No. 23-939

In the Supreme Court of the United States

DONALD J. TRUMP, *Petitioner*,

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER ATTORNEYS GENERAL EDWIN MEESE III AND MICHAEL B. MUKASEY; LAW PROFESSORS STEVEN CALABRESI AND GARY LAWSON; AND CITIZENS UNITED AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

The question on which the Court granted review is as follows:

> Whether and if so to what extent does a former president enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

This brief addresses a preliminary question that is fairly encompassed within the question as framed by the Court:

> Whether Jack Smith has lawful authority to undertake the "criminal prosecution" referenced in the Question Presented.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Although this case raises a weighty issue of presidential immunity, it also necessarily raises a preliminary question, i.e., whether Jack Smith actually has authority to prosecute this case all. He does not. Those actions can be taken only by persons properly appointed as federal officers to properly created federal offices. But neither Smith nor the position of Special Counsel under which he purportedly acts meets those criteria. He wields tremendous power, effectively answerable to no one, by design. And that is a serious problem for the rule of law—whatever one may think of former President Trump or the conduct on January 6, 2021, that Smith challenges in the underlying case.

Specifically, Smith's appointment as Special Counsel violates the Appointments Clause. That Clause requires that all federal offices "not otherwise provided for" in the Constitution must be "established by Law," yet there is no statute establishing the Office of Special Counsel. And even if one overlooks the absence of statutory authority for the position, there is no statute specifically authorizing the Attorney General, rather than the President with the advice and consent of the Senate, to appoint such a Special Counsel. And in any event, the Special Counsel, if a

[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amici curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission.

valid officer, is a principal rather than inferior officer, and thus cannot be appointed without senatorial confirmation regardless of what any statutes say. In short, Smith's appointment was unlawful, as are all the legal actions that have flowed from it, including Smith's prosecution of former President Trump.

Given their interest in and demonstrated commitment to the rule of law, the legal issue this brief addresses is particularly important to *amici curiae*. Edwin Meese III served as the seventy-fifth Attorney General of the United States after having served as Counselor to the President, and is now the Ronald Reagan Distinguished Fellow Emeritus at the Heritage Foundation. He was Attorney General when the Independent Counsel Act was in force. Michael B. Mukasey served as the eighty-first Attorney General of the United States and previously served as a judge on the U.S. District Court for the Southern District of New York. He was Attorney General after the Independent Counsel Act expired and the Reno Regulations purported to govern the appointment of Special Counsels.

For their part, Professors Calabresi and Lawson are former Department of Justice officials as well as scholars of the original public meaning of the Constitution. Members of this Court have cited their work in the past. See, *e.g.*, *United States* v. *Vaello Madero*, 596 U.S. 159, 169 (2022) (THOMAS, J., concurring) (citing Calabresi); *id.* at 181, 185 n.1 (GORSUCH, J., concurring) (citing Lawson). They are the authors of the leading law review article on the

legality of appointing as Special Counsel any lawyer who is not a Senate-confirmed presidential appointee.

Finally, Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. They regularly participate as litigants, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310 (2010), and *amici* in important cases in which these fundamental principles are at stake. Citizens United is a 501(c)(4) nonprofit social welfare organization, and Citizens United Foundation is a 501(c)(3) nonprofit educational and legal organization.

SUMMARY OF ARGUMENT

Regardless of what one thinks about the immunity issue presented in this case, Jack Smith does not have authority to conduct the underlying prosecution. Those actions can be taken only by persons properly appointed as federal officers to properly created federal offices. Smith wields tremendous power, and effectively answers to no one. However, neither Smith nor the position of Special Counsel under which he purportedly acts meets those criteria. And that is a serious problem for the rule of law, whatever one may think of the conduct at issue in Smith's prosecution.

Attorney General Garland purported to appoint Smith to serve as Special Counsel for the Department of Justice ("DOJ"), citing authority under 28 U.S.C. §§ 509, 510, 515, and 533. But none of those statutes, nor any other statutory or constitutional provisions, remotely authorized the appointment by the Attorney

General of a private citizen or government employee to receive extraordinary criminal law enforcement power under the title of Special Counsel.

First, the Appointments Clause requires that all federal offices "not herein otherwise provided for" in the Constitution must be "established by Law," U.S. Const. art. II, § 2, cl. 2, and there is no statute establishing the Office of Special Counsel in DOJ. The statutory provisions relied upon by DOJ and lower courts for the appointment of Special Counsels over the past half century do not authorize the creation and appointment of Special Counsels at the level of United States Attorneys.

