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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. Geoffrey STANEK, Defendant.	Case No. 3:16-CR-051-BR MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COUNT TWO

I. RELEVANT FACTUAL/PROCEDURAL BACKGROUND

The alleged facts are well-known to the Court. On January 2, 2016, a group including some of the defendants charged in this case went to the Malheur National Wildlife Refuge to stage a political protest, citing a number of grievances against the Federal government.

As part of this protest, some of the charged defendants purportedly occupied the Refuge. A number of other people, including other charged defendants, came to the Refuge over the ensuing weeks in order to participate in the protest, to support the protestors, or to simply investigate for themselves what was transpiring at the Refuge.

Count Two charges that, on or about January 2, 2016, and continuing through February 12, 2016, defendants Ammon Bundy, Jon Ritzheimer, Ryan Payne, Ryan Bundy,

Brian Cavalier, Shawna Cox, Jason Patrick, Dylan Anderson, Sean Anderson, David Lee Fry, Jeff Wayne Banta, Sandra Lynn Anderson, Wesley Kjar, Corey Lequieu, Jason Blomgren, Darryl Thorn, Geoffrey Stanek, Travis Cox, Eric Lee Flores, and Jake Ryan:

> did knowingly possess or cause to be present a firearm or dangerous weapon in a federal facility located at the Malheur National Wildlife Refuge, and counseled, commanded, induced and procured the commission thereof, with the intent that the firearm or dangerous weapon be used in the commission of a crime, to wit: 18 U.S.C. § 372, Conspiracy to Impede Officers of the United States, in violation of [18 USC §§] 930(b) and 2.

This charge (1) is impermissibly vague, both on its face and as applied to defendants in this case, and (2) is unconstitutionally overbroad in violation of the Free Speech clause of the First Amendment and the entirety of the Second Amendment. Accordingly, Count Two should be dismissed.

II. § 930 IS IMPERMISSIBLY VAGUE

The standard for vagueness is laid out in the Memorandum in Support of the Motion to Dismiss Count 1, filed contemporaneously with this motion. The relevant sections of that memorandum are incorporated by reference into this memorandum. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 US 104, 108 (1972). A statute that violates that test is void for vagueness even if the statute is arguably *not* vague with regard to some conduct. *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015). When a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 499 (1982). When a statute imposes criminal punishment, "the requirement for clarity is enhanced." *United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013).

§ 930(b) interferes with the Second Amendment right to bear arms, and in the context of the instant case, with the First Amendment right of free speech and of assembly, and it is a criminal statute. As such, a stringent vagueness test should apply. Because § 930(b) cannot meet that heightened standard, this Court should dismiss Count Two.

A. § 930 DOES NOT PROVIDE FAIR NOTICE

§ 903(b) fails to give a person of ordinary intelligence fair notice of the prohibited conduct by using terms whose definitions are so broad that an average person would not understand when he or she was in violation.

1. "FEDERAL FACILITY"

For example, § 930(g)(1) defines a "federal facility" as "a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties." That definition fails to clearly identify which buildings are covered by the statute because reasonable people would disagree as to what that definition means. How is one to know whether a particular "part" of a building "owned or leased by the Federal Government" is a place where "Federal employees are regularly present for the purpose of performing their official duties?" Must the Federal Government lease the entire building to make any "part" of it a federal facility? What constitutes the "regular" presence of federal employees? What are "official duties" and how do they differ from other duties or activities? A federal building may contain living quarters, a cafeteria, recreational space, a machine shop, a storage room or any number of other spaces that federal employees might use for personal, non-official duties or for any number of other reasons. The definition of "federal facility" does not give fair

notice to a person of average intelligence as to when they might happen to be in a "federal facility" and when they are not.

Congress seems to have recognized this problem by codifying a lack-of-notice defense at § 930(h). The defense does not apply to subsection (b) however, oddly leaving unaddressed the lack-of-notice problems discussed above for the more serious offense.

2. "FIREARM"

§ 930 does not define "firearm." A firearm is commonly understood to be a gun, but must the gun be operable? Does an inoperable or relic firearm violate the statute?

