



Can the Attorney General Appoint a Special Counsel?

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[00:00:00.3] Jeffrey Rosen: In July, Judge Aileen Cannon dismissed a criminal case charging former President Trump with hoarding classified documents at his home in Mar-a-Lago, Judge Cannon held that the prosecutor in the case, special counsel Jack Smith, was not properly appointed by the Justice Department.

[00:00:20.5] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode of We the People, we'll explore the merits of Judge Cannon's decision as well as the constitutional and statutory basis for the special counsel. Joining me to discuss this question are two of America's leading constitutional scholars, both of whom argued before Judge Cannon on this central question, and it is such an honor to convene them today. Matthew Seligman of Stanford Law School and Josh Blackman of the South Texas College of Law Houston. Matthew Seligman is a non-resident fellow at Stanford Law School. He was previously a Climenko Fellow and lecturer on law at Harvard Law School, a fellow at the Center for Private Law at Yale Law School, and a visiting assistant professor at the Benjamin N. Cardozo School of Law. Matthew filed a brief in Judge Cannon's Court. Matthew, it is wonderful to welcome you to We The People.

[00:01:28.9] Matthew Seligman: Thanks so much. It's wonderful to be here.

[00:01:31.1] Jeffrey Rosen: And Josh Blackman is the Centennial Chair of Constitutional Law at the South Texas College of Law Houston. Josh is also an adjunct scholar at the Cato Institute and has written three books. His latest and introduction to constitutional law was a top five bestseller on Amazon. Josh also filed a brief in the case. Josh, it is wonderful to welcome you back to we the People.

[00:01:35.3] Josh Blackman: Thanks for having me back Jeff.

[00:01:44.4] Jeffrey Rosen: Let's begin with Judge Cannon's opinion, questioning the constitutional basis of the special prosecutor. Matthew, what did Judge Cannon hold and what was her reasoning?

[00:01:45.3] Matthew Seligman: Judge Cannon, who held that, the special counsel, who is an inferior officer under the Constitution, and I'll explain what that distinction means was not lawfully appointed by the Attorney General Merrick Garland. The relevant constitutional provision is the appointments clause of the Constitution and cases over the decades have created a tripartite distinction between principal officers, inferior officers, and then mere employees. And that covers the field of everyone who works for the federal government. The distinction between principal and inferior officers is critically important to Judge Cannon's decision. The constitution requires that principal officers be appointed by the President with the advice and consent of the Senate. Now, for inferior officers who have some lesser degree of authority, The Constitution gives an option.

[00:03:00.5] Matthew Seligman: By default they still have to be appointed by the President with the advice and consent of the Senate. But if Congress passes a law, it can vest that appointment power in the head of the department, like for example, the Attorney General. Now since, the Special counsel is an inferior officer, at least that's what Judge Cannon held, and there's precedent from the Supreme Court that indicates as much. The question then is whether Congress has passed a law that says that the Attorney General can appoint the special counsel as an inferior officer because if it hasn't, then still the default option is that the president has to appoint the special counsel with the advice and consent of the Senate. So this is a constitutional question that ultimately comes down to a statutory question. What laws has Congress passed? And do those laws give the Attorney General Merrick Garland the authority to appoint the special counsel?

[00:03:52.7] Jeffrey Rosen: Thank you very much for that introduction. Josh, what would you add to the question of what Judge Cannon held in striking down the special prosecutor?

[00:04:03.0] Josh Blackman: So what's interesting here is that the Judge didn't actually make a ruling on the appointments clause of the Constitution, which Matt mentioned a moment ago. Was Jack Smith a principal officer or an inferior officer? You can't just assume, for argument's sake, I'll assume he is inferior, but I don't think she believed that. But we'll just assume that for the moment. Trump's lawyers argued that in fact, Smith was a principal officer who'd have to go through the Senate confirmation process, but the Judge didn't rule that. There was another issue involving the appropriations clause. That is, did Congress in fact appropriate money for Jack Smith's position? Now there's a statute, the statute was basically passed in the late 1980s saying that there's basically a permanent pot of money for the independent counsel.