To see this, one must merely compare the statutes concerning the Attorney General's appointment authority to the authority granted to some other Department Heads whom Congress has explicitly empowered to appoint inferior officers. For example, the Agriculture Secretary "may appoint such officers and employees *** as are necessary. Similarly, the Education Secretary "is authorized to appoint *** such officers and employees as may be necessary. Likewise, the Homeland Security Secretary "is authorized to appoint *** officers and employees" generally. And the Transportation Secretary "may appoint *** officers and employees." No such statute confers such general officer-appointing power on the Attorney General.

The government's cavalier construction of the Attorney General's authority, moreover, would allow the Attorney General to create by regulation an entire shadow Department of Justice. That is absurd.

Second, even if one overlooks the absence of statutory authority for the position, there is no statute specifically authorizing the Attorney General, rather than the President with Senate approval, to appoint a Special Counsel with the kind of authority wielded by Jack Smith. Under the Appointments Clause, inferior officers can be appointed by department heads only if Congress so directs by statute, see U.S. Const. art. II, § 2, cl. 2. No such statute exists for the Special Counsel. The organic statutes for the Justice Department differ in this respect from the organic statutes quoted above for the Departments of Transportation, Agriculture, Education, and Health and Human Services, all of which explicitly vest in the Department Head the power to appoint inferior officers.

Third, the Special Counsel, if a valid officer, is a principal rather than inferior officer, and thus cannot be appointed without senatorial confirmation regardless of what any statutes purport to say. This is true as a matter of original meaning, and it is even true as a matter of case law once one understands that neither *Morrison* v. *Olson*, 487 U.S. 654 (1988), nor *Edmond* v. *United States*, 520 U.S. 651 (1997), can plausibly be read to say that any person who is in any fashion subordinate to another executive official other than the President is an "inferior" officer. Such a reading of those decisions leads to the ludicrous result that there is only one noninferior officer in every executive department.

As a final matter, *United States* v. *Nixon*, 418 U.S. 683 (1974), does not hold to the contrary, because no

question was ever raised in that case about the validity of the independent counsel's appointment. *Nixon's* brief comments about special prosecutors are thus non-binding dictum. *Nixon* concerned the relationship between the President and DOJ as an institution, not between the President and any specific actor purportedly appointed by DOJ.

There are times when the appointment of a Special Counsel is appropriate, and the Constitution provides for such appointments by allowing the use of existing U.S. Attorneys who can be made Special Counsels. Any number of United States Attorneys have served as a Special Counsel. Those investigations were lawful.

But the Attorney General cannot appoint someone never confirmed by the Senate, as a substitute United States Attorney under the title "Special Counsel." Smith's appointment was thus unlawful, as are all actions flowing from it, including his prosecution of former President Trump.

ARGUMENT

I. No Statute Authorizes the Position of Special Counsel Supposedly Held by Smith.

The legality of Jack Smith's appointment is a potentially fatal flaw in this entire prosecution, which must be resolved at some point prior to trial. He wields extraordinary power, yet effectively answers to no one. This Court has "expressly included Appointments Clause objections * * * in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they

were ruled upon below[.]" *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 878-879 (1991) (collecting cases). It thus has a quasi-jurisdictional character that should be treated as a priority over standard defenses. While this Court can and should decide the question presented in the petition, it would be prudent for the Court also to decide the legality of Smith's appointment now, or at a minimum instruct the trial court to do so prior to trial if this case is remanded.

The illegality addressed in this brief started on November 18, 2022, when Attorney General Merrick Garland exceeded his legal authority by purporting to appoint Smith to serve as Special Counsel for the Department of Justice ("DOJ"). Smith was appointed "to conduct the ongoing investigation into whether any person or entity [including former President Donald Trump] violated the law in connection with efforts to interfere with the lawful transfer of power following the 2020 presidential election or the certification of the Electoral College vote held on or about January 6, 2021." Off. of the Att'y Gen., Order No. 5559-2022, Appointment of John L. Smith as Special Counsel (Nov. 18, 2022). Attorney General Garland cited as statutory authority for this appointment 28 U.S.C. §§ 509, 510, 515, and 533. But none of those statutes, nor any other statutory or constitutional provisions, remotely authorized the appointment by the Attorney General of a private citizen or mere government employee to receive extraordinary criminal law enforcement power under the title of Special Counsel.

A. Only Congress can create a federal office.

The Constitution itself creates no executive positions other than the presidency (and the vice presidency, if one considers it an executive position). Instead, the Constitution commits the power to create federal offices to Congress under the Necessary and Proper Clause, which gives Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

A law creating offices to carry out executive functions is the quintessential law "necessary and proper for carrying into Execution" federal powers. Moreover, "Congress has the *exclusive* constitutional power to create federal offices." Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 Notre Dame L. Rev. 87, 101 & n.74 (2019) ("Calabresi & Lawson, *Mueller's Appointment*") (discussing 2 *The Records of the Federal Convention of 1787*, at 550 (Max Farrand ed., 1911)); see also *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2227 (2020) (KAGAN, J., concurring in judgment with respect to severability and dissenting in part). English monarchs could create offices, but the Founders considered this power abusive and consciously denied it to the President. See Steven G. Calabresi & Gary Lawson, *The U.S. Constitution: Creation, Reconstruction, the*

Progressives, and the Modern Era 382 (2020). Accordingly, the Constitution does not give the President or the heads of executive departments the power to create any offices and to appoint any officers they deem appropriate. Instead, it requires that Congress first create *all* offices to which federal officers—principal,[2] superior,[3] or inferior[4]—can be appointed.

