No. 23-939

In The Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE GUARDIAN DEFENSE FUND, INC. IN SUPPORT OF NEITHER PARTY

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BRIEF OF *AMICUS CURIAE* SUPPORTING NEITHER PARTY

Amicus Curiae, the Guardian Defense Fund, Inc., respectfully submits this brief in support of neither party.[1]

INTEREST OF AMICUS CURIAE

The Guardian Defense Fund, Inc. is an Idaho not for profit corporation organized to promote social welfare within the meaning of I.R.C. § 501(c)(4). The Guardian Defense Fund, Inc.'s mission is to advocate for free and fair elections and to defend the founding principle that the United States of America is a nation of laws, not of man, and neither her elected representatives and executives nor her judges and justices are above or beyond their reach. The appointment of Special Counsel to investigate the President without careful adherence to precedential Constitutional safeguards abrogates the will of voters and quells the power of their voices in their own governance. As such, the Guardian Defense Fund, Inc. offers a valuable perspective and humbly submits this *amicus curiae* brief in furtherance of the interest of justice.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This Court should find that there is no statutory or constitutional basis for the appointment of a Special Prosecutor to investigate, indict, and prosecute former President Donald J. Trump, and therefore, such appointment was illegal and void *ab initio*.

The separation of powers doctrine stands at the center of the principles enshrined in the Constitution. The Constitution places extraordinary executive power in the hands of a single individual—the President—and the investigation, indictment, or prosecution of this unitary President for his acts or his campaign by subordinate officers of the executive branch bears grave weight and demands solemn care.

Recognizing these intrinsic concerns, in 1978 Congress passed the Ethics in Government Act, including Title VI, which carefully crafted an interbranch process explicitly creating an office vested with the power to investigate potential criminal conduct by the President, whether or not for his official acts or for his presidential campaign.[2] This carefully crafted statute was upheld by the Court in *Morrison v. Olson*, 487 U.S. 654 (1988), and was reenacted by Congress each time there proved a need—and allowed to sunset when that need subsided, the last time in 1999.

In light of this clear Congressional intent to abrogate such an office, and for the reasons set forth more fully herein below, Attorney General Merrick Garland erred in relying on the general language of

[2] 28 U.S.C. §§ 591 – 598.

28 U.S.C. §§ 509, 510, 515, and 533 as authority to appoint John L. "Jack" Smith to investigate, indict, and prosecute former President Trump (the "Smith Appointment"). Without constitutionally aligned, judicially approved, and legislatively authorized statutory authority, the Attorney General's purported appointment was illegal and invalid from its inception, and all actions performed by this appointee are null and void.

ARGUMENT

I. Investigation of the President by Agents of the Executive Branch Raises Grave Constitutional Issues.

The Constitution of the United States, Article II, paragraph 1, mandates that "[t]he executive Power shall be vested in a President of the United States of America." This "Vesting Clause," places extraordinary power in one human being: the President—the one person the entire country has elected to lead it.[3] In contrast, the Constitution

[3] *See, e.g.*, *Myers v. United States*, 272 U.S. 52 (1926) at 123 where the Court made this clear:

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide; and, as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit

diffuses legislative and judicial power: the former in a bicameral Congress consisting of two senators from each of the fifty states, together with four hundred and thirty-five congressional seats variably allocated by the census among the fifty states; the latter in a multi-member Supreme Court and lower courts as mandated by Congress and limited by certain rules governing justiciability. U.S. CONST. art. I §§ 1-3; U.S. CONST. art. III, §§ 1-2.

Justice Alito addressed the unitary nature of executive power in response to a confirmation hearing question as follows:

> I think it's important to draw a distinction between two very different ideas. One is the scope of Executive power . . . . [W]e might think of that as 'how big is this table', the extent of the Executive power. [The other idea is] when you have a power that is within the prerogative of the Executive, who controls [it]? [T]he concept of [the] unitary Executive doesn't have to do with the scope of Executive power . . . It has to do with who within the Executive branch controls the exercise of Executive power, and the theory is the Constitution says the Executive power is conferred on the President.[4]

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and hamper that power beyond the limitations of it, expressed or fairly implied.