[00:04:03.4] Josh Blackman: And Trump's lawyer said, aha, that applies to the old independent counsel that existed before the 1990s doesn't apply to sort of this new federal counsel that Jack Smith is operating under. Cannon hinted and suggested that there too is a problem that there's no funding for Smith. But she didn't rule that way. Her opinion as sort of long as it was, it was a long decision actually focused on a fairly narrow issue. Was there an office to which Jack Smith was appointed? In other words, did Congress create a position for Jack Smith and Trump's lawyers and several of the amicus briefs argue that No, they did not. And then because Smith doesn't have his office, he is in fact a private citizen, he's no different than you, me or Matt. And I think Jeff, if you tried to indict someone, a Judge would laugh at you and say, go away, Mr. Rosen. And that's basically what Judge Cannon said to Jack Smith, you are a private citizen, you

hold no government office. You can't indict the president. Come back with a real US attorney and then we'll talk.

[00:05:48.4] Jeffrey Rosen: Thank you so much for that. So on Monday, Jack Smith filed an appeal in the 11th Circuit arguing that there's a clear statutory basis for his appointment as special counsel in 28 USC 533. That's a number that came up frequently and also in other provisions of the US code, he said that the Supreme Court has already decided this question in Nixon versus US and said there's a long tradition of special counsels being appointed under these statutes. Matthew, can you describe the basis for Jack Smith's appeal?

[00:06:18.5] Matthew Seligman: The Special Counsel's appeal is grounded essentially in two sources of authority. The first is the Supreme Court's decision in United States v. Nixon, and the second is the statutes themselves. So first United States v. Nixon was a case about Richard Nixon and the special prosecutor that was appointed to investigate the Watergate break-in. And when the Special counsel subpoenaed documents from the White House, President Nixon resisted that. He said that there were separation of powers issues between, well, you know, the special prosecutor works for me because I'm the president and so how can he subpoena me? And so that's how the issue was framed in United States v. Nixon. In the course of that decision, the Supreme Court said that the special prosecutor had been appointed pursuant to a set of statutes. Those statutes are sections 509 and 510, section 515 and section 533, and these are exactly the same statutory provisions that the special counsel relies on now. There is no real difference between the "special prosecutor" in the Watergate investigation and the special counsel now. So the special counsel argues this issue has already been decided.

[00:07:41.0] Matthew Seligman: The Supreme Court already said that a special prosecutor/special counsel can be appointed by the attorney general. The special prosecutor in the Watergate investigation had been appointed by the attorney general. And both the special prosecutor and the special counsel now are inferior officers and the statutory authority is exactly the same. So the Supreme Court already decided this issue. So the lower courts, Judge Cannon and now the 11th Circuit are bound by that decision. There are arguments about whether that statement in the United States v. Nixon is dicta-binding, holding, or dicta, and I'm sure we'll talk about that, but that's the argument that the special counsel gives. And then moving on from precedence, the special counsel argues that, well, and the Supreme Court was right when it said there is the statutory authority. So let's look at the statutes. Now the two principal statutes that the special counsel and the Department of Justice for decades have relied on are Section 515 and Section 533.

[00:08:47.8] Matthew Seligman: Section 515 is an old statute. It goes back to the 1870s when the Department of Justice was first created, and it gives the attorney general to take certain actions with respect to any attorney specially appointed by the attorney general under law. The text of the statute is a little bit complicated, but the special counsel argues that this statute does and always has for 155 years now given the attorney general the authority to appoint these specially appointed attorneys. Section 533 I think is textually about as clear as you can get. It says, "the attorney general may appoint officials to detect and prosecute crimes against the United States." And so the argument here is that the text of that statute, Section 533, gives the attorney general the power to appoint officials, including the special counsel, to prosecute crimes

against the United States. And according to the special counsel, that satisfies the requirements in the appointments clause that the attorney general be vested with the power to appoint the special counsel.

[00:10:00.3] Jeffrey Rosen: Josh, anything to add about Jack Smith's arguments as Matthew so clearly summarizes it? First, that United States v. Nixon covers the question, and second, that these two statutes, 515 and 533, clearly authorize the appointment of the special counsel. And then if you like, you can start to respond to whether or not you think that Nixon and the statutes cover the case.

[00:10:24.9] Josh Blackman: Sure. So I think everything goes back to Nixon and Watergate always seems to do that in the modern era. What's unique about the Watergate situation is the nature of this position. Believe it or not, it was actually Robert Bork. Yes, Robert Bork, who didn't get in the Supreme Court, who was acting attorney general at the time. And then he appointed a special counsel to look into the Watergate issue. And what's sort of unique about that position is what kind of power he gave it. If you read the order, Robert Bork gave the broadest possible powers imaginable. In fact, Bork said the only way that this special counsel would be fired is if several members of Congress concur in the termination. What? Yes, the AG gave the removal power over to Congress. But we know from a later case called Bowsher v. Synar that you can't do that, right? That Congress has no power in moving executive branch officials outside the impeachment context. And that's sort of important.

