WHAT WE DID AND DID NOT ARGUE IN *UNITED STATES V. TRUMP*

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Editor's Note: This essay had already been submitted to the *Harvard Journal of Law & Public Policy* before *United States v. Trump* was decided by the United States District Court for the Southern District of Florida on July 15, 2024. The authors have decided to publish this essay without regard to the District Court's decision, and they will address that decision in future writings.

On June 21, 2024, Judge Aileen Cannon of the United States District Court for the Southern District of Florida heard oral argument in *United States v. Trump*. This prosecution was brought by Special Counsel Jack Smith with regard to former President Trump's possession of certain documents at Mar-A-Lago. Blackman presented oral argument that day based on an amicus brief we had filed, with the Landmark Legal Foundation, in March.

Our goal here is to explain the lines of argument we put forward in our amicus brief, our motion, and at the hearing on Friday, June 21, 2024.[1] We will address three questions. First, does *United States v. Nixon* require the District Court to dismiss the former President's motion to dismiss the indictment? Second, does the Special Counsel hold a *continuous* "Officer of the United States" position? And third, has Congress appropriated money to pay the Special Counsel and his staff and contractors?

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[1] Brief of Professor Seth Barrett Tillman and Landmark Legal Foundation as *Amici Curiae* in Support of Defendant Trump's Motion to Dismiss the Indictment, United States v. Trump, Case No. 9:23-cr-80101-AMC-BER (S.D. Fla. Mar. 21, 2024), ECF No. 410, 2024 WL 1214430, https://ssrn.com/abstract=4755563, https://tinyurl.com/3kju33w4; Motion for Leave of Professor Seth Barrett Tillman and Landmark Legal Foundation to Participate in Oral Argument as *Amici Curiae* in Support of Defendant Trump's Motion to Dismiss the Indictment [ECF No. 326], United States v. Trump, Case No. 9:23-cr-80101-AMC-BER (S.D. Fla. May 30, 2024), ECF No. 590, 2024 WL 2833495 https://ssrn.com/abstract=4837841, https://tinyurl.com/3kju33w4; Trs. of Oral Arguments (June 21, 2024), ECF No. 635, 647–50, https://tinyurl.com/3kju33w4. The motion was decided. *See* United States v. Trump, Case No. 9:23-cr-80101-AMC, 2024 WL 3404555 (S.D. Fla. July 15, 2024), ECF No. 672, https://tinyurl.com/hk4z7e76.

I. DOES *NIXON* REQUIRE THE DISTRICT COURT TO DISMISS FORMER PRESIDENT'S MOTION TO DISMISS THE INDICTMENT?

There are two primary legal questions raised by Trump's motion to dismiss the indictment. First, is the Special Counsel's office or position constitutional?[2] And second, was Smith lawfully appointed to hold that position?

Not surprisingly, the Special Counsel answered both questions in the affirmative. The Special Counsel's position squarely relied upon *United States v. Nixon* (1974).[3] In *Nixon*, Special Prosecutor Jaworski sought to enforce a subpoena against President Nixon, and the Supreme Court, with certain limitations, upheld the lawfulness of the subpoena. Even if not expressly stated, the Court's opinion implied, to some extent, that the position of special prosecutor was constitutional. In the Trump litigation in the Southern District of Florida, Special Counsel Smith analogized the position he (purportedly) holds to that held by Special Prosecutor Jaworski. To put it simply, Special Counsel Smith argued that *Nixon* was on-point, controlling, and remains good law—until overruled by the Supreme Court.

Trump's counsel made three arguments in response. First, that *Nixon* was undermined by subsequent developments in the Supreme Court's Appointments Clause jurisprudence. Second, that the lawfulness of the special prosecutor's position was not argued by the parties in *Nixon*. And third, that the *Nixon* Court's implicit determination (such as it was) that the special prosecutor's position was lawful was, at best, dicta, and so not controlling. These arguments were also advanced by an amicus brief filed by Attorneys General Meese and Mukasey, Professors Calabresi and Lawson, and Citizens United.

During oral argument, we made a different argument. We assumed for the sake of argument that the parties in *Nixon* had raised the issue: that is, whether the special prosecutor's position was lawful. We further assumed that the Court's decision squarely addressed that issue. We even assumed that in addressing that issue, the decision on this point was the Court's *holding*, and not *dicta*. Even with all of these assumptions in place, *Nixon* is not controlling in *United States v. Trump*. Why? A prior decision is only controlling, as opposed to persuasive, where the facts are the same. And here, the facts are not the same.[4]

We put forward three reasons in support of our position. *First*, the *Nixon* Court repeatedly described the circumstances giving rise to the conflict as *unique*.[5] The Court described the special prosecutor as having "unique authority and tenure.[6] And finally, the Court plainly stated that the case was decided based on "the unique *facts* of this case."[7] When the Court tells the parties, the legal community, and the country that the facts are "unique" and when it does so multiple times,

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[2] *See* U.S. CONST. art. II, § 2.