3. INTENT TO USE IN THE COMMISSION OF A CRIME

The vagueness problem is further exacerbated by the requirement in § 930(b) that a defendant "inten[d] that [the] firearm … be used in the commission of a crime." That could apply to the intent to commit *any* crime, at any time or place. A hunter who knows his son works in a federal facility could pack a broken rifle in his son's workbag on Monday so the son could take it to the gunsmith to fix. It the hunter intended to use the gun to hunt without a license on state-owned land at some point, in violation of ORS 498.002(1), has the hunter violated § 930(b)? Has the son? § 930(b) also punishes an attempt to possess or cause to be present a firearm. Is the hunter in violation of § 930(b) if, on his way home from the gunsmith with the repaired rifle, he attempts to enter the post office to pick up his mail, only to realize that it is after hours and the post office is closed?

4. EQUAL PROTECTION ISSUE

The enhanced punishment based on the vague intent, along with the curtailment of the lack-of-notice defense to § 930(b) also raises troubling equal protection problems. *See*

e.g. Lawrence v. Texas, 539 US 558, 579 (2003) (O'Connor, J., concurring) (discussing Equal Protection clause, noting that a statute must be rationally related to a legitimate state interest). There is no rational basis for punishing the same conduct (possessing a firearm) differently in §§ 930(a) and (b) but curtailing a defense based solely on the intent of a defendant to use the firearm in some crime to be committed someplace else in the future.

B. § 930 ALLOWS FOR ARBITRARY ENFORCEMENT

The Due Process Clause prohibits statutes that delegate too much discretion to the executive or judicial branches by using vague standards because of the risk of arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

§ 930(b) requires law enforcement and prosecutors to make *ad hoc* determinations of which building or part of any building is a "federal facility." It requires a subjective decision about whether possessing an inoperable or inaccessible firearm violates the statute. It leaves broad, unlimited discretion to law enforcement to determine whether a person intends that the firearm be used in the commission of any crime. For those reasons, the conduct punished in § 930(b) is so broad that it encourages arbitrary enforcement in violation of the Due Process Clause of the Fifth Amendment.

III. VAGUE AS-APPLIED

§ 903(b) is also unconstitutionally vague as applied in this case.

A. DEFENDANTS HAD INSUFFICIENT NOTICE

Defendants have constitutional rights to assemble with others and to speak out against the government, and they have constitutional rights to possess and openly carry firearms while they so do. Defendants have sincerely held beliefs that the government has

overstepped in its ownership and regulations of land and its regulation of gun possession and carrying, and the possession and open carrying of guns is a symbolic expression of their political beliefs. Defendants have engaged in similar protects in the past, and have not been notified that their possession of firearms was criminal.

They certainly had no notice that the mere possession of firearms on the Refuge would lead to federal felony charges. Indeed, a brochure on the Refuge's website informs the public that possession of weapons "on the refuge" is regulated by state law. See Malheur National Wildlife Refuge—Hunting, available at www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_2/Malheur/Documents/malheur_hunting.pdf, last visited April 26, 2016. State law—Art. 1, Sec. 27 of the Oregon Constitution—expressly allows for the right to bear arms in self defense. The brochure expressly approves of gun possession by informing the public that weapons may be discharged "only on hunt areas shown on this map during the hunt seasons." Nowhere does the brochure inform the public that the possession of firearms or dangerous weapons is prohibited in buildings on the refuge.

Even if defendants had been aware that § 930(b) might apply to them, they had no way to know where on the refuge it applied. The MNWR is a large area with many buildings that are rarely used by anyone. Defendants had no way to know what the government would consider a "federal facility" on the Refuge. Are all outbuildings within the scope of § 930(b) even if they were abandoned or seldom used? For example, the guard tower purportedly used by some defendants has apparently not been used for years prior to the episode at issue in the instant case, and was apparently not even accessible before being fixed up.

For those reasons, defendants were not on notice that they were committing a federal felony by possessing firearms or dangerous weapons in a "federal facility" on the MNWR with the intent to commit some vague, unspecified crime. Thus, § 930(b) is unconstitutionally vague as applied to them because it fails to provide fair notice of the potential of a felony conviction for protesting against the government.

