

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division - Felony Branch**

UNITED STATES	:	2017 CF2 1279
	:	Judge Kimberley Knowles
v.	:	Next Court Date: 3/15/2017
	:	
AARON SCHOEN	:	

**MOTION TO DISMISS FOR CONFLICT OF INTEREST,
OR IN THE ALTERNATIVE, TO DISQUALIFY THE DEPARTMENT OF JUSTICE
AND TO APPOINT A SPECIAL PROSECUTOR**

Aaron Schoen moves-pursuant to the Fifth and Sixth Amendments, the D.C. Rules of Professional Conduct, 28 U.S.C. § 528 et seq., and 28 C.F.R. § 600.1 et seq.-to dismiss the indictment because of the conflict of interest of the Department of Justice [HEREINAFTER “DOJ”]. In the alternative, the accused moves to disqualify the DOJ and to appoint a special prosecutor. In support of the Motion, undersigned states as follows:

1. On January 20, 2017, over 200 people were arrested, allegedly in connection with protests of the inauguration of Donald Trump.
2. On February 3, 2017, Christopher J. Mutimer, attorney at Scrofano Law PC, accepted this case *pro bono publica*.
3. Counsel has advised the accused of the potential conflict of interest, pursuant to D.C. Professional Rule of Conduct 1.9 (relating to conflicts of interest).¹
4. The conflicts resolution process is still on-going and, as such, counsel maintains a limited representation of the accused in this case.

¹ It is unclear how many *pro bono* cases undersigned’s firm will ultimately accept. At this point, it may be three cases with three separate attorneys in the firm.

5. Counsel is filing this motion on behalf of the accused to ensure that the accused's constitutional rights are protected pending resolution of any and all conflicts.
6. On January 20, 2017, Donald Trump assumed office as President of the United States.
7. Mr. Trump is now the head of the executive branch of the United States government. On the same day, the accused was arrested-along with over 200 other individuals-for an alleged violation of the Riot Act, D.C. Code§ 22-1322.
8. On January 21, 2017, the United States Attorney for the District of Columbia (USAO- DC) filed a complaint alleging a felony violation of the Riot Act. The government alleges that a group of individuals was protesting the inauguration of Mr. Trump-that is, the now-head of the executive branch. See *Gerstein* affidavit of 1/21/2017 (in Courtview). The USAO-DC, as with all United States Attorneys and Assistant United States Attorneys, is an employee of the DOJ. The DOJ is an agency of the executive branch, and the head of that agency reports directly to Mr. Trump.
9. A preliminary hearing was set for March 15, 2017.
10. The government indicted this case on February 8, 2017. Accordingly, the preliminary hearing has been vacated and the matter is set for arraignment on March 15, 2017.

WHEREFORE, for the reasons herein and any other reasons the Court deems appropriate, the accused respectfully requests this Honorable Court Dismiss this Case.

ORAL HEARING REQUESTED

Respectfully Submitted,
SCROFANO LAW PC

/S/

BY:

Christopher J. Mutimer
Bar No: 1011284
406 5th Street NW
Suite 130
Washington, DC 20001
Ph: 202-670-2390
cjm@scrofanolaw.com

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MEMORANDUM OF POINTS AND AUTHORITIES

The USAO-DC has a conflict of interest in any prosecution alleging crimes related to a protest related to Donald Trump. The conflict of interest is obvious: President Trump is the head of the executive branch and exercises supervisory authority over the United States Attorney General, the USAO-DC, and any AUSAs who may be assigned to work on this case. A prosecution alleging violations of the law during public gatherings for President Trump's inauguration creates—at the very least—the appearance of impropriety. This raises fundamental issues under the Constitution, as well as local Rules of Professional Conduct, that require dismissal or appointment of a special prosecutor.

