IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	*	
PLAINTIFF,	*	
	*	
v.	*	**CAUSE NO. SA-17-CR-882-DAE**
	*	
LUIS VALENCIA (1),	*	
DEFENDANT.	*	
	*	

GOVERNMENT'S RESPONSE IN OPPOSITION TO THE MOTION OF DEFENDANT LUIS VALENCIA TO DISMISS INDICTMENT FOR LACK OF AUTHORITY TO PROSECUTE (DKT # 164)

TO THE HONORABLE DAVID A. EZRA, SENIOR UNITED STATES DISTRICT JUDGE:

The United States of America opposes the motion to dismiss the indictment filed by Defendant Luis Valencia based upon "lack of authority to prosecute," (Dkt #164), and respectfully states:

I.

On November 12, 2018, Defendant Luis Valencia filed a motion urging this Court to dismiss the indictment in this case, based on lack of authority of counsel for the United States to prosecute this case. The motion is without merit and should be denied.

II.
ARGUMENT

On November 7, 2018, Attorney General Jefferson B. Sessions resigned from office and, on the same date, the President directed Matthew G. Whitaker, who previously served as Chief of Staff to Attorney General Sessions, to serve temporarily as Acting Attorney General under the Federal Vacancies Reform Act.

The defendant subsequently moved to dismiss the indictment in this case, arguing that the Acting Attorney General's appointment was invalid under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The President's designation of the Acting Attorney General was valid, but the Court need not address the designation's validity in this case. That is because the legal authority of the Department of Justice to prosecute this case does not depend in any way on whether a vacancy in the office of Attorney General has been properly filled. The prosecution is being supervised by a United States Attorney pursuant to statutory authority, and the United States Attorney is supervised by the Senate-confirmed Deputy Attorney General. In any event, the alleged invalidity of the Acting Attorney General's designation does not invalidate the indictment.

A. The Acting Attorney General's Designation Was Valid.

Under the Federal Vacancies Reform Act, the default rule is that the Deputy Attorney General fills the role of Attorney General in an acting capacity when that office becomes vacant. *See* 5 U.S.C. § 3345(a)(1); 28 U.S.C. § 508(a). But the Act gives the President authority to depart from this default rule and designate another person to fill the role. First, the President may designate another presidential appointee, who is already Senate confirmed, to fill the vacant office. 5 U.S.C. § 3345(a)(2). Second, the President may designate an officer or employee within the same agency to perform the duties of the vacant office, provided that the person has been in the agency for at least 90 days in the 365 days preceding the vacancy at a pay rate equivalent to or greater than GS-15 of the General Schedule. 5 U.S.C.

§ 3345(a)(3). Except in the case of a vacancy caused by sickness, time limits apply to the person's service in an acting capacity. 5 U.S.C. § 3346.

The Department of Justice's Office of Legal Counsel has determined that the President lawfully designated Mr. Whitaker as the Acting Attorney General pursuant to 5 U.S.C. § 3345(a)(3) and that Mr. Whitaker's appointment was constitutional. *See* Office of Legal Counsel, *Designating an Acting Attorney General* (Nov. 14, 2018), available at https://www.justice.gov/olc/file/1112251/download. As explained in that opinion, the Acting Attorney General meets the requirements of Section 3345(a)(3). *Id.* at 3. And 28 U.S.C. § 508—which codifies the default rule that the Deputy Attorney General "may exercise" the duties of Attorney General when there is a vacancy in that office—does not prevent the President from using the procedures in Section 3345(a)(2) or (a)(3) to designate a different Acting Attorney General. *Id.* at 4-6. An appointment under Section (a)(3) is valid under the Appointments Clause, U.S. Const. art. II, § 2 cl. 2, because the Acting Attorney General's temporary designation does not make him a "principal officer" who requires Senate confirmation. *Id.* at 6-20. This view is supported by historical practice and the Supreme Court's decision in *United States v. Eaton*, 169 U.S. 331 (1898). *See* Office of Legal Counsel, *Designating an Acting Attorney General* at 7-20.

For the reasons stated in the Office of Legal Counsel opinion, the defendant is incorrect in the assertion that the Acting Attorney General's designation is invalid. If the Court reaches the issue, it should follow the reasoning set forth in

the Office of Legal Counsel's opinion. As explained below, however, the Court need not reach this issue.

B. Even If the Acting Attorney General's Designation Were Invalid, That Would Not Justify Dismissal of the Indictment.

The defendant argues that the Acting Attorney General lacks constitutional authority to represent the United States and that his lack of authority flows to every subordinate officer in the Department of Justice, meaning that the indictment must be dismissed. This argument misunderstands the constitutional and statutory framework.