This is confirmed by the Appointments Clause, which provides for the appointment of officers "which shall be *established by Law*." U.S. Const. art. II, § 2, cl. 2 (emphasis added). The addition of the emphasized phrase in the Appointments Clause was deliberate. "On September 15, 1787, '[a]fter "Officers of the U.S. whose appointments are not otherwise provided for," were added the words "and which shall be established by law."'" Calabresi & Lawson, *Mueller's Appointment*, *supra*, at 101 & n.77 (quoting 2 *The Records of the Federal Convention of 1787*, at 628). This addition's plain import is that the "law" that establishes the office must be a statute; a regulation or Executive

[2] Principal officers must provide opinions in writing if asked to do so by the President, and a majority of the principal officers, together with the Vice President, can invoke the Twenty-Fifth Amendment and incapacitate the President.

[3] Superior officers like inferior Article III judges and Ambassadors must be nominated by the President, confirmed by the Senate and appointed by the President. They play no role under the Twenty-Fifth Amendment.

[4] Inferior officers must both have a boss who directs what they can do and can remove them at will and also must not exercise so much raw power that they are functionally superior. Thus Congress cannot vest the power to appoint all inferior Article III judges in the Supreme Court as a court of law.

Order is not the kind of "law" that can create an office under the Appointments Clause. See *Seila Law*, 140 S. Ct. at 2227 (KAGAN, J.) (citing 1 Annals of Cong. 582 (1789) (Madison)). Indeed, the Constitution consistently uses the terms "law" and "laws," when otherwise unqualified, to mean statutes. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1315 (1996). If no statute establishes an office, there is no office to which someone can be appointed.

B. No statute cited by the Attorney General authorizes the Office of Special Counsel.

And here, no statute authorizes such an appointment. DOJ's current structure, as provided by statute, includes an Attorney General, Deputy Attorney General, Associate Attorney General, Solicitor General, eleven Assistant Attorneys General, one U.S. Attorney for each judicial district (currently ninety-four), a director of the Federal Bureau of Investigation, a director of the U.S. Marshals Service, one U.S. Marshal for each judicial district, a director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, a director of the Bureau of Prisons, twenty-one U.S. Trustees, and as many assistant United States Attorneys and "special attorneys" as the Attorney General deems necessary.

This list does not include more than 100,000 people who work at DOJ. The vast majority of federal workers, including those who work at DOJ, are not "officers of the United States." They are instead employees, whose appointments are not controlled by the Appointments Clause and who therefore do not

require specific statutory authorization. For their appointments, it suffices to provide, as Congress has done, that "[e]ach Executive agency, military department, and the government of the District of Columbia may employ such number of *employees* of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year." 5 U.S.C. § 3101 (emphasis added). But officer positions must be specifically "established by Law." U.S. Const. art. II, § 2, cl. 2. And employees cannot exercise the power of officers. See *Lucia* v. *SEC*, 585 U.S. 237, 245-246 (2018).

To be sure, the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1984 ("EGA"), added to the mix an "independent counsel" appointed by a special three-judge court upon referral by the Attorney General.[5] But the statutory provisions for the independent counsel expired in 1999 when Congress failed to reauthorize them.

Shortly before that expiration, Attorney General Janet Reno promulgated regulations—which, if valid, are still in force today—providing for an "Office of Special Counsel." See *Office of Special Counsel*, 64 Fed. Reg. 37,038 (July 9, 1999) (codified at 28 C.F.R. §§ 600.1-600.10) ("Reno Regulations"). Under these regulations, the Attorney General may, in some circumstances, "appoint an *outside* Special Counsel to assume responsibility for the matter." 28 C.F.R. § 600.1 (emphasis added). The regulations clarify that

[5] The original language, "special prosecutor," was changed to "independent counsel" by the Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039.

"outside" counsel means someone "from outside the United States Government." *Id.* § 600.3(a). The Reno Regulations, like the independent counsel statute, contemplate appointment, as a putative inferior officer, of a nongovernmental official to an office that is fully the equivalent of a United States Attorney. But regulations are not the kind of "law" that can "establish[]" a federal office. Only a statute can do that under the Appointments Clause, and no *statute* creates a Special Counsel with the jurisdiction and authority Smith wields.

