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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Quiel, Petitioner/Movant, vs. **USA,** Respondent.	No. CV 16-01535-PHX-JAT (MHB) CR-11-02385-PHX-JAT **QUIEL'S SUPPLEMENT TO HIS OBJECTION TO GOVERNMENT'S RESPONSE TO COURT ORDER**

Petitioner Michael Quiel ("Quiel" or "Movant"), by and through undersigned counsel, files this supplement to his objection to the Government's Evidence filed as a Response to Court Order. (Doc. 35.) Mr. Quiel filed an objection on July 18, 2018. (Doc. 36). This supplement provides additional law and argument to be added to his prior filing on July 18.

This supplement is necessary because, even though in his Objection, Mr. Quiel demonstrated why the U.S.' evidence was inadequate to comply with this Court's order (Doc. 34), and the U.S.' argument was misleading at best and fraudulent at worst, the U.S. failed to address the Supreme Court's recent ruling

in *Lucia v. SEC*, No. 17-130, 2018 WL 3057893 (2018). After again reviewing *Lucia*, Mr. Quiel provides this supplement to demonstrate the inadequacies of the U.S.' evidence and argument in light of *Lucia.*

ARGUMENT

The U.S. failed to actually perform any Appointments Clause analysis pursuant to *Lucia*, ie., cite the statute that created the offices Stockwell and Edelstein allegedly held, and cite the statute that set forth the duties, salaries, and means of appointment.

As the Supreme Court has repeatedly held and reiterated in *Lucia*, in determining whether one is an officer or an employee consists of a two-part test: first, "an individual must occupy a 'continuing' position established by law," *id.*, *citing United States v. Germaine*, 99 U.S. 508, 511 (1879); and second, "they 'exercised significant authority pursuant to the laws of the United States.'"[2] *Id.*, *citing Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

The U.S. failed to provide the requisite evidence that this Court ordered produced by July 3, 2018. (Doc. 34).

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[2] The phrase "Established by Law" means "by statute." *Lucia*, Thomas, J., concurring. *See, e.g., King Mfg. co. v. Augusta*, 277 U.S. 100, 103 (1928) ("The Constitution of the United States does not use the term 'statute', but it does employ the term 'law,' often regarded as an equivalent, to describe an exertion of legislative power.") *See also Clinton v. City of New York*, 524 U.S. 417, 437 (1998) (Congress makes "law" through the enactment of legislation.)

1. No Statute Creates An Office Of Attorney Employed Full Time By The Department Of Justice.

As to the first part, the Court in *Lucia* made clear that to be an officer, one must "hold a continuing office established by law. *Lucia*, *citing Freytag*, 881. In the same paragraph, the Court again restated the law that any "appointment is to a position created by statute, down to its 'duties, salary, and means of appointment." *Lucia*, *citing Freytag*, 501 U.S., at 881.

As to this first part, the U.S. failed to cite any statute that created an office which Stockwell and Edelstein held. The U.S. cited the following statutes: 28 U.S.C. §§515, 541-543, 547. Section 515 creates no office (the letters also cited Section 515); rather, Section 515 only grants authority to the "Attorney General, or any other officer of the Department of Justice, or an attorney specially appointed by the Attorney General under law…." 28 U.S.C. § 515(a).[3] Section 541 creates the office of United States Attorney and details how the appointment occurs, term of office, and how removed. Section 542 creates the office of Assistant United States Attorney, how the appointment occurs, and how removed. Section 543 creates the office of Special Attorneys that includes "qualified tribal

[3] Section 515 does not create an office even for an attorney specially appointed, because it specifically states "under law," clearly not referring to Section 515, even though subsection (b) states, "Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath." 28 U.S.C. §515.

prosecutors…for prosecuting Federal offenses committed in Indian country," as well as how the appointment occurs and how removal occurs. Section 547 sets forth the duties of a United States Attorney.

