No. 23A745

In the Supreme Court of the United States

DONALD J. TRUMP,

Applicant,

v.

UNITED STATES

On Application for Stay of the Mandate to be Issued by the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER ATTORNEY GENERAL EDWIN MEESE III, LAW PROFESSORS STEVEN CALABRESI AND GARY LAWSON, AND CITIZENS UNITED AS *AMICI CURIAE* IN SUPPORT OF APPLICANT

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Jack Smith does not have authority to conduct the prosecution underlying this case. 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. And that is a serious problem for the rule of law—whatever one may think of former President Trump or the conduct Smith challenges in the underlying case.

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 as Special Counsel for the Department of Justice (DOJ). Smith was appointed "to conduct the ongoing investigation into whether any person or entity [including 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., "Appointment of John L. Smith as Special Counsel," Order No. 5559-2022 (Nov. 18, 2022). 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 provision, remotely authorized the appointment by the Attorney General of a private citizen to receive extraordinary criminal law enforcement power under the title of Special Counsel.

[1] No party or counsel for party authored this brief in whole or in part, and no entity, aside from *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

First, the Appointments Clause requires that all federal offices "not 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. And *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.

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 by and with the advice and consent of the Senate, to appoint such a Special Counsel. 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, and so directs specifically enough to overcome a clear-statement presumption in favor of presidential appointment and senatorial confirmation. No such statute exists for the Special Counsel.

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 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.

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. For example, Patrick Fitzgerald, U.S. Attorney for the Northern District of Illinois, was appointed by the then-Acting Attorney General to investigate the Valerie Plame leak, which occurred within the District of Columbia. And Fitzgerald, a Senate-confirmed officer of the United States, prosecuted Vice President Cheney's Chief of Staff, Scooter Libby, in the U.S. District Court for the District of Columbia. Other recent examples include U.S. Attorneys John Huber and John Durham, who were both lawfully appointed.

What statutes and the Constitution do not allow, however, is for the Attorney General to appoint a private citizen, who was never confirmed by the Senate, as a substitute United States Attorney under the title "Special Counsel," as happened here. That appointment was unlawful, as are all the legal actions that have flowed from it, including Smith's prosecution of Trump.

Given their interest in and demonstrated commitment to the rule of law, the legal issue this brief addresses is particularly important to *amici.* The Honorable 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. During his tenure as Attorney General, the Department of Justice steadfastly defended proper limits on federal power. Professors Calabresi and Lawson are scholars of the original public meaning of the Constitution. Finally, Citizens United (a 501(c)(4) social welfare organization) and Citizens United Foundation (a 501(c)(3)) educational and legal organization) are dedicated to restoring government to the people through by promoting federalism, free enterprise, individual liberty and limited government.

ARGUMENT

I. The legality of Smith's appointment must be conclusively resolved before trial.

The legality of Jack Smith's appointment is a potentially fatal flaw in this entire prosecution, and as such must be resolved before this case proceeds to trial in the district court. That reality alone warrants a stay by this Court—and an order directing the lower courts to address that issue expeditiously.

1. Although this Court could itself reach this issue now, it should wait for the lower courts to opine in the first instance. The 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. *Comm'r*, 501 U.S. 868, 878–879 (1991) (collecting cases). In this case, however, prudence dictates that the Court should wait. "Because this is 'a court of review, not of first view,' it is generally unwise to consider arguments in the first instance[.]" *Byrd* v. *United States*, 584 U.S. 395, 404 (2018) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005)).

The implications of the Appointments Clause issue here is nothing short of historic, and the Court would benefit from allowing both district courts currently handling the prosecutions of the former President—in the District of Columbia and the Southern District of Florida—to examine the issue and give the losing party the opportunity to be heard by the D.C. Circuit and Eleventh Circuit, respectively. It is highly likely that all those courts will examine the issue on an expedited basis. This is especially true because, for the reasons summarized in this brief, the law as articulated by this Court is sufficiently clear that it should not take the lower courts long to invalidate Smith's appointment.