[4] Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 351 (2006) (response to question from Sen. Kennedy).

Law enforcement is squarely within the scope of the executive power.[5] Accordingly, since the President holds the entire executive power, and the executive power specifically includes law enforcement, both the legislative and judicial branches have approached with great care the thorny question of under what circumstances, and under what procedure, a President can be investigated by a subordinate officer of the executive branch. As stated by Brett M. Kavanaugh, now Justice Kavanaugh, in the Georgetown Law Review in 1998:

> [A] serious question exists as to whether the Constitution *permits* the indictment of a sitting president .... The Constitution itself seems to dictate ... that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.[6]

Kavanaugh further opined that "the President would be quickly impeached, tried, and removed" if he or she does a "dastardly deed."[7]

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[5] *See, e.g., United States v. Nixon*, 418 U.S. 683, 693 (1974) (The "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). *See also, Bowsher v. Synar*, 478 U.S. 714 (1986), where the Court struck down a provision of the Gramm-Rudman Act because it invaded the President's exclusive authority to enforce the laws.

[6] Kavanaugh, Brett M., *The President and the Independent Counsel*, 86 *Geo. L. R.* 2133, pp. 2157-58 (1998).

[7] *Id.,* p. 2161.

Several constitutional principles come into play when attempting to structure a vehicle under which a subordinate to the President is granted the power to conduct a criminal investigation of his or her boss. First, where an exclusive province of the executive power, such as law enforcement, is encroached upon by Congress, the Court has on several occasions held that such laws violate the Take Care Clause. For example, in considering the President's removal power, the Court stated:

> It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government.

Myers v. United States, 272 U.S. 52, 127 (1926). More recently, the Court held:

> "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010).

The Court's standing doctrine protects the executive branch's Take Care duty from encroachment not only by the legislative branch, but also by the judicial branch. In *Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992) the Court reasoned that to allow Congress to

> convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'.

Lujan v. Def. of Wildlife, 504 U.S. 555, 577 (1992); *see also, Allen v. Wright*, 468 U.S. 737, 761 (1984) ("The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' We could not recognize respondents' standing in this case without running afoul of that structural principle.") *(internal citation omitted) (quoting* U.S. CONST. art. II, § 3)).

Likewise, in *Printz v. United States* 521 U.S. 898 (1997) the Court relied in part on the Take Care Clause to strike down certain provisions of the Brady Act that required local law enforcement to engage in federal enforcement actions, stating:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves Presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of [state

> executive officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known . . . . That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

Printz v. United States 521 U.S. 898, 922-23 (1997).

In light of these serious structural constitutional concerns, interpreting a statute to provide for the investigation of the President should be undertaken with caution. Generally in this setting, in order to interpret a statute to permit encroachment upon the President's powers under the Vesting Clause and the Take Care Clause, and with due respect to separation of powers concerns, courts have required a clear statement of Congressional intent. Guidance is provided by the Court's analysis of whether the Administrative Procedure Act applies to the President. For example, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), in concluding that the President is not bound by the Administrative Procedure Act, the Court stated:

> The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -- (A) the Congress; (B) the courts of

> the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia." 5 U.S.C. §§ 701(b)(1), 551(1). The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. *Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion. c.f. Nixon v. Fitzgerald,* 457 U.S. 731, 748, n.27, 73 L. Ed. 2d 349, 102 S. Ct. 2690 (1982) (Court would require an explicit statement by Congress before assuming Congress had created a damages action against the President). As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935), we hold that they are not reviewable for abuse of discretion under the APA, *see Armstrong v. Bush*, 288 U.S. App. D.C. 38, 45, 924 F.2d 282, 289 (1991).