The Reno Regulations cite as authority 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510 and 515-519. In his order appointing Smith, Attorney General Garland cited "28 U.S.C. §§ 509, 510, 515, and 533." Order No. 5559-2022 at 1. These statutes, singly or collectively, plainly provide no such authority.

First, 5 U.S.C. § 301 is a general authorization for the issuance of regulations by the Attorney General or any other department head:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

5 U.S.C. § 301. This is merely a general housekeeping provision. Nothing in it creates any offices or authorizes the creation (or abolition) of any offices. Indeed, if § 301 were taken as general authorization for appointment of officers, the entirety of the more

numerous specific provisions for appointment of officers throughout the United States Code would be superfluous. That is an absurd construction of § 301, and no one seriously advances it.

Second, § 509 of Title 28 merely says that "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General * * *[,]" except for some functions not relevant here. But this provision likewise does not authorize the creation of any office. It simply says that the Attorney General can control all his subordinates in DOJ or personally assume and exercise their responsibilities.

Third, and similarly, § 510 merely says: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." As with § 509, the statute provides for shifting authority among the persons who work at DOJ, but it says nothing about *who those persons are or how they got there*.

Fourth, Attorney General Garland also cited 28 U.S.C. § 515, and the Reno Regulations relied on 28 U.S.C. §§ 515-519. Again, alone or singly, none of these provisions comes close to authorizing the creation of a Special Counsel or the appointment by the Attorney General of a private citizen to the position.

For its part, § 515(a) confers only the following power:

> The Attorney General *or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law*, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

Thus, § 515(a) does not create any offices or authorize their creation. Instead, it concerns the powers of people who have been properly appointed to offices "under law" pursuant to *other statutory provisions*, and it allows the Attorney General to designate a U.S. Attorney or a special attorney appointed "under law" to prosecute a case "whether or not he is a resident of the district in which the proceeding is brought." *Ibid.*

Section 515(a) is thus a geographical and jurisdictional allocative provision, not a grant of power to appoint private citizens as Special Counsels. It allows Patrick Fitzgerald, the Senate-confirmed U.S. Attorney for the Northern District of Illinois, to prosecute Scooter Libby in Washington, D.C. Section 515(a) permits this geographical flexibility.

Nor does subsection (b) of § 515 provide the requisite authority to appoint Smith to his current position:

> 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. The Attorney General shall fix the annual salary of a special assistant or special attorney.

Again, this subsection is not a grant of a new power to retain or to hire new officers, but instead provides on its face that attorneys *who have already been hired or retained*, and who may be only employees, not officers, can also have a title and salary.

To be sure, § 515(a) and (b) both assume that there are going to be attorneys "specially appointed by the Attorney General under law" and "specially retained under the authority of the Department of Justice." And indeed, an explicit provision elsewhere in Title 28, § 543 (discussed below), authorizes the Attorney General to hire such persons, who can then be denominated and commissioned as "special assistant[s]" or "special attorney[s]" under § 515(b). But these provisions confer no authority to create new inferior offices themselves.

Likewise, §§ 516-519 concern the internal allocation of authority among existing DOJ personnel and provide no authority to create offices. Section 519, for example, provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed

> under section 543 of this title in the discharge of their respective duties.

There is no office-creating power here, either.

Fifth, Section 519, however, points to the correct answer regarding the Attorney General's statutory authority to appoint Special Counsels. Section 519 notes that there are "special attorneys appointed under section 543 of this title[.]" Indeed, there are. Section 543 of Title 28 is *explicit* authority for the Attorney General to appoint Special Counsels. Yet neither the Reno Regulations nor the Garland memo appointing Smith makes any mention of this provision. They do not, because § 543 does not authorize the kind of Special Counsel contemplated by the Reno Regulations or the Garland appointment of Smith. Section 543 is narrowly cabined, as one would expect from the overall structure of Title 28. The government for decades has steadfastly refused to rely on this provision, that explicitly provides the Attorney General with hiring authority, and it continues to refuse to rely on it in current litigation—for the obvious reason that the provision contains internal limitations which the government seeks to avoid.

This is clear from the text of § 543, which provides:

> (a) The Attorney General may appoint attorneys to *assist* United States attorneys when the public interest so requires, including the appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting Federal offenses committed in Indian country.

> (b) Each attorney appointed under this section is subject to removal by the Attorney General.

28 U.S.C. § 543 (emphasis added). This is an obvious and explicit authorization for the creation and appointment of "special assistants" or "special counsels" who merely *assist* U.S. Attorneys when the public interest so requires.

There are, moreover, many contexts in which the appointment of such persons makes sense. The government often encounters problems for which private lawyers have expertise—either gained from past government service or private experience—on matters such as organized crime, banking, antitrust, tribal law, and so forth. Those lawyers may not want a permanent government position but may be willing to help the government on a limited basis, perhaps as part of a task force or a team dealing with a specific piece of complex litigation requiring expert knowledge. An appointment as a special assistant or special counsel, under the control and direction of a United States Attorney, is an obvious win-win in such instances.