The Supreme Court has long recognized the "requirement of a disinterested prosecutor." *E.g., Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987). "[A]ppointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. ... If this is the case, we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt." *Id.* at 811. "Prosecution by someone with conflicting loyalties 'calls into question the objectivity of those charged with bringing a defendant to judgment.'" *Id.* at 810 (quoting *Vasquez v. Hillery*, 474 U.S. 254,262 (1986)). *See also, e.g.,* D.C. R. Pro. Conduct

8.4(d); 28 U.S.C. § 530B(a) (“An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.”). Moreover, prosecution by a biased prosecutor has been deemed by our Court of Appeals to be a “structural error.” *In re Taylor*, 73 A.3d 85, 100-01 (D.C. 2013). An error is structural “when the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Rivera v. Illinois*, 56 U.S. 148, 160 (2009). The Supreme Court has required “reversal of the conviction” in cases deemed to have “structural error” even where “the effect of the violation cannot be ascertained.” *Vasquez*, 474 U.S. 254, 263 (1986).

This problem is one of constitutional magnitude. *See Young*, 481 U.S. at 810 (rejecting harmless-error review in addressing claim of conflicted prosecutor in contempt proceeding). The DOJ is also under federal law, required to disqualify “any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff when “such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof” 28 U.S.C. § 528 (emphasis added). The DOJ has promulgated regulations that provide a procedure for the appointment of a special prosecutor. 28 C.F.R. § 600.1 *et seq.*

Perhaps no greater conflict can exist than when a prosecutor is pursuing charges allegedly based on a disagreement with the political viewpoints of that prosecutor's superior. Continued prosecution by the DOJ creates the potential to raise question after question in the eyes of the public and the accused. For example, whether the prosecutor pursuing charges because of evidence of a crime or because the accused was part of a group that was protesting President

Trump. Whether the prosecutor can fairly distinguish between protected First Amendment activity versus criminal conduct. Whether this prosecutor exercising independent prosecutorial judgment or acting in part because of a fear of reprisal from President Trump.

Even if the Court finds that the DOJ does not have an actual conflict of interest, or can exercise prosecutorial authority without actually being pressured by President Trump, the controlling statutes and cases still require disqualification of the DOJ.² It is the "appearance" of impropriety that controls. *See Young*, 481 U.S. at 808; 28 U.S.C. § 528. The DOJ cannot shake the appearance of impropriety in a case founded on alleged actions so intimately connected with perceived criticism of President Trump.

RELIEF REQUESTED

Accordingly, the accused moves to dismiss the indictment. In the alternative, the accused moves to disqualify the DOJ and to have the Court appoint a special prosecutor. Any further prosecution by the USAO-DC-or any other DOJ employee-would merely serve to continue the "appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Young*, 481 U.S. at 808.

² Under D.C. law, the prosecution of criminal cases under D.C. Code§ 22-1322 and other related criminal statutes is the exclusive purview of the USAO-DC. The District of Columbia is not authorized to prosecute these cases. No federal prosecutor can be brought in from another branch of the DOJ to prosecute these cases, as the same conflict of interest would exist. For the same reason, the United States Attorney General cannot select private counsel to prosecute this case without raising the same issues regarding the appearance of impropriety, as the selection of prosecutor would be in the hands of the conflicted executive branch.

Respectfully Submitted,

/S/

BY:

Christopher J. Mutimer
Bar No: 1011284
406 5th Street NW
Suite 130
Washington, DC 20001
Ph: 202-670-2390
cjm@scrofanolaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing has been served by e-filing on the United States Attorney's Office for the District of Columbia, on February 10, 2017.

/S/

Christopher J. Mutimer

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ORDER

This matter is before the Court upon Defendant's Motion to Dismiss or in the Alternative to Appoint a Special Prosecutor, any Opposition, and the entire record herein. Having considered the Motion, it is this _____ day of _____, 2017 **HEREBY**

ORDERED that the Motion is **GRANTED**; it is further

ORDERED that the indictment be **DISMISSED**;

SO ORDERED.

The Honorable Kimberley Knowles

Copies to:

Christopher J. Mutimer
Scrofano Law PC
406 5th Street NW
Suite 130
Washington, DC 20001

Jennifer Kerkhoff
Assistant United States Attorney
555 Fourth Street NW
Washington, DC 20530