The letters the U.S. presented as evidence of an alleged appointment do not appoint Stockwell or Edelstein to any of the offices created in the statutes cited. In fact, the letters do not allege any appointment to any office at all. It is unclear why the U.S. cited as authority the statutes creating the offices of U.S. Attorney, Assistant U.S. Attorney, and Special Attorneys, unless the U.S. now claims those are the office(s) which Stockwell and Edelstein held. Certainly, the letters the U.S. produced fail to disclose an appointment to office by the President with advice and consent of the Senate for a U.S. Attorney, or an appointment to an office by the Attorney General in the case of Assistant U.S. Attorneys or Special Attorneys. If Stockwell and Edelstein were impersonating a U.S. Attorney, an Assistant U.S. Attorney, or a Special Attorney, such would also be a federal crime.[4]

The Supreme Court found that if they "are not officer at all, but instead non-officer employees…the Appointments Clause cares not a whit about who named them. *Lucia, citing Germaine*, 99 U.S. at 510.

Based on the foregoing, the U.S. failed to meet the first requirement under *Lucia*, that Stockwell and Edelstein held any office created by Congress. If they

[4] It is a crime to impersonate an officer of the United States when one was not appointed to an office. 18 U.S.C. Section 912.

did not hold an office, and were mere employees—which is precisely as their letters specifically state—then there is a significant Constitutional challenge to the authority they exercised that purports to make them equal in authority to a U.S. Attorney.

2. No Statute Grants Authority To An Attorney Employed Full Time By The Department Of Justice To Act As An Officer Of The DOJ.

The Supreme Court has made clear that the Appointments Clause limits the exercise of certain kinds of governmental power to those persons appointed pursuant to the specific procedures it sets forth for the appointment of officers. *Buckley*, 424 U.S. at 125-26, quoting *Germaine*, 99 U.S. at 510. "No class or type of officer is excluded because of its special functions." *Id.* at 132. When one has not been properly appointed, that individual, even if an employee, cannot constitutionally exercise powers to be exercised by an officer of the U.S. *Id.* at 141-43; *see id.* at 267 (White, J., concurring in part and dissenting in part) (agreeing). The Appointments Clause "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder v. U.S.*, 515 U.S. 177, 182 (1995). The Court in *Ryder* held invalid a conviction where the appointing official was not among those specified in the Appointments Clause. *Id.* at 179. Only when an individual is assigned to a position not an office can an inferior officer make such assignment and not raise an

Appointments Clause challenge. *Auffmordt v. Hedden*, 137 U.S. 310, 326-28 (1890).

The Constitution provides that the President and the officers he appoints are the ones who are "to administer the laws enacted by Congress" and to "execute its laws." *Printz v. U.S.*, 521 U.S. 898, 922-23 (1997). "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Even where an agent or employee has carried out the duties of a duly constituted office, he was not legally an officer because he was not appointed in accordance with the Appointments Clause. *United States v. Smith*, 124 U.S. 525, 531-32 (1888); *see also Germaine*, 99 U.S. at 509-10; *Burnap v. U.S.*, 252 U.S. 512, 516 (1920).

The U.S. relies on the authority given in 28 U.S.C. §515(a). Even the letters for Stockwell and Edelstein cite 28 U.S.C. §515(a) and 28 C.F.R. § 0.13(a). However, as quoted above under the first requirement, Section 515(a) is authority limited to the Attorney General, officers of the Department of Justice, and a specially appointed attorney. The U.S. cannot show that Stockwell or Edelstein held any of those offices.

The U.S. also relies on the authority in 28 C.F.R. § 0.13(a) to redelegate the authority in Section 515(a), which states in part, "Each Assistant Attorney General and Deputy Assistant Attorney General is authorized to exercise the authority of

the Attorney General under 28 U.S.C. 515(a), in cases assigned to, conducted, handled, or supervised by such official, to designate Department attorneys." 28 C.F.R. § 0.13(a).[5] First, before designating a Department attorney, the regulation requires that a case must be "assigned to, conducted, handled, or supervised by"