The problem for the government in the case of the Reno Regulations and the Smith appointment is that those Regulations and the Smith appointment order do not contemplate "special counsels" who *assist* U.S. Attorneys. Instead, they contemplate Special Counsels who *replace* U.S. Attorneys in specific cases. Smith, for example, was not appointed to assist U.S. Attorneys. He was hired as a powerful standalone officer who replaces rather than assists the functions of United

States Attorneys within the scope of his jurisdiction. This is precisely the role that the EGA authorized for Independent Counsels. But that statute no longer exists, and in the absence of that statute or a similar one, there is simply no statutory office of Special Counsel to which Smith could be appointed to function as a stand-in for a U.S. Attorney.

Sixth, the remainder of Title 28 confirms this conclusion. Section 533, relied upon by Attorney General Garland, is part of a chapter dealing with the FBI and is entitled "Investigative and other officials; appointment."[6] It says:

> The Attorney General may appoint officials—(1) to detect and prosecute crimes against the United States; (2) to assist in the protection of the person of the President; and (3) to assist in the protection of the person of the Attorney General[;] (4) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

28 U.S.C. § 533 (footnotes omitted).

But § 533(1) is not a general authorization to the Attorney General to appoint officers. It specifically and solely authorizes the appointment of "Investigative and other officials"—*officials*, not

[6] It should be noted that the Reno Regulations do *not* cite 28 U.S.C. § 533 as a source of appointment authority for the Attorney General.

officers—connected with the FBI. This does not include Special Counsels.

Preliminarily, § 533 is part of Chapter 33 of Title 28, encompassing §§ 531-540D, which deals with the "Federal Bureau of Investigation." Section 532, immediately preceding § 533, is entitled "Director of the Federal Bureau of Investigation," and spells out the Attorney General's authority over the FBI. Section 534, immediately following § 533, concerns preserving evidence in criminal cases.

Section 533 thus clearly deals with FBI officials and agents, not Special Counsels. This is how the government has long understood this provision, which has been employed as the basis for the FBI's law enforcement authority.

Next, § 533 concerns the appointment of investigative and prosecutorial "officials." Such officials, as that term is used in the statute,[7] are not Article II "officers of the United States" and cannot perform the functions of officers of the United States. They are nonofficer employees, who, as FBI agents, must be subject to the supervision and direction of officers of the United States. The FBI needs office and field personnel to perform its functions, and § 533 allows the agency to have them. But those office and

[7] An eighteenth-century statute might have used a term such as "officials" to have a broader meaning than applies to 28 U.S.C. § 533. See *Lucia* v. *SEC*, 585 U.S. 237, 252-254 (2018) (THOMAS, J., concurring). As a matter of statutory interpretation, however, there is no plausible case for reading the term as it appears in § 533 to be coextensive with the constitutional meaning of "officer."

field personnel are not officers of the United States and do not have the range and power of a Special Counsel.

To the contrary, the word "Officer" is a constitutional term of art, not only because it is used that way in the Appointments Clause, but also because Article II, Section 4 allows for the impeachment and removal from office of "all civil Officers of the United States[.]" U.S. Const. art. II, § 4. Congress can try to impeach the Deputy Attorney General or the FBI Director, but no one thinks Congress can impeach DOJ trial attorneys, Office of Legal Counsel attorney-advisers, or field personnel at the FBI. What is more, officers can be put by Congress in the line of succession to the presidency. See U.S. Const. art. II, § 1, cl. 6. But no one thinks investigative officials at the FBI or DOJ trial attorneys, who are bureaucrats and employees, can be put in the line of succession to the presidency. That simply is not how Congress was using the term "officials" in § 533.

Finally on this point, and perhaps most tellingly, a cavalier reading of § 533 to authorize hiring beyond its obvious scope obliterates the careful structure of Title 28. That Title is divided into chapters dealing with the Attorney General; the FBI; U.S. Attorneys; the Marshals Service; U.S. Trustees; the Bureau of Alcohol, Tobacco, Firearms and Explosives; and the now-sunsetted Independent Counsel. Wide-ranging Special Counsels of the sort represented by Smith are not part of these provisions outside of the now-defunct Ethics in Government Act sections.

Seventh, at a more granular level, the effect of a loose reading of the statutes is even more bizarre. Congress, as noted earlier, has provided for the appointment, all with presidential nomination and senatorial consent, of a Deputy Attorney General, an Associate Attorney General, a Solicitor General, exactly eleven Assistant Attorneys General (plus an Assistant Attorney General for Administration who is in the competitive service and is appointed by the Attorney General), and exactly one U.S. Attorney for each judicial district, of which there are currently ninety-four. A reading of § 533 to create essentially unlimited inferior officer appointment power in the Attorney General wreaks havoc on this structure. It would allow the Attorney General to appoint an entire shadow DOJ to replace the functions of every statutorily specified officer. No wonder the Reno Regulations did not invoke it.