[3] 418 U.S. 683 (1974).

[4] *See* United States v. Johnson, 921 F.3d 991, 1001 (11th Cir. 2019) (William Pryor, J.) (en banc) ("Although Johnson argues that *Terry* is inconsistent with the original meaning of the Fourth Amendment and that we should apply it narrowly to 'limit[] the damage,' we must apply Supreme Court precedent neither narrowly nor liberally—only faithfully."); Jefferson County v. Acker, 210 F.3d 1317, 1320 (11th Cir. 2000) ("There is, however, a difference between following a precedent and extending a precedent.").

[5] *See* 418 U.S. at 691 ("unique"), 697 ("uniqueness of the setting").

[6] *Id*. at 694.

[7] *Id*. at 697 (emphasis added).

the implication is that other cases are, in fact, *dis*similar and that the holding should not be extended to different facts at a subsequent date. *Nixon* was the proverbial ticket good for one ride—or perhaps, one president. *Bush v. Gore* could be characterized in a similar fashion.[8]

Second, the *Nixon* Court supported its decision by expressly relying on several statutory provisions, and on regulations put into effect in 1973 by Acting Attorney General Robert Bork.[9] Although the former statutory provisions remain in effect, the latter regulations were superseded by the Ethics in Government Act (1978), which created independent counsels. The 1978 act, because it was not re-authorized by Congress, expired in 1999. Subsequently, new regulations were put into effect in 1999 by Attorney General Reno. The *Nixon*-Court-era regulations for special prosecutors and the modern, now-in-force Reno regulations for special counsels are not the same. For that reason alone, *Nixon* is not and cannot be controlling: *Nixon* relied upon federal regulations which are no longer in effect.[10]

Third, the *Nixon* Court explained why the 1973 Bork regulations were significant. The Court noted:

> The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.[11]

Under the 1973 Bork regulations, the special prosecutor enjoyed unique and a since unmatched level of independence. The special prosecutor was beyond the ordinary removal power of the President, who, in the ordinary course, can remove high ranking Executive Branch officers of the United States at pleasure. Under the Bork regulations, the special prosecutor could not be removed even for "good cause;" rather, he could only be removed for "extraordinary improprieties." Again, this level of independence is well beyond what appears in the Reno regulations.[12] Finally, the 1973 Bork regulations permitted removal of a special prosecutor *only* after the President had consulted and sought consensus from eight high ranking members of Congress. Not only do modern special counsels enjoy no such protections against removal, any effort in this manner to insulate special counsels against presidential removal would seem to be plainly forbidden by more recent developments in Supreme Court case law.[13] To put it simply,

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[8] 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances . . . .").

[9] *See Nixon*, 481 U.S. at 694–95, 694 n.8 (citing 38 Fed. Reg. 30738–39, as amended by 38 Fed. Reg. 32805).

[10] *See Id.* at 695 (characterizing the 1973 Bork regulations as having "the force of law"); *cf.* Allapattah Services, Inc. v. Exxon Corp., 362 F.3d 739, 765 (11th Cir. 2004) (suggesting that a Supreme Court holding is no longer controlling "where specific statutory language that had previously been interpreted by the Court is amended . . . .").

[11] *Nixon*, 418 U.S. at 694 n.8 (quoting the underlying regulation).

[12] *See* 28 C.F.R. 600.7(d) (1999) (permitting a special counsel's removal for "good cause").

[13] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986).

the *Nixon* decision, to the extent it validated the office of special prosecutor as lawful, did so based on a regulatory framework that is no longer in force and which could not be put into effect today by statute due to *Bowsher v. Synar*. *Nixon* was predicated on a unique and an unmatched level of independence vested in special prosecutors. By contrast, today's special counsel, including Jack Smith, enjoy no such independence against removal. Thus, *Nixon* is not controlling.

In making the argument above, we only conclude that *Nixon* is not *controlling*; it does remain *persuasive*—as do other more recent Supreme Court Appointments Clause decisions.