The Appointments Clause requires the President, "with the Advice and Consent of the Senate," to "appoint" all "Officers of the United States . . . which shall be established by law." U.S. Const. art. II, § 2, cl. 2. This method is the default means of appointing all officers and the exclusive means of appointing *principal* officers. *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 n.3 (2018). The Clause goes on to say, however, that Congress may vest the appointment of "inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

Congress "established" the Attorney General as "the head of the Department of Justice." 28 U.S.C. § 503. But Congress has also established the office of United States Attorney, directing the President to "appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district." 28 U.S.C. § 541(a). The United States Attorney has the statutory authority and responsibility to "prosecute for all offenses against the United States" occurring "within his

district." 28 U.S.C. § 547(1). Congress has also established the office of Deputy Attorney General, 28 U.S.C. § 504, and has authorized the Attorney General to delegate any of his functions to "any other officer, employee, or agency of the Department of Justice," 28 U.S.C. § 510.

i. The prosecution is supervised by a validly appointed United States Attorney.

Although almost all of the functions of the Department of Justice and its officers are vested in the Attorney General, 28 U.S.C. 509, the Attorney General need not and in most cases does not exercise those functions himself. Nor does the authority of a United States Attorney to conduct litigation on behalf of the Department depend on any action by the Attorney General. By statute, Congress has expressly authorized each United States Attorney to, among other things, "prosecute for all offenses against the United States." 28 U.S.C. 547. Thus, where a U.S. Attorney's office is conducting a criminal prosecution under the direction and supervision of the U.S. Attorney, federal law expressly authorizes the conduct in that litigation, without the need for any separate authorization from the Attorney General. This means that the United States Attorney's authority to conduct this prosecution does not depend on whether the Acting Attorney General has been validly assigned to his position by the President.

The United States Attorney who authorized and now supervises this prosecution was appointed by the President and confirmed by the Senate. That appointment fully complied with the Appointments Clause and Section 541(a). Because this prosecution is being supervised by a presidentially appointed and

Senate-confirmed officer—the United States Attorney, who has statutory authority to prosecute, *see* 28 U.S.C. § 547(1)—there is no basis to dismiss the indictment or otherwise delay prosecution of this case.

ii. The United States Attorney is supervised by the Senate-Confirmed Deputy Attorney General, whom the defendant contends should be the Acting Attorney General.

Additionally, under the Department of Justice's organizational structure, the officer with direct supervision over the United States Attorneys is the Senate-confirmed Deputy Attorney General. *See* 28 C.F.R. § 0.15(a) ("The Deputy Attorney General is authorized to exercise all the power and authority of the Attorney General, unless such power and authority is required by law to be exercised by the Attorney General personally."); Department of Justice, Organization, Mission & Functions Manual, https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general ("U.S. Attorneys report directly to the Deputy . . . ."); Department of Justice Organizational Chart, https://www.justice.gov/agencies/chart. The Deputy Attorney General is the very person who the defendant claims ought to have been named the Acting Attorney General. Defendant is in essence arguing that the person who already has indirect supervision over this prosecution (the Deputy Attorney General) ought to be in a different position (the Acting Attorney General) where he would even more indirectly supervise the prosecution.

iii. The Defendant has provided no basis for concluding that the Acting Attorney General has had any personal involvement in this prosecution.

Although an Attorney General may involve himself in particular cases handled by the Department, *see* 28 U.S.C. § 516, he is under no obligation to do so. And given the thousands of cases handled by the Department's litigating divisions and the offices of 93 U.S. Attorneys each year, it is not feasible for an Attorney General to participate personally in more than a small fraction of the Department's cases. This is especially true in criminal cases. The United States Sentencing Commission received reports of approximately 67,000 federal criminal cases in which the offender was sentenced in fiscal year 2017. *See* https://www.ussc.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2017.

In order to establish any prejudice from the alleged defects in the Acting Attorney General's designation, the defendant would have to show that the Acting Attorney General has personally participated in this matter or otherwise personally affected its course and that the adverse actions were undertaken on his initiative or direction. The defendant has not done so. And mere speculation that the Acting Attorney General had taken some action affecting this case is insufficient to warrant any relief, much less the drastic relief of dismissing the indictment.

iv. The Acting Attorney General's indirect supervision over the case as the head of the Department of Justice does not support dismissal.

The Acting Attorney General's indirect involvement with this case as the acting head of the Department of Justice does not affect the validity of this prosecution. The defendant cannot support the sweeping claim that *every* officer within the Department of Justice would lack authority to prosecute criminal cases were the Acting Attorney General's designation invalid. Although the Attorney General is the "head of the Department of Justice," 28 U.S.C. § 503, the United States Attorneys and other Department officers are validly appointed officers of the United States in their own right and have statutory authority that is not contingent on the validity of the Attorney General's (or Acting Attorney General's) appointment. *See United States v. Hartwell*, 73 U.S. 385, 393 (1867) (once an officer is "appointed pursuant to law, [v]acating the office of his superior would not have affected the tenure of his place"). *Cf. Tenure of Office of Inspectors of Customs*, 2 Op. Atty. Gen. 410, 412 (1831) (office holders continue to hold office despite a vacancy or change in the person who exercised appointing authority). The 115,000-member Department of Justice is not a house of cards that falls whenever it is not headed by a Senate-confirmed officer.

