such as subsections 1512(a)(2)(C) and (b)(3), apply, while after institution, subsections 1512(a)(2)(A) and (B) and (b)(1) and (2) apply to the official proceedings.

Although Congress did not explicitly adopt the definition of “official proceeding” from the Commission Report, its considered adoption of the same structure and language of the operative sections of the Report, as stated in the Senate Judiciary Committee Report—including the differentiation between obstruction of justice before and after an investigation is concluded and an official proceeding is instituted—supports limiting the definition of “official proceeding” in section 1512 to proceedings at which evidence is taken. This is especially so given that the definition included in section 1515(a)(1), at

least on its face, could be read to encompass *every* proceeding before a court, Congress, or other federal agency, no matter the subject or type of proceeding, a result that Congress could not have intended in this context. Given the breadth and ambiguity of subsection 1515(a)(1), the legislative history and context in which the language of section 1512 was adopted illustrates Congress's intended narrower meaning for "official proceeding."

Congress then amended section 1512 in 2002 to add what is presently subsection 1512(c), the provision under which Mr. Cua is charged; specifically, subsection 1512(c)(2). In doing so, Congress limited the section to actions affecting "official proceedings" but provided no further clarification as to the scope or meaning of the term. *See* Pub. L. 107-204 § 1102 (2002). *See also* 18 U.S.C. § 1512(c). In such case, the term "official proceeding" maintains its original meaning, as adopted at the time of the original enactment, which in this case is a proceeding at which evidence is taken.

In Mr. Cua's case, in Count 2, the government has failed to plead sufficient facts to support a violation of section 1512(c) because the proceedings before Congress on January 6, 2021, were not an official proceeding under the statute. For this reason, as well as other reasons stated by the defendants in *Montgomery*, Count 2 should be dismissed.

For the reasons stated above, the Court should grant this motion and permit Mr. Cua to adopt, conform, and supplement the motions to dismiss counts alleging violations of subsection 1512(c)(2) submitted by defendants in *United States v. Montgomery, et al.*, Case No. 1:21-cr-00046-RDM. A proposed order is submitted herewith.



Respectfully submitted,

DATED: November 16, 2021

/s/ William E. Zapf  
Jonathan Jeffress (D.C. Bar No. 479074)  
William E. Zapf (D.C. Bar No. 987213)  
KaiserDillon PLLC  
1099 14th Street NW  
8th Floor West  
Washington, DC 20005  
T: (202) 640-2850  
F: (202) 280-1034  
jjeffress@kaiserdillon.com  
wzapf@kaiserdillon.com

*Attorneys for Bruno Joseph Cua*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of November 2021, I filed the foregoing with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system, which system I understand has provided electronic notice counsel of record.

Dated: November 16, 2021

*/s/ William E. Zapf*\_\_\_\_\_

William E. Zapf