In short, the position supposedly held by Smith was not "established by Law." The authority exercised by him as a so-called "Special Counsel" far exceeds the power exercisable by a mere employee. See *Lucia*, 585 U.S. at 245-247. He is acting as an officer, but aside from the specific offices listed in the statutes discussed above, there is no office for him to hold. That alone deprives him of authority to represent the United States in any capacity, including before this Court.

C. Other Departments' office-creating statutes confirm this conclusion.

Yet more proof that the Attorney General lacks general officer-appointing authority of the sort needed to appoint a Special Counsel like Smith who has officer-level powers is to compare these statutes, and others in Title 28, with the organic statutes conferring officer-appointing authority to other "Heads of Departments" at the Cabinet level. Ordinary statutory interpretation demonstrates that the Attorney General received no power to appoint Special Counsels as inferior officers. None of the statutes canvassed in the previous section contains any such authorization. In contrast to the DOJ's organic statute, the organic statutes of the Agriculture, Education, Health and Human Services, and Transportation Departments *do contain inferior officer appointment power clauses*, to wit:

- First, the Secretary of Agriculture "may appoint such officers and employees *** and such experts, as are necessary to execute the functions vested in him[,]" 7 U.S.C. § 610(a).
- Second, the Secretary of Education similarly "is authorized to appoint *** such officers and employees, including attorneys, as may be necessary to carry out the functions of the Secretary and the Department[,]" 20 U.S.C. § 3461.
- Third, the Secretary of Health and Human Services "is authorized to appoint *** officers and employees," 42 U.S.C. § 913.

- And fourth, the Secretary of Transportation "may appoint *** officers and employees of the Department of Transportation[.]" 49 U.S.C. § 323(a).

Compare those textually explicit congressional grants of authority to what the United States Code grants to the Attorney General. In addition to the statutes discussed in Part I.B, which contain no officer-appointing powers, there is one provision that is at least similar to the statues just quoted regarding other Cabinet-rank officers. Congress gave the Attorney General power to "appoint such additional officers and employees as he deems necessary[,]" 18 U.S.C. § 4041—but that provision explicitly gives this power *specifically for the Bureau of Prisons only*. It does not grant that power more broadly for other DOJ components. Nor is there any other statute in Title 18 or Title 28 that grants the Attorney General similar power for other DOJ components.

D. The power of U.S. Attorneys, and thus Special Counsels, shows why the Attorney General lacks authority to appoint such officers.

This disparate treatment might at first seem confusing, but words of wisdom from a previous Member of this Court who previously had served as Attorney General sheds light on the matter. Before his time as an Associate Justice of the Supreme Court, then-Attorney General Robert Jackson, speaking in 1940 to the Second Annual Conference of United States Attorneys, noted the tremendous power

inherent in a prosecutor's authority merely to *investigate* a potential crime:

> It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed.

Robert H. Jackson, U.S. Att'y Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor, at 1 (Apr. 1, 1940), available at https://tinyurl.com/2s4dmdsz. Beyond that, as Justice Jackson noted, the prosecutor has additional authorities that carry enormous power to harm his or her targets:

> The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a

> suspended sentence, and after he is put away, as to whether he is a fit subject for parole.

Ibid. Jackson concluded:

> Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, *the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States*. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.

Id. at 2 (emphasis added)

In short, a U.S. Attorney wields tremendous power. And it strains credulity to the breaking point to argue that Congress would vest the ability to unilaterally confer such extraordinary power *sub silentio* upon the Attorney General in one of the statutes discussed in Part I.B, *supra*. It is instead unsurprising that Congress would deny the Attorney General such unfettered officer-appointing authority, given the potential danger to individual liberties that could result, a danger not found regarding officers in the Departments of Agriculture, Education, Health and Human Services, or Transportation.

For all these reasons, none of these statutes empowered Attorney General Garland to appoint Smith as Special Counsel.[8]

II. The Appointments Clause Establishes A Default Rule that All Appointees Are Principal or Superior Officers Requiring Presidential Nomination and Senate Confirmation.

Even if one somehow thinks that existing statutes authorize appointment of stand-alone Special Counsels with the full power of a U.S. Attorney, Smith was not properly appointed to such an "office" in any event, because no statute authorized his appointment by any mode other than presidential appointment and Senate confirmation.