[5] The U.S. would ignore the full wording of the regulation, inasmuch as subsection (b) demonstrates that the designation to Department attorneys does not grant a complete authority to handle all matters in a court proceeding. It states, "Each Assistant Attorney General is authorized to redelegate to Section Chiefs the authority delegated by paragraph (a) of this section, except that such redelegation shall not apply to the designation of attorneys to conduct grand jury proceedings." 28 C.F.R. § 0.13(b). Because (b) eliminates grand jury proceedings, it is clear that the words of authority in (a) are limited to "grand jury proceedings and proceedings before committing magistrate," whether the legal proceeding is civil or criminal in nature. 28 C.F.R. § 0.13(a). This regulation cannot be read to be a broad grant of everything that a U.S. Attorney is authorized by law to conduct, because a complete reading of both (a) and (b) shows that if a section chief assigns a matter after being authorized by an Assistant Attorney General, the Department attorney is only authorized in "proceedings before committing magistrate," whereas if it is an Assistant Attorney General or Deputy Assistant Attorney General who designates the case, then the Department attorney is also authorized to conduct "grand jury proceedings." Those two types of proceedings, before a grand jury and before a committing magistrate, cannot mean all legal proceedings, otherwise those words, especially the limitation made in subsection (b), would have no meaning or effect. The words "which United States attorneys are authorized by law to conduct," are clearly referring to the words preceding it—"grand jury proceedings and proceedings before committing magistrates." The words just prior to those, "any legal proceeding, civil or criminal," clearly shows that the proceeding before a grand jury or committing magistrate may be civil or criminal in nature, as well as of any type of legal proceeding before a grand jury or before a committing magistrate. The U.S. would have the interpretation of the regulation to read "to conduct any legal proceeding which United States attorneys are authorized by law to conduct," 28 C.F.R. § 0.13(a), which would render superfluous all the other words in between. It would also violate the plain meaning interpretation of the regulation.

the Assistant Attorney General or the Deputy Assistant Attorney General. In other words, the regulation requires that specific official have some involvement with a case prior to assigning it out to a Department attorney.

Second, taking a broad interpretation of the regulation as the U.S. would have this Court do raises significant Constitutional issues as well as with the wording of the statute and the Supreme Court cases cited herein. The U.S. would have full time employees exercise all the powers of a duly appointed U.S. Attorney, in essence acting with all the authority of an officer, but without the Constitutional and statutory requirements. As cited above, the Supreme Court has refused to allow such a broad delegation of authority. Further, the statute (28 U.S.C. § 515) limits the power to certain officers, but the U.S.' reading of the regulation would drastically extend the powers retained for specific officers to go to all employee attorneys.

The letters to Stockwell and Edelstein cite nearly verbatim 28 C.F.R. § 0.13(a).[6] But however the letters are read, the do not appoint Stockwell or Edelstein to any office nor set forth the responsibilities of an officer. The only

[6] The letters cannot be read to have assigned to Stockwell and Edelstein the case against Mr. Quiel. The regulation makes clear that either the Assistant Attorney General or the Deputy Attorney General needed that case assigned to them before designating a Department attorney. If it was assigned to a section chief and then assigned to Stockwell and Edelstein, then pursuant to 28 C.F.R. § 0.13(b), neither of them should have conducted the grand jury proceedings. And, as argued in Note 5, such a reading renders specific wording superfluous and against the plain wording.

office referred to in the letters is that of U.S. Attorney. Such a letter does not and cannot appoint them to that office or its equivalent without serious Constitutional violations.

Aside from its bare (but false) conclusion that Stockwell and Edelstein "were duly appointed officers of the United States," the U.S. has not shown that Stockwell or Edelstein were officers of the United States, what office they held, what statute created the office they allegedly held, and what statute set forth their duties, salary, and means of appointment.

Based on the foregoing, the U.S. completely failed to comply with this Court's order, requiring that "the Government must provide evidence that at least one attorney participating in the underlying criminal matter was a proper representative of the United States by Tuesday, July 3, 2018. This evidence should establish that the attorney was duly appointed under the Appointments Clause and that the attorney swore the statutorily-required oath to faithfully execute his or her duties." (Doc. 34). Because the U.S. has not produced the required evidence, this Court must find that it lacks subject matter jurisdiction and dismiss all the proceedings against Mr. Quiel with prejudice.

Respectfully submitted this 25th day of July, 2018.

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CERTIFICATE OF SERVICE

I certify that on July 25th, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record in this case.

By: /s/ Alan S. Richey