[00:11:27.8] Josh Blackman: If you read the Nixon decision, there's a word that appears over and over again, unique. Unique, unique, unique. It says, this is limited to these unique circumstances. And Jeff knows very well what a ticket for one ride is. Think of Bush v. Gore. Very often, the Supreme Court tells the US, this decision is limited to these facts. And we're telling you this. And the court says, unique, unique, unique. So what we have here is a rule in Nixon. Whether it's holding or dicta, I actually don't really care very much. Let's assume it's a holding. It's a holding limited to a very unique set of facts, which were later abrogated by cases like Bowsher. So whatever Nixon held, I think it says nothing at all about this different regime under a different set of appointment closures. I think it just says nothing at all. Judge Cannon went along with the dicta holding argument.

[00:12:10.3] Josh Blackman: I don't think that will get much sway above. But I think the argument that Seth Barrett Tillman and I put forward in our brief may be appealing to the 11th Circuit. On the statutory issue, we didn't actually make this argument, but I'll do my best to describe it. This was advanced primarily by a brief on behalf of Attorney General Meese, and Steve Calabresi, and Attorney General Mukasey, and Gary Lawson, and a few other scholars. They make a few points. I don't want to bore people with yucky statutes, this is a Constitution podcast. But one of the points is that one of the statutes that Matt mentioned is actually in a section concerning the FBI, and that this is not really an FBI provision. The word prosecute might think, oh, that means indict someone.

[00:12:53.6] Josh Blackman: Well, that actually has a meaning to actually investigate and actually to, Go through the nature of a crime. But I actually don't think those fine points matter much. What's significant here is that Jack Smith was appointed from outside the government.

And if you go through a number of the various special counsels over the years, there are people who were within the government who were just given additional powers. And I think that, for example, if the sitting United States Attorney for the Southern District of Florida was made a special counsel, this argument sort of goes away. What's unique about Jack Smith, and also, I guess, Robert Mueller some years ago, was he had a person outside government, but no pre-existing office. And what they're saying is you can't use the statute to give the significant power of an officer to these outside people. So even if there's some statute authorizing some prosecutor, it can't be the power that Jack Smith himself exercises, which is a vast power. He indicted Trump, and it's not even clear that Merrick Garland signed off on the indictment. He sort of hedged on that question during the argument. So all this stuff, particularly the statutes, are most secondary to what sort of power is being assigned to him.

[00:14:01.0] Jeffrey Rosen: Matthew, how sweeping is Judge Cannon's argument? Does it call into question only special counsels appointed outside the government, as Josh describes it, like Jack Smith and Robert Mueller? Or would it call into question the Nixon special prosecutor? And to what degree is this supported by precedent or not?

[00:14:21.9] Matthew Seligman: The decision is sweeping in some respects, but it is limited in the way that Josh indicated. And the reason why is because there isn't a serious dispute that the attorney general has the authority to take an already existing employee or other officer official in the Department of Justice and make them into a special counsel. And so the decision is limited in the sense that it applies only to these circumstances where a special counsel is hired directly from outside the government. Now, as Josh indicated, that's happened before.

[00:14:55.1] Matthew Seligman: So special counsel Robert Mueller and also special counsel Robert Hur, who investigated the Hunter Biden various cases, was also appointed directly from out of government. Now, that distinction between being appointed from out of government and being appointed in government is one that is critically important for the statutory interpretation. It's also a bit of a formality, because what this decision means is that if it's correct, that Jack Smith could not have been directly appointed as special counsel. However, there is no dispute that the attorney general has the authority to hire Jack Smith as a regular employee, and then one second later, appoint him as the special counsel. And so this really does come down to a matter of extremely thinly sliced technicalities. So the decision is limited in those respects.

[00:15:50.7] Matthew Seligman: Now, it's also true that it extends far beyond the special counsel. The reason is because the special counsel is not the only inferior officer in the Department of Justice. The arguments that Judge Cannon adopted in this decision apply to all inferior officers within the Department of Justice. We don't know exactly which officials in the Department of Justice count as inferior officers, because it's never been litigated. But I think it's fair to say that the list includes, at the very least, the principal deputy solicitor general, the deputy assistant attorney generals across all of the different component divisions. So the deputy assistant attorney general of the criminal division, the deputy assistant attorney general of the civil division, the deputy attorney general of the antitrust division, and on and on.