Franklin v. Massachusetts, 505 U.S. 788, 800-801 (1992) (emphasis supplied). Accordingly, in

construing a statute to provide that the President and presidential campaign can be investigated by a special counsel appointed by the Attorney General, precedent requires an explicit statement by Congress due to the unique constitutional position of the President, and the serious structural constitutional concerns discussed above. Such an explicit statement cannot be found in the general statutes upon which Attorney General Garland relied in the Smith Appointment.[8] However, it is clear that Congress can make such an explicit statement because it has done so in the past, in a law Congress has since removed from the books.

II. In 1978, Congress Created a Detailed Law Addressing the Constitutional Issues Related to Appointing a Special Prosecutor to Investigate a President or Presidential Campaign.

In 1978, following Watergate—and the 1973 Saturday Night Massacre where Attorneys General Richardson and Ruckelshaus each refused to fire Archibald Cox—Congress created the Ethics in Government Act.[9] The Act was designed, in part, to create a Special Prosecutor equipped to investigate the President while respecting the unique position of the President and the separation of powers among the three branches of government.[10] The Act

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[8] Discussed at length in Section V, below.

[9] Ethics in Government Act of 1978, 95 P.L. 521, 92 Stat. 1824.

[10] Title VI of the Act, which became 28 U.S.C. §§ 591 – 598, was initially titled *Special Prosecutor*; in the last version of the law before its sunset in 1999, the chapter was entitled *Independent Counsel*.

carefully involved all three branches: a) the legislative: Congress created the law providing for the Special Prosecutor, and maintained ongoing oversight over the same; b) the executive: the Attorney General determined whether a Special Prosecutor was required, and made the application for the appointment of a Special Prosecutor; and, c) the judicial: a special three judge court, called the Special Division, received the application and actually appointed the Special Prosecutor.

The Act was the result of an extremely thorough legislative process reflected in thousands of pages of legislative history. A review of the provisions of Title VI demonstrates the level of attention Congress devoted to achieving the appropriate balance among the branches to constitutionally appoint a Special Prosecutor capable of investigating the President. When the Attorney General "receive[d] specific information that [among others, the President and Vice President, and any officer of the principal national campaign committee seeking the election or reelection of the President], ha[d] committed a violation of any Federal criminal law other than a violation constituting a petty offense," the Attorney General was to apply for the appointment of a Special Prosecutor. 95 P.L. 521, 92 Stat. 1824, at 1867. The law makes no distinction between official or non-official acts of the President in requiring the Special Prosecutor's appointment, in contrast to the parties' positions here, which concern whether former President Trump's actions alleged in the indictment constitute official acts of his presidency as per *Nixon v. Fitzgerald*, and thus whether he is

categorically immune to prosecution—a position rejected by both the trial court[11] and the appellate court.[12] The Act also explicitly includes "officers of the principal national campaign committee seeking the election or reelection of a President," indicating that its provisions encompass far more than a President's official acts. 28 U.S.C. 591(b)(6).[13]

§592, titled "Application for appointment of a special prosecutor," provided detailed procedures the Attorney General was required to follow after receiving specific information alleging a crime committed by the President or certain specified individuals. §592(a) required the Attorney General to conduct a preliminary investigation not to exceed ninety days. *Id.*, at 1868. §592(b) provided the procedure the Attorney General was to follow if the preliminary investigation found no basis in the allegations. *Id.* §592(c) set forth the process the Attorney General was required to follow regarding an application to the Special Division if the preliminary investigation warranted further investigation or prosecution. *Id.*, at 1868-1869. §592(d)(1) provided that the application submitted to

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[11] *Thompson v. Trump*, 590 F. Supp. 3d 46, 74 (D.D.C. 2022) ([T]he court concludes that…absolute immunity does not shield President Trump from suit….").

[12] *Blassingame v. Trump*, 87 F.4th 1, 4 (D.C. Cir. 2023) ("The sole issue before us is whether President Trump has demonstrated an entitlement to official-act immunity.").