The defendant's request to dismiss the indictment based on putative defects in the appointment of the Acting Attorney General also overlooks the independent role of the grand jury in this matter. The indictment was returned by the grand jury, which "is a constitutional fixture in its own right," *United States v. Williams*,

504 U.S. 36, 47 (1992) (quotation omitted), and "act[s] independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960). "An indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956). And any failures by the Executive Branch, including prosecutorial misconduct in front of the grand jury, provide a court "no authority to dismiss the indictment . . . absent a finding that [the defendant] w[as] prejudiced by such misconduct." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

The Acting Attorney General's allegedly invalid designation does not affect the indictment's validity. As an initial matter, the indictment was returned before the Acting Attorney General's appointment. Moreover, the defendant cannot show any error or prejudice where the prosecutor before the grand jury was supervised by a validly appointed United States Attorney, as well as the same Deputy Attorney General who the defendant asserts should be the Acting Attorney General. *See United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 2006) (participation of statutorily unauthorized Special Assistant U.S. Attorney in grand jury proceedings was harmless error where he was supervised by authorized Assistant U.S. Attorneys); *United States v. Vance*, 256 F.2d 82, 83 (6th Cir. 1958) (per curiam) (even if indictment had to be signed by U.S. Attorney, signature by AUSA is a harmless error).

The defendant argues that the indictment may be dismissed under Federal Rule of Criminal Procedure 48, based on "unnecessary delay" in "bringing [the]

defendant to trial." Fed. R. Crim. P. 48(b). But there would be delay in this case only if the Court were to accept the defendant's sweeping argument that the appointment of the Acting Attorney General has stripped every Department of Justice attorney of the authority to prosecute criminal cases. The Court should reject such a claim.

v. The validity of the Acting Attorney General's designation does not affect this court's jurisdiction.

This Court has jurisdiction over this case regardless of the lawfulness of the Acting Attorney General's appointment. The Court has jurisdiction under 18 U.S.C. § 3231 over "all offenses against the laws of the United States" within the district. The Acting Attorney General's allegedly invalid designation does not strip the Court of jurisdiction. *See United States v. Plesinski*, 912 F.2d 1033, 1038 (9th Cir. 1990) (where a Special Assistant U.S. Attorney's appointment was statutorily invalid, his "unauthorized appearance on behalf of the government did not deprive the district court of jurisdiction over the proceedings"); *Home New Publishing Co. v. United States*, 329 F.2d 191, 193 (5th Cir. 1964) (participation of statutorily unqualified government counsel did not deprive court of jurisdiction where the case was supervised by an Assistant United States Attorney).

vi. There is no basis to suspend or otherwise delay this prosecution.

Finally, the Court should reject any suggestion that this prosecution be put on hold until there is a Senate-confirmed Attorney General or Acting Attorney General. As explained above, the prosecution is currently supervised by a duly-

appointed United States Attorney and by the Senate-confirmed Deputy Attorney General. Even if the defendant were ultimately correct that the Acting Attorney General's designation is invalid, the remedy would simply be for the Deputy Attorney General to assume that role or for the President to designate another Senate-confirmed officer. The defendant's constitutional challenge provides no reason to delay the administration of justice in this case.

For these reasons, the United States respectfully requests that this Court deny the motion of Defendant Luis Valencia to Dismiss the Indictment.

Respectfully submitted,

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By: /S/
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2018, a true and correct copy of the foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF System that will transmit notification of such filing to all counsel of record in this case.

/s/
BUD PAULISSEN
Assistant United States Attorney

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ORDER DENYING DEFENDANT LUIS VALENCIA'S MOTION TO DISMISS INDICTMENT FOR LACK OF AUTHORITY TO PROSECUTE (DKT # 164)

The Court has reviewed the Defendant's Motion to Dismiss Indictment for Lack of Authority to Prosecute, the Government's Response in Opposition thereto, and considered the arguments of the parties. The Court, being of the opinion that the Defendant's motion lacks merit, it is ORDERED that Luis Valencia's Motion to Dismiss Indictment for Lack of Authority to Prosecute (DKT #164) is in all ways DENIED.

SIGNED this _______ day of ________________________, 2018.

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DAVID A. EZRA
SENIOR UNITED STATES DISTRICT JUDGE