II. DOES THE SPECIAL COUNSEL HOLD A *CONTINUOUS* "OFFICER OF THE UNITED STATES" POSITION?

In *United States v. Hartwell* (1867), a clerk in the Treasury Department was charged with embezzlement.[14] The relevant federal statute applied to an "officer" who was "charged with the safe-keeping of the public money."[15] The defendant argued that because he was not an "officer," the indictment was defective. The Supreme Court disagreed and found that he was an "officer." Justice Swayne, writing for the majority, offered the following definition of an office: "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."[16] To be sure, in *Hartwell*, the Court's definition of "officer" involved only statutory construction. *Hartwell*'s four-factor test would again play a role in *United States v. Germaine* (1879)—another statutory construction case construing "officer."[17] Finally, in 1890, the Court would apply the *Germaine-Hartwell* four-factor framework in *Auffordmordt v. Hedden*, where the Court construed the meaning of "officer" as used in the Constitution's Appointments Clause.[18]

The Court returned to this issue in *Buckley v. Valeo* (1976), two years after *Nixon*.[19] *Buckley* did not entirely abandon the *Germaine-Hartwell* four-factor test, but the Court took a different approach to the "officer" issue. The *Buckley* Court distinguished "employees" of the United States from "officers of the United States." The former "are lesser functionaries subordinate to officers of the United States."[20] By contrast, in regard to Article II "officers of the United States," the Court explained: "We think . . . any appointee exercising *significant authority* pursuant to the laws of the United States is an 'Officer of the United States,' and *must*, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article."[21] *Must*, not *may*. And more recently, in *Lucia v. SEC* (2018), the Court adopted *Buckley*'s "significant authority" test,[22] and further held that in order for a position to be an "officer of the United States that . . . individual *must* occupy a 'continuing'

[14] 73 U.S. 385, 387 (1867).
[15] *Id* at 390.
[16] *Id*. at 393.
[17] 99 U.S. 508 (1879).
[18] 137 U.S. 310 (1890).
[19] 424 U.S. 1, 126 (1976); *see supra* note 3 (citing *United States v. Nixon*).
[20] *Id.* at 126 n.162
[21] *Id*. at 126 (emphases added).
[22] 585 U.S. 237, 245 (2018).

position established by law."[23] Again, *must*, not *may*.[24] The position held by Special Counsel Smith does not meet this standard.

What makes a position "continuous"? In *Morrison v. Olson* (1988), Chief Justice Rehnquist identified three factors:

> Finally, appellant's office is limited in tenure. There is concededly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is "temporary" in the sense that an independent counsel is [1] appointed essentially to accomplish a single task, and [2] when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, [3] appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake.[25]

Smith does not hold a "continuing position."[26] First, Attorney General Garland's order appointing Smith listed a finite set of circumstances to investigate. Indeed, if Smith wanted to conduct an investigation beyond the items enumerated in the order, he would need to seek further authorization from the Attorney General.

Second, once Smith completes his investigation and prosecution of those finite set of circumstances, his position ceases to exist. By contrast, a continuing position is a position which exists independent of the current holder, and even exists if the position is vacant. As we explain in our brief, the position of Independent Counsel under the former Ethics in Government Act (1978) met this standard due to the statutory regime that created a permanent umbrella structure. That continuing position expressly provided for a successor if the current holder had been removed, died, or resigned. By contrast, Smith's position is entirely tied to his person, and his continuing in that position. Smith's position or "office" is entirely tied to Smith. If Smith were removed, died, or resigned, then the position he holds would cease to exist.

Third, Smith has no ongoing responsibilities after the finite set of circumstances in the appointing order are resolved. Were President Biden to issue a complete pardon to Donald Trump and his co-defendants tomorrow, Smith would have nothing to do.

At oral argument, Jack Smith's counsel was pressed on the issue of continuity. He stated:

> [James] Pearce [on behalf of the Special Counsel]: Then the question becomes one of continuity. And the way the courts have talked about this, from *Germaine* and *Hartwell* on, are questions of: Is this something that is episodic, intermittent, occasional? So, sort of, a doctor that's seeing patients on an occasional basis . . . .[27]

We think Jack Smith's counsel has erred here by conflating a *continuous* position and *episodic* duties. In *Morrison*, Chief Justice Rehnquist expressly distinguished these categories. Above, we quoted a Rehnquist passage concerning the need for a *position* to be continuous. In the immediately preceding paragraph, Rehnquist offered a different analysis to explain why the

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[23] *Id.* at 245 (emphasis added).