[13] The phrase "seeking the *election* or reelection of the President" implies an even broader scope, protecting both the individual seeking election and his or her national campaign committee staff, even before that individual has held the office of President for the first time—demonstrating again the grave constitutional concerns involving executive office.

the Special Division "shall contain sufficient information to assist the division of the court to select a special prosecutor and to define that special prosecutor's prosecutorial jurisdiction." *Id.*, at 1869. §592(d)(2) provided that the application and all supporting documentation could not be released beyond the Department of Justice and the Special Division without permission of the Special Division. *Id.* §592(f) provided that the Attorney General's decision to apply to the Special Division for the appointment of a special prosecutor was not subject to review in any court. *Id.*

In what was codified at 28 U.S.C. §49, Congress created the Special Division of the United States Court of Appeals for the District of Columbia for the purpose of appointing special prosecutors and defining their jurisdiction. *Id.*, at 1873. §49(d) provided that the Special Division would be appointed by the Chief Justice of the United States, and would consist of three circuit court judges, with one from the United States Court of Appeals for the District of Columbia. *Id.*

§593 set forth the duties of the Special Division, including appointing the special prosecutor, defining the special prosecutor's jurisdiction, excluding the appointment of anyone who held or had recently held any office of "profit or trust under the United States," and filling vacancies should they arise. *Id.*, at 1869. §594 (a) – (f) defined the specific authority and duties of the special prosecutor; §595 provided a detailed regime for reporting and Congressional oversight of the special prosecutor; and §595 (c) required that the special prosecutor would advise the House of Representatives if he or she received any "substantial or credible information…that may

constitute grounds for an impeachment." *Id.*, at 1869-1871.

§595(d) granted Congress oversight jurisdiction "with respect to any conduct of any special prosecutor," and §595(e) allowed Congress to request the appointment of a special prosecutor, though subject to the same structural considerations. *Id.*, at 1871-1872. §596 detailed the process to remove a special prosecutor, and allowed for judicial review of that removal. *Id.*, at 1872. §597 governed the relationship between the special prosecutor and the Department of Justice. *Id.*, at 1872-1873. Finally, §598 contained a five-year sunset provision. *Id.*, at 1873.

III. In 1988, the Supreme Court Upheld Title VI of the Ethics in Government Act as Constitutional.

The Supreme Court upheld these Title VI provisions for appointing a special prosecutor in *Morrison v. Olson*, 487 U.S. 654 (1988). The *Morrison* case offers a textbook example of "how the [Ethics in Government] Act works in practice." *Morrison v. Olson*, 487 U.S. 654, 665, 108 S. Ct. 2597, 2605 (1988). After the President, acting on advice of the Justice Department, ordered the Administrator of the EPA to withhold certain documents in defiance of a House subpoena, the House Judiciary Committee later began an investigation into the Justice Department's role in that decision. Pursuant to the requirements of the Act, the Attorney General's office completed a preliminary investigation, determined that independent counsel was warranted, and applied for such to be appointed by the Special Division of the judiciary, which appointed

James McKay as independent counsel (later replaced after his resignation by Alexia Morrison). *Id.*, 487 U.S. at 665-67, 108 S. Ct. at 2606. Independent Counsel Morrison caused a grand jury to issue subpoenas to certain employees of the Department of Justice, they moved to quash, and this suit rose to the attention of the Court when the Court of Appeals reversed the trial court's decision to uphold the subpoenas, arguing that the statute was unconstitutional.

The Supreme Court addressed several constitutional arguments among other substantive issues[14] the most relevant of which is whether the Act violated, at its most basic level, the fundamental structure of the Constitution. The Court considered it no small matter, for "[t]ime and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. *Id.*, 487 U.S. at 693, 108 S. Ct. at 2620. Ultimately, the Court rested its affirmation of the constitutionality of the Act on the fact that neither the legislature nor judicial worked any "usurpation of properly executive functions" and that the Act further permitted some degree of executive power to "ensure that the laws are 'faithfully executed' by an independent counsel." *Id.*, 487 U.S. at 695, 108 S. Ct. at 2621.