Any such statute, of course, is governed by the Appointments Clause of Article II, Section 2, which provides that the President "shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of

[8] Importantly, the absence of authority for creation of the office of Special Counsel precludes application of anything resembling a "de facto officer" doctrine, even if such a doctrine would otherwise be an object of discussion. The de facto officer doctrine deals with technical defects in the appointments of officers, such as a missing signature on an appointing document or a lack of a quorum during Senate confirmation. Here, the basic problem is not a technical defect in appointment. The basic problem is that the purported office itself was not properly created. See Gary S. Lawson & Guy I. Seidman, *The Hobbesian Constitution: Governing Without Authority,* 95 Nw. U.L. Rev. 581, 595-596 (2001). Even if one can have de facto officers in some circumstances, one cannot have de facto *offices*. See *Norton* v. *Shelby County*, 118 U.S. 425, 440-442 (1886).

the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2.

This sentence in the Constitution makes three things clear. First, the default mode of appointment for all officers, whether superior or inferior, is presidential nomination, Senate confirmation, and then presidential appointment. Second, in the case of inferior officers, this default presumption can only be overridden by Congress via statute. And third, even in the case of inferior officers, Congress must speak in common sense language to authorize a permissible mode of appointment for those officers other than presidential nomination, Senate confirmation, and presidential appointment. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2376-2380 (2023) (BARRETT, J., concurring).

This latter common sense of language rule is implicit in the Appointments Clause and the constitutional structure. That Clause is both a separation-of-powers and a federalism provision. It divides appointment power between the President and the Senate—not between the President and Congress as a whole—which lacks power to confirm appointees. See *Buckley* v. *Valeo,* 424 U.S. 1, 127 (1976) (per curiam). The Senate is the body in which States receives equal representation, whatever their size or population, which guards against large-state

Presidents underrepresenting smaller states in the executive and judicial departments. As one Constitutional Convention participant put it, presidential appointment power without the check of the Senate would allow presidents "to gain over the larger States, by gratifying them with a preference of their Citizens." 2 *The Records of the Federal Convention of 1787*, at 43 (Max Farrand ed., Yale Univ. Press 1911) (statement of Mr. Bedford reported by James Madison), available at https://tinyurl.com/4jpxdfun. These structural concerns warrant an interpretative presumption in favor of a common sense statement of congressional intent to authorize appointment of an inferior officer by any means other than presidential nomination and senatorial confirmation.

Ordinary statutory interpretation demonstrates that Congress gave the Attorney General no power to appoint Special Counsels as *inferior officers*. Comparing the statutes discussed in Part I.B with the organic statutes relating to other Heads of Departments discussed in Part I.C shows as much. And, given the extraordinary power of a U.S. Attorney—and thus *a fortiori* a Special Counsel who has as much power as a U.S. Attorney, if not more—Congress's choice not to confer such power would be eminently reasonable, even if it were not mandated by the Constitution.

III. Even if Special Counsels Were Statutorily Authorized, They Would Require Presidential Nomination and Senate Confirmation.

If Smith actually had the power to convene grand juries, issue subpoenas, direct and conduct prosecutions, and litigate in this Court, he would obviously be an "Officer of the United States" rather than a mere employee. See *Lucia*, 585 U.S. at 248; *Buckley*, 424 U.S. at 139-140; Calabresi & Lawson, *Mueller's Appointment*, *supra*, at 128-134. More than that, he would be a *superior* officer (or principal officer, as that term is typically used). And by the plain terms of the Appointments Clause, superior officers *must* be appointed by the President with the Senate's advice and consent. That is not how Smith was appointed, and thus he could not serve as Special Counsel even if Congress validly created such a position by statute.

The Special Counsels contemplated by the Reno Regulations are the equivalent of, if not more powerful than, U.S. Attorneys because they can prosecute crimes nationwide and not merely in one of 94 districts. And it is obvious as an original matter that U.S. Attorneys are superior officers, see Calabresi & Lawson, *Mueller's Appointment*, *supra*, at 138-142.

The only plausible argument to the contrary rests not on original meaning but on a wild overreading of the Court's decisions in *Morrison* v. *Olson,* 487 U.S. 654 (1988), and *Edmond* v. *United States,* 520 U.S. 651 (1997). Those decisions, especially *Edmond,* contain language that some lower courts have read to mean that anyone who had a superior on an agency

organization chart must be an "inferior" officer. But if that were true, the Solicitor General, the Associate Attorney General, all the Assistant Attorneys General, all U.S. Attorneys, and even the Deputy Attorney General, would be inferior officers, because they all answer at some level to the Attorney General. Could Congress therefore let the Attorney General unilaterally appoint the Deputy Attorney General, Solicitor General, or FBI Director? Of course not.