[24] *See also Id.* at 269 (Sotomayor, J., dissenting) (characterizing Buckley's "significant authority" test and the *Lucia* majority's continuing position test as "two *prerequisites* to officer status" (emphasis added)).

[25] Morrison v. Olson, 487 U.S. 654, 672 (1988).

[26] *Lucia*, 585 U.S. at 245 (quotation marks omitted).

[27] Tr. of Oral Argument, 155:13–20 (June 21, 2024).

duties must be regular, rather than episodic. In other words, as under the *Germaine-Hartwell* framework, the *duration or continuity of an office* as opposed to the *regularity of the duties of the office* are distinct factors or categories. As Rehnquist stated:

> Second, appellant is empowered by the Act to perform only *certain, limited duties*. An independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. Admittedly, the Act delegates to appellant "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," § 594(a), but this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office. The Act specifically provides that, in policy matters, appellant is to comply to the extent possible with the policies of the Department. § 594(f).[28]

To be an "officer of the United States," the position held must have a *continuous* duration and regular *duties*. For example, *Germaine* and *Hartwell* used words like "intermittent" and "occasional" to refer to the nature of the position's "duties."[29] Where the duties are episodic as opposed to regular, constant, and ongoing, that would indicate that the position is not an "officer" position, and is instead an employee, contractor, or agent. In *Lucia*, the Court held that the *position* (as opposed to its *duties*) must be "continuing."[30] Again, the *Hartwell-Germaine* test was a four-factor test, the position's duration or continuity was one factor, and the position's duties were a different, separate factor. The fact that the duties can be described as ongoing, as opposed to episodic, does not mean that the position *itself* is continuous, and will continue from its current holder to future successors.

Jack Smith's position is not a continuing one. It fails the tests mandated by *Buckley*, *Morrison*, and *Lucia*. Smith does not hold an "officer of the United States" position. And as such, he cannot prosecute Trump—or anyone else for that matter.

III. HAS CONGRESS APPROPRIATED MONEY TO PAY THE SPECIAL COUNSEL AND HIS STAFF AND CONTRACTORS?

According to the Special Counsel, Congress has appropriated monies to pay the Special Counsel and his staff. The Special Counsel relies upon a note to 28 U.S.C. § 591. The note states: "A permanent indefinite appropriation is established within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsel appointed pursuant to the provisions of 28 U.S.C. [§] 591 et seq. or other law."

The Special Counsel's reliance on this funding mechanism is problematic for several reasons. First, the note is not a numbered section of the United States Code. (The precise status of a "statutory note" is a complicated matter.) The Special Counsel argues that the note is part of the United States Code even if not a numbered provision. Second, Section 591 was part of the regime under the Ethics in Government Act (1978). Congress failed to reauthorize that act, and, as such,

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[28] *Morrison*, 487 U.S. at 671–72 (emphasis added).

[29] United States v. Germaine, 99 U.S. 508, 512 (1879); United States v. Hartwell, 73 U.S. 385, 393 (1867); *see also* In re *Grand Jury Investigation*, 315 F. Supp. 3d 602, 644 (D.D.C. 2018) (explaining that the special counsel's work or duties are "not occasional, intermittent, or episodic" because the duties remain "ongoing and regular until complete").

[30] *Lucia*, 585 U.S. at 237.

Section 591 expired. The Special Counsel argues that that the funding provision in the note survives Congress's failure to reauthorize the statute with which it was codified. But it is not entirely clear how a "note" to Section 591 survives after Section 591 is no longer in effect. And third, the note is a funding mechanism for "independent counsels"—a position established by the prior independent counsel regime. The text of the note does not expressly reach today's "special counsels," which is how the Reno-era regulations refer to the position at issue in *United States v. Trump*. For the reasons we explain below, the positions of "independent counsel" and "special counsel" are not analogous.

The traditional purpose of Independent Counsels (under the 1978 act) and Special Prosecutors (as in *Nixon*) was to prevent a particular conflict of interest: where the DOJ would investigate *itself*, the President, as well as the President's family and close confidants. There would be a conflict in such cases because the DOJ is ultimately responsible to the President. In other words, prosecutors outside the usual chain of responsibility, and who enjoyed unusual independence, were needed so that DOJ could avoid internal conflicts—the conflicts that arise where the prosecutor investigates itself and/or those to whom the prosecutor is responsible. For example, Attorney General Garland's decision to appoint a special counsel to investigate President Biden's document case, as well as Hunter Biden's criminal case, fits into this paradigm. Special Counsel Jack Smith explained this approach in his opposition brief:

> [T]he GAO, "an independent agency within the legislative branch" that serves Congress, *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983), stated that it "agree[d] with the Department that the same statutory authorities that authorize the Attorney General (or Acting Attorney General) to delegate authority to a U.S. Attorney to investigate and prosecute high ranking government officials are 'other law' for the purposes of authorizing the Department to finance the investigation and prosecution from the permanent indefinite appropriation."[31]

Smith's brief also relied on *United States v. Stone* (2019).[32] *Stone* relied upon the same GAO report discussed above, and the *Stone* court explained: "The [Ethics in Government Act] authorized the Attorney General to refer criminal matters involving certain *high-level government* officials, including the President, to a three-judge court, which would be responsible for the appointment of an independent investigating attorney."[33]

Special Counsel Smith has not been asked to investigate the DOJ, the President, the President's family or his close confidants. Special Counsel Smith indicted Trump *after* he was out of office for more than a year. At that time, he was not President—he was a former President. In other words, he was a private citizen. Indeed, not only was he charged *after* he was no longer President, but the charges in the Florida indictment relate exclusively to conduct that took place *after* he was President. As Smith explained in his own brief, the scope of "independent counsel"

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[31] Smith Brief at 20 (Mar. 7, 2024), ECF No. 374 (citing GAO, *Special Counsel and Permanent Indefinite Appropriation*, B-302582, 2004 WL 2213560, at *4 (Comp. Gen. Sept. 30, 2004)) (underscore added).

[32] 394 F. Supp. 3d 1 (D.D.C. 2019).

[33] *Id.* at 17 (emphasis added); *see also* Tr. of Oral Argument, 60 (June 21, 2024) (Pearce on behalf of the Special Counsel: "It is inherent in the effort to, on the one hand, ensure that—whether we call it an independent counsel or a Special Counsel—has adequate independence when a situation presents itself that requires the avoidance of conflict or somebody who can operate outside of the typical Justice Department, sort of, operations *because it's investigating the Justice Department itself or it's investigating some sort of high-ranking or high-level political official*." (emphasis added)).

in Section 591's note does not permit the Attorney General to fund *any* prosecution at his discretion via independent counsels, but only those "independent counsels" where the DOJ would face an internal conflict associated with the DOJ investigating a "high ranking government official."

Given that Trump was not a "high ranking," "high-level," or any type of government official at the time he was indicted, and that the alleged conduct also took place after he was out of office, the DOJ faces no internal conflict. In these circumstances, the funding mechanism in Section 591's note cannot be used to pay Smith, his employees, and his contractors. And if this argument is correct, all work by the Special Counsel's office must cease—except, perhaps, that associated with making filings for reconsideration and appeal. We take no position here as to whether Smith's continued work, particularly if Judge Cannon should rule against him, would trigger criminal or civil liability under the Anti-Deficiency Act, federal or state RICO, or other state offenses. Moreover, if Judge Cannon rules that Smith is not in fact a duly-appointed officer under federal law, should he be sued in state court, then any attempt to invoke the federal officer removal statute would be frustrated by Judge Cannon's extant ruling. Indeed, such a removal action may automatically be referred to Judge Cannon's courtroom as a related matter.

When pressed on this point, the Special Counsel stated that *if* the District Court should determine that the funding mechanism in Section 591's note is not available to fund Jack Smith and his office, the DOJ is sure that other statutes provide a lawful means to fund the Special Counsel. However, counsel for the Special Counsel made reference to no specific federal statute that could lawfully fund Jack Smith and his office. To us, this sort of abstract "defense," absent specificity, seemed highly irregular.[34]

CONCLUSION

United States v. Trump poses more than a few threshold legal questions. We do not suggest that all the answers to those questions line up neatly in former President Trump's favor. But we do say that those lines of argument supporting a dismissal of the indictment are substantially more than frivolous; indeed, we believe that several of those arguments have considerable merit. These issues are of the variety regularly seen by federal courts—they are the sort of issues and arguments that reasonable minds may disagree. And unless we are mistaken, that is also, now, the position of the Special Counsel.[35]

[34] Tr. of Oral Argument, 44 (June 21, 2024) (Pearce on behalf of Special Counsel: "[T]o the extent that the Court is seriously entertaining the notion that there is a constitutional or funding problem, I actually think it would behoove the Court and the parties to have some additional briefing.").

[35] Tr. of Oral Argument, 46:7–8 (June 24, 2024) ("To be candid with the Court, we find [Tillman's position] to be not a frivolous [one], but a . . . .").