The unspoken message to the present is clear: Title VI of the Act was at the time, and remained until its expiration, the only law that specifically allowed the investigation of a sitting President. The serious constitutional ramifications of such investigation

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[14] For the purposes relevant here, we do not address the dichotomy between inferior and principal officers, the limits of Article III, nor the jurisdictional questions at issue.

necessarily preclude anything but the most careful adherence to the separation of powers doctrine when devising or appointing such counsel. When Congress determined that the law should expire in 1999, it removed the only such mechanism that has ever been deemed appropriate for such a momentous task.

IV. Congress Determined that Title VI Should Expire, Ending the Position of Special Prosecutors Capable of Investigating Presidents.

The original provisions discussed above were enacted in 1978 as a direct response to the Watergate scandal. The 1978 law was amended and reauthorized in 1983[15] and again in 1987.[16] Between 1987 and 1992, due to the breadth, length, and expense of the Iran Contra investigation by Special Prosecutor Walsh, the statute came under increased criticism. In the face of this criticism, Congress determined that the law should not be renewed, and it lapsed on December 15, 1992.

Following the Whitewater scandal in the Clinton Administration, however, in 1994 Congress took the action of reinstating the statute to allow the appointment of Judge Starr to investigate President Clinton. From the standpoint of Congressional intent, it is significant to note that when faced with the investigation of President Clinton, Congress passed Title VI of the Ethics in Government Act

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[15] Ethics in Government Act Amendments of 1982, P.L. 97-409, 96 Stat. 2039, January 3, 1983.

[16] Independent Counsel Reauthorization Act of 1987, P.L. 100-191 101 Stat. 1293, December 15, 1987.

back into law after a two-year period when it was not in force. As with the Walsh investigation, however, the breadth, length, and expense of the Starr investigation came under substantial public criticism. Congress therefore once again allowed the statute to lapse on June 30, 1999, and to date it has chosen not to reinstate it.[17]

Accordingly, there is currently no law on the books that provides for the appointment of a special prosecutor with the authority to investigate a President, as Title VI did. It is clear from past Congressional action that if Congress intended to have such a law in force, it knows how to do so. Indeed, it reenacted Title VI specifically to permit the Starr investigation, and then once again removed it from the books. The only conclusion that can be drawn is that it is the intent of Congress that there shall be no more special prosecutors investigating the President—that is, unless Congress were to again legislate Title VI or a substantially similar law into action.

V. The General Statutes Relied Upon by Attorney General Garland do not Authorize the Appointment of a Special Counsel Capable of Investigating Former President Trump.

This proceeding results from the appointment of Special Counsel John L. "Jack" Smith by Attorney

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[17] The law was reauthorized for the last time on June 30, 1994, Independent Counsel Reauthorization Act of 1994, P.L. 103-270, 108 Stat. 732, and expired under the five-year "sunset" provision on June 30, 1999.

General Merrick Garland to "conduct the ongoing investigation into whether any person or entity 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…."[18] In reliance on that authorization, Special Counsel Smith ultimately brought a grand jury indictment against former President Trump in the United States District Court for the District of Columbia on or about August 1, 2023, alleging four counts: Conspiracy to Defraud the United States, a violation of 18 U.S.C. § 371; Conspiracy to Obstruct an Official Proceeding, a violation of 18 U.S.C. § 1512(k); Obstruction of and Attempt to Obstruct an Official Proceeding, a violation of 18 U.S.C. § 1512(c)(2); and Conspiracy Against Rights, a violation of 18 U.S.C. § 241. Each of the counts of the indictment explicitly constrains itself to actions

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[18] The appointment, made via Order No. 5559-2022 on November 18, 2022, authorized Special Prosecutor Smith to conduct both the investigation related to the 2020 presidential election and the certification of the Electoral College vote held on or about January 6, 2021, and also to

a. "conduct the ongoing investigation referenced and described in the United States' Response to Motion for Judicial Oversight and Additional Relief, *Donald J. Trump v. United States*, No. 9:22-CV-81294-AMC (S.D. Fla. Aug. 30, 2022) (ECF No. 48 at 5-13), as well as any matters that arose or may arise directly from this investigation or that are within the scope of 28 C.F.R. § 600.4(a)"; and
b. "to prosecute federal crimes arising from the investigation of these matters."