One can be a superior rather than inferior officer in two ways. One is to have no decisional superior other than the President. Some of Smith's court filings insist that he is independent from his nominal superior (the Attorney General), and even the President, assuring the courts that "coordination with the Biden Administration"—which includes not only President Biden but also Attorney General Garland—is "non-existent." Gov't Mot. in Limine at 6, *United States* v. *Trump*, No. 1:23-cr-257-TSC (D.D.C. Dec. 27, 2023), ECF No. 191. By his own admission, then, Smith thus has no functional superior, necessarily rendering him a superior officer. And this lack of accountability only compounds the invalidity of his purported appointment. See *Seila Law*, 140 S. Ct. at 2197-2199.

The other way to be a superior officer is to have so much power and authority that one is superior in a substantive sense. It means that much, but it can also mean more in certain contexts.

As Justice Souter perceptively wrote in his *Edmond* concurrence: "Because the term 'inferior officer' implies an official superior, one who has no superior is not an inferior officer. * * * It does not

follow, however, that if one is subject to some supervision and control, one is an inferior officer. Having a superior officer is *necessary* for inferior officer status, but not sufficient to establish it." 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment) (emphasis added). Deputy Secretaries, Assistant Secretaries, and U.S. Attorneys exercise so much power that they must be Senate-confirmed superior officers.

Either way, if he is an officer at all, rather than being only a special assistant, Smith is a superior officer. By his own account he has no superior actively supervising or directing him as required by *Edmond* or *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). Attorney General Garland does not supervise or direct him, as he assured the Nation he would not when he appointed Smith as Special Counsel. See Ryan J. Reilly, *Attorney General emphasizes special counsel's 'independence' in Trump probe*, NBC News (June 14, 2023), https://tinyurl.com/3r2ba5sa.

And Smith is appearing in this Court on behalf of the United States. He is prosecuting a former President, the first time that has happened in our Nation's history. And that former President is now the presumptive nominee of the opposition party to become President yet again. Smith is purporting to exercise at least as much power as a U.S. Attorney, and arguably more since he has brought cases in both Florida and Washington, D.C. That is the hallmark of a superior officer, who must be appointed as such.

The absence of such an appointment means that Smith lacks authority to prosecute former President Trump on behalf of the United States. And that is a powerful, sufficient reason to vacate the decision below and order that Smith's prosecution be dismissed.

IV. This Court Should Explicitly Set Aside the Dictum from *Nixon*.

In the course of ruling that Smith lacks authority to pursue the present prosecution, the Court should also repudiate certain dictum in *United States* v. *Nixon*, 418 U.S. 683 (1974). For reasons explained in detail in Calabresi & Lawson, *Mueller's Appointment*, *supra,* at 112-114, that decision did not pass on the scope of § 533. Yet it contains some ill-considered dictum regarding that statute, see *Nixon*, 418 U.S. at 694-695, that merits no weight. The issue raised in the briefs in that case involved only the relationship between the President and the DOJ as an institution; the same arguments would have been raised if the Attorney General personally, rather than the independent counsel, had brought the suit at issue there. See Calabresi & Lawson, *Mueller's Appointment*, *supra,* at 120-123. Moreover, *Nixon* was argued and decided before the modern rebirth of separation of powers, which dates from two years after *Nixon*, that is, in *Buckley*, 424 U.S. 1.

Moreover, as a major treatise by several current and former Justices of this Court has explained, "not all dicta are created equal." Bryan A. Garner et al., *The Law of Judicial Precedent* 69 (2016) (alterations omitted). These Justices and judges cite as an example

of dictum that should be accorded precedential value an opinion where:

> The question had been briefed by the parties, so the statement was informed[;] that supply more extensive analysis and is not incompatible with any decision before or since * * * [and would not give] litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.

Id. at 61 (quoting *United States* v. *Bloom*, 149 F.3d 649, 653 (7th Cir. 1998) (Easterbrook, J.)). Such judicial dictum must be distinguished from obiter dictum, where a matter was not briefed or analyzed. *Id.* at 62. Such "ill-considered dicta" do not carry as much weight. *Kappos* v. *Hyatt*, 566 U.S. 431, 443 (2012). And *Nixon*'s side commentary about special prosecutors is precisely such obiter dictum.

* * *

To be sure, there are times when the appointment of a Special Counsel is appropriate. And statutes and the Constitution both provide ample means for such appointments by allowing the use of existing United States Attorneys. Any number of United States Attorneys have served as a Special Counsel. For example, David Weiss, the U.S. Attorney for the District of Delaware, is now prosecuting the President's son, Hunter Biden, outside of Delaware as a Special Counsel under an August 11, 2023 appointment by Attorney General Garland as "Special Counsel." Other recent examples include U.S. Attorneys John Huber and John Durham. All these

prosecutions were lawful. But Smith's appointment was not.

CONCLUSION

Smith is the classic "emperor with no clothes." Accordingly, whatever the Court may conclude about the immunity issue presented here, the judgment of the Court of Appeals should be vacated, and the prosecution dismissed.

Respectfully submitted,

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