B. § 930 WAS ARBITRARILY ENFORCED

The government has singled out the defendants for punishment despite the involvement of dozens of others in the protest against the government's treatment of the Hammond family. Defendants in general were open about their motives and intentions of their protest. This case became criminal only after political and public pressure grew to end the protest. These facts establish that § 930(b) is vague as applied because it is being used arbitrarily to punish defendants based on political pressures and the content of defendants' protest speech against the government.

IV. § 930 IS OVERBROAD

A. § 930 CHILLS CONSTITUTIONALLY PROTECTED SPEECH

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

A statute is facially invalid under the overbreadth doctrine if it prohibits a substantial amount of freedoms protected by the First Amendment as compared to its plainly legitimate sweep. *United States v. Stevens*, 559 US 460, 473 (2010). "The

doctrine exists out of concern that the threat of enforcement of an overbroad law may chill constitutionally protected speech." *Arce v. Douglas*, 793 F.3d 968, 984 (9th Cir. 2015).

The offense charged in Count Two prohibits the exercise of a substantial amount of First Amendment freedoms by expressly targeting another constitutional right, the right to keep and bear arms, as protected by the Second Amendment, which provides:

> A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

§ 930 prohibits the exercise of First Amendment freedoms by prohibiting the possession of a firearm in a federal facility even when possession of that firearm is inseparable from the protected speech of a political protest. "Gun possession can be speech where there is an intent to convey a particularized message, and the likelihood is great that the message would be understood by those who viewed it." *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003) (internal quotations and citation omitted).

The First Amendment protects conduct intended to send a political message. *See Texas v. Johnson*, 491 US 397 (1989) (flag burning as act of protest is protected by the First Amendment). The framers of the Constitution would have recognized the powerful political message advanced by the possession of firearms during a protest against the government. *See District of Columbia v. Heller*, 554 US 570, 592-599 (2008) (discussing the origin of the Second Amendment as a means of protecting political expression against the government and concluding that "[i]t was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."). The "militia" as used in the Second Amendment referred to all able-bodied

American men. *Id*. at 596. The individual right to keep and bear arms was a constitutional necessity for securing and enabling the right of the people to assemble and engage in political protest against the government. *Id*.

Because § 930 is not narrowly tailored to achieve a specific interest, for example by only punishing firearm possession in select "sensitive" federal facilities, like courthouses or schools, s*ee Heller*, 554 US at 626-627, or by only punishing possession when coupled with the intent to use the firearm to commit a crime within the federal facility, and because it prohibits a substantial amount of protected speech and assembly when the exercise of those rights involves the possession of a firearm, Count Two should be dismissed. See *Citizens United v. Fed. Election Comm'n.*, 558 US 310, 340 (2010) ("political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.").

B. §930 VIOLATES THE SECOND AMENDMENT

Even if only to preserve the issue, defendant asserts that §930 violates the Second Amendment of the US Constitution. "Like most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 544 US at 626. *Heller* suggests that a statute forbidding "the carrying of firearms in sensitive places such as schools and government buildings" would still be constitutional. *Id*. However, *Heller* also notes that "self defense," cited repeatedly by many defendants in the instant case as the reason for any possession of a firearm, is "the central component" of the rights conferred by the Second

Amendment. *Id*. at 599. Thus, an "as applied" challenge based on the Second Amendment may ripen. *See, e.g. United States v. Barton*, 633 F.3d 168, 174 (3rd Cir. 2011) ("To raise a successful as-applied challenge, Barton must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections."), *see also, e.g. Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2009) (state statute prohibiting a felon from possessing firearms as applied to plaintiff was unreasonable).

V. COUNT TWO SHOULD BE DISMISSED

Based on the vagueness and overbreadth of 18 USC § 930(b) on its face and as applied, Count Two of the Superseding Indictment in this case should be dismissed.

Respectfully submitted this 27th day of April, 2016.

/s/ (intended as original in electronic filings)

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