former President Trump took while the sitting President of the United States.[19]

In the face of the repeal of Title VI, Attorney General Garland based the Smith Appointment on four general statutes, 28 U.S.C. §§ 509, 510, 515, and 533, which were passed in 1966. None of these four statutes concern the investigation of the President. When the general language of these statutes is compared to the extensive and carefully crafted provisions of Title VI, it is clear that they do not provide the explicit statement the Supreme Court has required in the past when considering whether a statute was intended to apply to the unique constitutional position held by the President.[20]

28 U.S.C. § 509 merely provides that all functions of the Department of Justice are vested in the Attorney General with specific exceptions not relevant here.

28 U.S.C. § 510 allows the Attorney General to authorize his subordinates to perform his duties

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[19] President Trump vacated his office on January 20, 2021 through the inauguration of President Joseph R. Biden, Jr.; *compare, from the indictment,* "From on or about November 14, 2020, through on or about January 20, 2021…" *United States of America v. Donald J. Trump*, 1:23-cr-00257-TSC (D.D.C. 2023), ECF 1, at ¶ 6 (Count One, Conspiracy to Defraud the United States – 18 U.S.C. § 371), "From on or about November 14, 2020, through on or about January 7, 2021…" *Id.,* at ¶ 126 (Count Two, Conspiracy to Obstruct an Official Proceeding – 18 U.S.C. 1512(k)), "From on or about November 14, 2020, through on or about January 7, 2021…" *Id.,* at ¶ 128 (Count Three, Obstruction of, and Attempt to Obstruct, an Official Proceeding – 18 U.S.C. §§ 1512(c)(2)), *and* "From on or about November 14, 2020, through on or about January 20, 2021…", *Id.,* at ¶ 130 (Count Four, Conspiracy Against Rights – 18 U.S.C. § 241).

[20] *Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992).

were he to deem it appropriate. This does not purport to equip the Attorney General with additional power but merely authorizes assignment of existing authority.

28 U.S.C. § 515 allows any attorney specially appointed by Attorney General to conduct a broad range of legal proceedings regardless of his or her residency, and directs certain aspects of his or her position, like the salary, who must take the oath, and to whom said attorney reports. This statute does not equip the Attorney General with additional power to investigate the President of the United States, but governs those other such special counsel the Attorney General may appoint at his or her discretion.

The last statute the Order cites for authority permits the Attorney General to appoint officials to "detect and prosecute crimes against the United States" and 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. As above, this is simply affirmation that the Attorney General may investigate, detect, and prosecute crimes for which he is authorized.

It is clear from the Smith Appointment—particularly when Special Counsel Smith was also specifically authorized to assume authority over the investigation of former President Trump regarding his alleged possession of classified materials[21]—that Special Counsel Smith was specifically appointed to investigate the President. Accordingly, the issue

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[21] *See* Att'y Gen. Order No. 5559-2022, November 18, 2022, at (c).

before the Court is whether four very general 1966 statutes that make no mention of granting the Attorney General the authority to appoint a special counsel to investigate the President can be construed to authorize the same when the 1978 statute that was specifically designed to permit such an investigation was intentionally abandoned by Congress in 1999. Logic, the rules of statutory construction, and constitutional considerations mandate an answer in the negative.

a. Logic.

Logic dictates that if the general statutes pre-existing Title VI were sufficient for the job, Congress would not have passed Title VI to begin with. There would have been no need. The great care taken to craft Title VI to arrive at a structure Congress believed would allow the appointment of a prosecutor to investigate the President, himself sometimes referred to as the "Prosecutor in Chief", is not at all evident in 28 U.S.C. §§ 509, 510, 515, and 533. These general statutes at best allow the Attorney General to enlist special lawyers for special tasks. They never address the investigation of the President. Those issues were explicitly addressed by Title VI, but Congress made the determination that Title VI should expire. Congress has repeatedly shown it knows how to reinstate the 1978 statute, and has chosen instead, twice, to seek impeachment of former President Trump. It would be illogical to assume that the Attorney General can now achieve the same exact result through reliance on the pre-existing general provisions contained in 28 U.S.C. §§ 509, 510, 515, and 533.

b. Statutory Construction.