2. For that matter, this question should be resolved even prior to this Court's resolving any claim of immunity asserted by former President Trump, as he should not need to assert any defense—including immunity—against a private citizen. For that reason, *amici* will promptly present their material to the relevant trial courts so that those district judges can rule on the issue with dispatch, and in a posture that is procedurally correct. *Amici* therefore expect that this Court will be squarely presented with this issue in short order, with the benefit of percolation in the lower courts.

For these reasons, this Court in the meantime should not treat the current stay application as a petition for certiorari. The Court should instead follow the normal procedure under Sup. Ct. R. 13(1). That should allow ample time for lower courts to first rule on the Appointments Clause issue presented by the prosecutions currently led by Smith, and if necessary, for subsequent review of that question in this Court.

II. Jack Smith's designation as Special Counsel violates the Appointments Clause.

Smith's lack of authority to prosecute Trump follows from first principles. In our constitutional system, Congress alone has the authority to create federal offices not established by the Constitution. And the Attorney General cannot ex nihilo fashion offices as he sees fit. Nor has Congress given the Attorney General power to appoint a Special Counsel of this nature. Thus, without legally holding any office, Smith cannot wield the authority of the United States, including his present attempt to prosecute the former President. And that alone is a powerful reason to grant the present application for a stay.

A. Only Congress Can Create a Federal Office.

The Constitution vests executive power in the President. U.S. Const. art. II, § 1, cl. 1. It then commits the power to create federal offices to Congress under the Necessary and Proper Clause, *id.* art. I, § 8, cl. 18. "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) (*Mueller*); see also *Seila Law LLC* v. *CFPB*, 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 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 (1st ed. 2020) (discussing sources). Accordingly, the Constitution does not give the President or department heads power to create any offices or appoint whatever

officers they deem appropriate. Instead, it requires that Congress first create *all* offices to which federal officers, principal or inferior, can be appointed.

The Appointments Clause confirms this, providing for the appointment of officers "which shall be *established by Law*." U.S. Const. art. II, §2, cl. 2 (emphasis added). The Framers deliberately added the emphasized phrase on September 15, 1787. Calabresi & Lawson, *Mueller*, *supra*, at 101 & n.77. The plain import of "law" is a statute, see *Seila Law*, 140 S. Ct. at 2227 (Kagan, J.), consistently so in the Constitution when otherwise unqualified, see Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1315 (1996). With no statute, there is no office to which someone can be appointed.

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

And here, no statute authorizes such an appointment. The Department of Justice's (DOJ) current statutory structure includes an Attorney General, Deputy Attorney General, and various other offices, not including more than 100,000 DOJ employees. And the vast majority of federal workers, including those at DOJ, are not "officers of the United States." They are employees, whose appointments are not governed 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 … 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*, 138 S. Ct. 2044, 2051–2052 (2018).

1. The Ethics in Government Act of 1978, Pub. L. No. 95-521 (EGA), added to this mix an "independent counsel" appointed by a special three-judge court upon referral by the Attorney General. 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) [hereinafter "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 "outside" 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 only a *statute*—not a regulation—is the kind of "law" that can "establish[]" a federal office under the Appointments Clause. And no *statute* creates a Special Counsel with the jurisdiction and authority Smith wields.

2. The Reno Regulations cite as authority 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, 515–519. And 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.[2]

First, 5 U.S.C. § 301, a general authorization for the issuance of regulations by the Attorney General or any other department head, provides, "The head of an Executive department or military department may prescribe regulations for the government of his department [and] the conduct of its employees ***." This general housekeeping provision does not create any offices or authorize the creation of any offices. Indeed, if § 301 were a 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.

Second, § 509 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 rather than authorize the creation of offices, it says the Attorney General can control all his subordinates or personally assume and exercise their responsibilities.

Third and similarly, § 510 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

[2] In his Response opposing a stay here, Smith drops a footnote claiming that the plain-vanilla language of 28 U.S.C. § 518(a) authorizes his prosecuting President Trump, Resp. at 1 n.1, hiding quite an elephant in that mousehole. See *Sackett* v. *EPA*, 598 U.S. 651, 677 (2023). For the reasons that follow, Smith must be an officer to lead this prosecution, not a mere employee. But the fact remains that Congress created no such office, and § 518(a) does not confer office-making power.

the Attorney General." As with § 509, it provides for shifting authority among DOJ personnel, 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 Attorney General's appointing 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 *** whether or not he is a resident of the district in which the proceeding is brought.