[00:16:39.8] Matthew Seligman: Now, the example of the principal deputy solicitor general is one that I find particularly striking, because the principal deputy solicitor general argues before

the Supreme Court maybe a half dozen times a year, and is frequently the acting solicitor general, because the solicitor general has to be confirmed by the Senate, which means, at least according to Judge Cannon's decision, that the United States has been represented before the Supreme Court by an unconstitutionally appointed official for decades and decades, and not a single justice of the Supreme Court noticed. I find that to be particularly striking, and it's also an indication of the potential sweep of Judge Cannon's decision.

[00:17:24.8] Jeffrey Rosen: Josh, do you agree or not about that potential sweep? How broadly do you think the reasoning sweeps? And tell us whether it has been adopted by any other Supreme Court justice beyond Justice Clarence Thomas in his concurring opinion in *US v. Trump*.

[00:17:44.6] Josh Blackman: I think Matt makes a fair point about what are called the DAGs, the deputy assistant attorney generals, and the deputy solicitor general. This is a problem, I think, for the theory advanced by the *Mies amici*. It's actually not a problem for the Blackman Tillman position, because we actually don't think it makes much of a difference whether this position is principled or inferior. We don't actually focus on that. In our view, what matters is whether you're an officer, and there's a line of cases going back to the 19th century describing certain facets of what an officer is, and one of them has that continuity and duration. It doesn't mean you're in it for a long or short period of time. It means when your task finishes, when the purpose of your appointment finishes, does the office continue? And if the answer is yes, it's a pretty good sign that this is an office. So the position of a DAG or deputy SG, in our view, is an office. And so I think he can exercise his powers without any problems. The problem for Jack Smith, though, is that we don't think he has an office at all. And this is one place where there might be some distance between the US and the defendant. The reason why is, Jack Smith is appointed for a particular purpose.

[00:18:51.2] Josh Blackman: You can read a letter, he's to investigate certain things that arose out of J6 and maybe related matters, and when those are done, his position just dissolves and vanishes in a poof. The Judge, I think, focuses on the fact that this went on for a couple years, which is certainly true, it's been dragging on forever, but that's not, I think, the relevant test. Does this position have duration? Does it have some way of continuing beyond the present order? In our view, no, it doesn't. It's over once. If Trump were to be pardoned tomorrow by President Biden, not going to happen right? If President Biden pardoned Trump tomorrow, Jack Smith wouldn't have a job. Maybe some other people can indict, but he's done. So in our view, he's not an officer at all. And that doesn't pose any problems with the DAG and deputy SG example that Matt mentioned a moment ago.

[00:19:40.1] Jeffrey Rosen: Matthew, tell US about Justice Thomas's concurring opinion and *US v. Trump*. He says, I am not sure that any office for the special counsel has been established by laws the Constitution requires. He doesn't definitively tell what he thinks about the question. But does Justice Thomas's reasoning sweep more or less broadly than Judge Cannon? And has any other justice on the US Supreme Court adopted Justice Thomas's position?

[00:20:06.4] Matthew Seligman: The concurring decision by Justice Thomas that you reference was in the immunity decision that was decided on July 1st in the January 6 case. And then the

decision by Judge Cannon was in the Mar-a-Lago classified documents case. But that's not the only case against former President Trump that is being prosecuted by special counsel Jack Smith. There's also the January 6 case. And as Josh mentioned, the appointment letter of Jack Smith says that he has these two different portfolios, the classified documents situation and President Trump's involvement in the January 6th events. So the Supreme Court held that a former president, including former President Trump, is immune from some set of his official acts while taking office. Absolutely immune for those acts that were taken within certain core executive functions of the president. And then presumptively immune for all official acts. And so this was an issue that the district court in DC had denied this immunity. The DC circuit also denied this immunity.