The guiding light of statutory construction is to determine Congressional intent.[22] As discussed above, Congressional intent is that special prosecutors capable of investigating the President shall not exist unless Congress reenacts the 1978 statute or a new version thereof. Construing 28 U.S.C. §§ 509, 510, 515, and 533 to wholly subsume the effect of Title VI would therefore thwart Congressional intent to abolish such special prosecutors by determining that Title VI should expire. Moreover, this intent is clearly illustrated by the fact that when Congress desired the Whitewater investigation to be handled by a Special Prosecutor, it reenacted Title VI. If Congressional intent was that 28 U.S.C. §§ 509, 510, 515, and 533 were sufficient to appoint a Special Prosecutor to investigate the President, Congress would not have reenacted Title VI. This comports with the canon of construction known as the Harmonious Reading Canon: rather than read both Title VI of the Act and 28 U.S.C. §§ 509, 510, 515, and 533 as conflicting authorizations of the same activity—investigation of the President—rather, the latter ought to be read as the general rule for special counsel, and Title VI of the Act as imparting the authority in the specific sense of presidential investigations only when such extraordinary authority is supported by the legislative and judicial branches.

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[22] *See generally*, Easterbrook, Frank H., *The Role of Original Intent in Statutory Construction,* 11 Harvard Journal of Law and Public Policy 59 (1988).

As well, interpreting 28 U.S.C. §§ 509, 510, 515, and 533 so as to have the same exact result as Title VI of the Ethics in Government Act would contradict the canon of statutory construction that the legislature would not pass meaningless or redundant words into law.[23] As noted above, if 28 U.S.C. §§ 509, 510, 515, and 533 are interpreted to mean the same thing as Title VI, then Title VI provides merely redundant, meaningless provisions. This cannot be the case.

Finally, the canon of statutory construction known as *generalia specialibus non derogant* provides that specific statutes control over more general statutes.[24] Here, Title VI, repealed, is on all fours with the Smith Appointment, and controls over the more general provisions of 28 U.S.C. §§ 509, 510, 515, and 533. The general and specific cannot be interpreted to mean the same thing.

c. Constitutional Issues.

These have been explored above in Section II and will not be repeated here. However, interpreting 28 U.S.C. §§ 509, 510, 515, and 533 so as to have the same result as Title VI of the Ethics in Government Act would violate the Avoidance Canon, which states that if a statute is susceptible to more than one reasonable construction, courts should choose an

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[23] "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

[24] *See, e.g.*, *Rogers v. United States*, 185 U.S. 83, 88 (1902).

interpretation that avoids raising constitutional problems.[25] As discussed above, interpreting 28 U.S.C. §§ 509, 510, 515, and 533 to achieve precisely the same result as Title VI of the Ethics in Government Act raises serious structural constitutional problems, and therefore such an interpretation should be avoided.[26]

VI. The Most Reasonable Interpretation of 28 U.S.C. §§ 509, 510, 515, and 533 are General Grants of Authority Not Supporting Presidential Investigations.

Given the foregoing, the most reasonable interpretation of 28 U.S.C. §§ 509, 510, 515, and 533 is that they allow the Attorney General to appoint a Special Prosecutor capable of investigating crimes within the executive branch in general, but not the unique constitutional position of the President.[27] Indeed, investigations of crimes within the executive branch, by officers of the executive branch, routinely take place. The argument here is that when it comes to investigating the President—the one individual vested with the entire power of the executive branch—these general statutes are insufficient for

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[25] *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

[26] See discussion in Section I above.