Thus, § 515(a) does not authorize creating any offices. Instead, it concerns the powers of those properly appointed to offices "under law" pursuant to other statutes, and allows the Attorney General to designate a U.S. Attorney or special attorney appointed "under law" to prosecute a case "whether or not he is a resident." *Ibid.* Section 515(a) is thus a geographical and jurisdictional allocative provision, not a grant of power to appoint private citizens as Special Counsels.

Nor does subsection (b) of Section 515 provide the requisite authority:

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

Again, this does not grant power to retain or to hire new officers, but instead provides that attorneys already hired or retained, and who may be only employees, not officers, can also have a title and salary.

To be sure, §§ 515(a) and 515(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, another provision, § 543 (discussed below), authorizes the Attorney General to hire such persons, who can then be commissioned as "special assistant[s]" or "special attorney[s]" under § 515(b). But these provisions confer no authority to create offices.

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 points to the Attorney General's statutory authority to appoint Special Counsels, noting 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 because § 543 does not authorize the kind of Special Counsel contemplated

by the Reno Regulations or Garland's 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, 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.

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, contexts in which the appointment of such persons makes sense. Government often encounters problems for which private lawyers have expertise, who may not want a permanent government position but may be willing to help the government on a limited basis. 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 no statutory office of Special Counsel to which Smith could be appointed to function as a stand-in for a U.S. Attorney.

3. 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." 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.

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 *officers*—connected with the FBI. This does not include Special Counsels. This is clear for three reasons.

First, § 533 is part of Chapter 33 of Title 28, encompassing §§531–540D, which deals with the "Federal Bureau of Investigation." Section 532 is entitled "Director of

the Federal Bureau of Investigation," and spells out the Attorney General's authority over the FBI. And § 534 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.

Second, § 533 concerns the appointment of investigative and prosecutorial "officials." Such officials, as that term is used in the statute,[3] are not Article II "officers of the United States" and cannot perform those functions. 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 personnel are not officers of the United States and lack 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[.]" Congress can try to impeach the Deputy Attorney General or the FBI Director, but no one thinks Congress can impeach DOJ trial attorneys 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

[3] An eighteenth-century statute might have used a term such as "officials" to have a broader meaning than applies to § 533. See *Lucia*, 138 S. Ct. at 2056–2057 (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."

investigative officials at the FBI or DOJ trial attorneys can be put in the line of succession to the presidency. That simply is not how Congress was using the term "officials" in § 533.

Third, and perhaps most tellingly, a cavalier reading of § 533 to authorize hiring beyond its obvious scope obliterates the 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 EGA sections.

4. At a more granular level, the effect of a loose reading of the statutes is even more bizarre. Congress has provided for the Senate-confirmed presidential appointment of a Deputy Attorney General, Associate Attorney General, Solicitor General, eleven Assistant Attorneys General (plus an Assistant Attorney General for Administration who is in the competitive service, appointed by the Attorney General), and one U.S. Attorney for each judicial district, of which there are ninety-four. A reading of § 533 to empower creating essentially unlimited inferior officers 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.

Moreover, for reasons described in depth in Calabresi & Lawson, *Mueller*, *supra*, this Court in *United States* v. *Nixon*, 418 U.S. 683 (1974), did not pass on the

scope of § 533. That decision contains dictum regarding § 533, see *Nixon*, 418 U.S. at 694–695, but it merits no weight. Anyone tempted to rely on *Nixon* should read the case briefs to see what issues were truly raised there. Those issues involved only the relationship between the President and 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. See Calabresi & Lawson, *Mueller*, *supra,* at 120–123. Moreover, *Nixon* was argued and decided before the modern rebirth of separation of powers and the Appointments Clause, which dates from two years after *Nixon* in *Buckley* v. *Valeo*¸ 424 U.S. 1 (1976) (per curiam).

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*, 138 S.Ct. at 2051–2052. 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 robs him of authority to represent the United States in any capacity, including before this Court.