[27] For example, the District Court for the District of Columbia ruled in 2006 that James Comey had the statutory authority under 28 U.S.C. §§ 509, 510, and 515 to appoint Patrick J. Fitzgerald as Special Counsel to investigate which officer of the executive branch leaked Valery Plame's name to the press. That matter did not involve the investigation of the President, but of others in the Executive Branch. *United States v. Libby*, 429 F. Supp. 2d 27 (D.D.C. 2006).

the reasons discussed above. Similarly, while 28 C.F.R. § 600.1 *et seq*. may be sufficient to support the appointment of special prosecutors to investigate subordinate officers of the Executive Branch, they cannot constitutionally be interpreted as a basis for the Smith Appointment.

VII. The Constitution Provides the Remedy.

The argument asserted herein is not that the President cannot be investigated. For example, a President may consent to an investigation undertaken by a subordinate officer of the executive branch, as President Nixon did in Watergate when he appointed Leon Jaworski, and consented to special regulations regarding Jaworski's removal.[28] However, the primary method for the investigation of the President is through Congress under the Impeachment Power. If Congress truly believes that a President has engaged in high crimes and misdemeanors, the Constitution already provides the remedy: impeachment. The tortured history of the various special counsels who have undertaken investigations of the President—Cox, Jaworski, Walsh, and Starr—demonstrates that the Framers got it right from the start. The power to investigate and impeach the President lies with Congress, not within the executive branch. Article I, Section 2, Clause 5 provides:

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[28] Att'y Gen. Order No. 554-73, reprinted in Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 575 (1973).

> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article I, Section 3, Clauses 6 and 7 state that:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside; And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law.

Article 2, Section 4 provides:

> The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

These provisions address quite clearly under what circumstances, and under what process, the President of the United States may be investigated, impeached, tried in the Senate upon articles of impeachment, and, if removed from office, subsequently prosecuted and held accountable in a court of law.

In his 1998 Georgetown Law Review article, now Justice Kavanaugh reviewed the practical reasons supporting this conclusion as follows:

In an investigation of the President himself, no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated—whether in favor of the President or against him, depending on the individual leading the investigation and its results. In terms of credibility to large segments of the public (whose support is necessary if a President is to be indicted), the prosecutor may appear too sympathetic or too aggressive, too Republican or too Democrat, too liberal or too conservative.

The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President's political party—and thus also for the political, economic, social, diplomatic, and military causes that the President champions. The dramatic consequences invite, indeed, beg, an all-out attack by the innumerable actors who would be adversely affected by such a result. So it is that any number of the President's allies, and even the Presidents themselves, have criticized Messrs. Archibald Cox, Leon Jaworski, Lawrence Walsh, and Kenneth Starr—the four modern special prosecutors to investigate presidents.

The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be

> impeached by the House and removed from office by the Senate—and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.[29]

Leon Jaworski stated the same conclusion in the 1975 Report of the Watergate Special Prosecution Task Force:

> [T]he impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President's resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation's Chief Executive Officer. Those consequences, it was argued, should result from the impeachment mechanism explicitly provided by the Constitution, a mechanism in which the elected representatives of the public conduct preliminary inquiries and, in the event of the filing of a bill of impeachment of the President, a trial based upon all the facts.[30]

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[29] 86 *Geo. L. R.* 2133, 2157—58 (1998).

[30] Watergate Special Prosecution Force, *Watergate Special Prosecution Force Report,* U.S. Government Printing Office, 1975, at 122.

Ad hoc attempts to alter the Framers' vision have repeatedly proven unsatisfactory, which is why Congress determined to sunset Title VI. This uncertainty demonstrates that the Framers got it right, and the solution they provided to the problem is the one that should be followed today. Indeed, absent the statutory authority formerly provided by Title VI, it is in fact the only available remedy.

CONCLUSION

Congress has deliberately terminated the only statutory authority designed to appoint a special prosecutor with the power to investigate the President. With that authority no longer in place, there exists no statutory authorization for the office Special Counsel Smith now purports to hold. The appointment was illegal, the resulting office has been a nullity from inception, and all actions taken by this illegally appointed officer should be null and void.

Respectfully submitted,

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