C. The Appointments Clause Establishes a Default Rule that All Principal Officers Require Presidential Nomination and Senate Confirmation.

Even though existing statutes authorize appointment of stand-alone Special Counsels with the powers of a U.S. Attorney, Smith was not properly appointed to such an "office." No statute *clearly* authorized his appointment by any mode other than presidential nomination and Senate confirmation.

Any such statute, of course, is governed by the Appointments Clause, which makes three things clear. First, the default mode of appointment for all officers is presidential nomination and Senate confirmation. Second, this default presumption can only be overridden by Congress, for inferior officers. Third, even then, Congress must speak *clearly* to authorize a permissible mode of appointment for those officers other than presidential nomination and Senate confirmation.

This "clear statement" rule is implicit in the Appointments Clause and the constitutional structure. That Clause is both a separation-of-powers and federalism provision. It divides appointment power between the President and Senate—not between the President and Congress as a whole. See *Buckley,* 424 U.S. at 127. The Senate is the body in which States receives equal representation, which guards against large-state Presidents underrepresenting smaller states in the executive and judicial departments. These structural concerns warrant an interpretative presumption in favor of a clear statement of congressional intent to authorize appointment by any means other than presidential nomination and senatorial confirmation. Cf. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2372–2375 (2023) (invoking the major questions doctrine because "the Executive seiz[ed] the power of the Legislature"); *Gregory* v. *Ashcroft,* 501 U.S. 452, 460–461 (1991) (articulating federalism clear-statement rule).

Even without such a presumption, 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 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*. See 7 U.S.C. § 610(a) (USDA); 20 U.S.C. § 3461 (DOEd); 42 U.S.C. § 913 (HHS); 49 U.S.C. § 323(a) (DOT). But Congress gave the Attorney General power to "appoint such additional officers and employees as he deems necessary[,]" 18 U.S.C. § 4041, *only for the Bureau of Prisons*, not other DOJ components. Congress's reasons here are unclear, but also irrelevant when statutes are unambiguous.

D. Even If Special Counsels Were Statutorily Authorized, They Would Need 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*, 138 S. Ct. at 2051–2052; *Buckley*, 424 U.S. at 139–140; Calabresi & Lawson, *Mueller*, *supra*, at 128–134. More than that, he would be principal officer. And by the plain terms of the Appointments Clause, principal officers *must* be Senate-confirmed. That is not how Smith was appointed, and he thus could not serve as Special Counsel even if such a statutory position validly existed.

The Special Counsels contemplated by the Reno Regulations are equivalent to, if not more powerful than, U.S. Attorneys. It is obvious that U.S. Attorneys are superior officers, see Calabresi & Lawson, *Mueller*, *supra*, at 138–142, and the same is true of the Special Counsels who mirror them. The only plausible argument to the contrary rests not on original meaning but on a wild overreading of this 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, and even the Deputy Attorney General, would be inferior officers, because they answer at some level to the Attorney General. Could Congress therefore let the Attorney General appoint the Solicitor General? 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. 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 Attorney General Garland and President Biden—is "non-existent." Gov't Mot. in Limine at 6, *United States v. Trump*, No. 1:23-cr-257-TSC (filed D.D.C. Dec. 27, 2023). Smith thus has no functional superior, necessarily rendering him a principal officer. And this lack of accountability only compounds the invalidity of his purported appointment. See *Seila Law*, 140 S. Ct. at 2197–2199. As Justice Souter perceptively wrote in his *Edmond* concurrence, "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).

Either way, if he is an officer, Smith is a principal officer. He has no superior supervising or directing him. Attorney General Garland does not supervise or direct him, as he said he would not when Smith was appointed Special Counsel.

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. Smith is purporting to exercise at least as much power as a U.S. Attorney, and arguably more. That is the hallmark of a superior (or principal) officer.

The absence of such an appointment means that Smith lacks authority to prosecute Trump on behalf of the United States. That alone is sufficient to grant a stay.

CONCLUSION

Smith is the classic "emperor with no clothes." He has no more authority to represent the United States in this Court, or in the underlying prosecution, than Patrick Mahomes, Kim Kardashian or Mick Jagger. The Court should grant the stay.

Respectfully submitted,

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