[00:21:12.0] Matthew Seligman: It went up to the Supreme Court. The Supreme Court says, actually, there is this immunity and sent the case back down to determine whether the conduct alleged in the indictment in DC falls within the scope of that new immunity that the Supreme Court established. Now, in the course of that decision, Justice Thomas issued a concurring opinion that addressed this issue, which was not briefed in the DC case at all, but is potentially an issue in both the DC case and as we know, the Mar-a-Lago case, which is Jack Smith was the prosecuting attorney for the DC January 6 case. And so he was sitting at counsel's table in the Supreme Court for the immunity decision. And so the question might arise, okay, so does the DC case completely go away in the way that Judge Cannon says the classified documents case? So now this issue was not raised in the DC case on this appeal. The reason is because it hasn't come up yet in the DC case. But nonetheless, Justice Thomas asked the question about this at oral arguments.

[00:22:20.6] Justice Thomas: " Did you in this litigation challenge the appointment of special counsel?"

[00:22:23.4] Matthew Seligman: And then he said in this concurring opinion, you know he didn't say necessarily for sure that the special counsel is not lawfully appointed. But I think he signaled pretty strongly that he would probably hold that if the issue comes to the Supreme Court, which I think eventually it probably will. Now, the question, the key question, though, is whether any other Justice agrees with Justice Thomas. We don't know for certain. No other justice signed on to agree with Justice Thomas's concurrence. No other justice on the Supreme Court in the immunity decision said anything at all about this Appointments Clause issue. That doesn't necessarily mean that they don't agree, but it is a bit of a signal. It's also, I think, fair to say that the Appointments Clause position adopted by Judge Cannon has been a minority position.

[00:23:12.7] Matthew Seligman: How much of a minority position? I think you can probably debate, but it's certainly not been the mainstream position. So I think it's unlikely that a majority of the Supreme Court would ever agree with Judge Cannon's decision. Josh may disagree about that. But, whether it's one or two or three justices that ended up agreeing that the special counsel is unlawfully appointed, I can't really say. It's possible, but we Supreme Court litigators say that there's really only one rule at the Supreme Court that matters, and that's the rule of five. And can you get five justices to agree with your position? I think that's gonna be a really steep hill for the opponents of the special counsel's appointment to climb.

[00:23:55.3] Jeffrey Rosen: Josh, do you agree or disagree that this is a minority position on the Supreme Court, Justice Thomas? And we don't know how many more justices. And then, address this question. Is it the job of lower court judges to predict the law and to embrace positions that have not been embraced by a majority of the Supreme Court or not?

[00:24:15.8] Josh Blackman: So it's often said that the DC Circuit is the second highest court in the land, and perhaps that's true. But they've also developed their own body of case law over the decades. And I think there are a number of decisions from the 1980s and 1990s where the court basically looked at *United States v. Nixon* and presumed that this decision authorized this idea of these outside people being appointed to these special counsel positions. And as an original matter, I think those cases are probably wrong, for the reasons I mentioned. I think they misread *Nixon*. But those precedents built up over the years. So it's unsurprising when all the district courts in DC reach the same conclusion. They were found by the same DC Circuit precedent. We're now in Florida. We are next to the Atlantic and North Potomac.

[00:24:57.9] Josh Blackman: And I think there's a different set of precedent that applies. I think Judge Cannon's decision, I don't agree with it in all regards, but I think it at least advances a plausible reading of *Nixon*. I think there are other readings you can adopt as well. And then once you get over the hump of what *Nixon* controls, I think there's some very difficult statutory questions. And again, lurking in the background is a case we haven't mentioned yet, maybe in passing, is *Morrison* against *Olson*. This was this landmark case, a seven to one decision by the court, holding the independent counsel statute. Justice Scalia wrote, I think one of his most important dissents ever, where he said, this wolf comes with a wolf. This is unconstitutional. I'd wager there are five votes over *Morrison*, maybe six votes. I don't know. So when you're asking how many votes did Justice Thomas get, perhaps as a stopgap of overruling *Morrison*, they go with this sort of narrow statutory question. And the court always likes to say, "Oh, we're not gonna do constitutional. We're doing narrow statutory." This is a major question. I don't know. Make something up, right? So who can predict? But the question, of course, is the election. We don't talk about elections, but we do in this context.

[00:26:03.7] Josh Blackman: If Trump wins, the AG fires Jack Smith on day one. The prosecution vanishes. Maybe Trump pardons himself. I don't know. And we don't have to decide this. If Trump loses, then Jack Smith goes full steam ahead with the trial. In fact, Smith might have a trial in December fully now. He could have it this year if Judge Chutkan moves fast enough. Then this case will go to the Supreme Court, and at that point, Trump is no longer a vital political candidate. And maybe the court said, all right, whatever, right? If we rule in favor of Trump, what's going to happen? We'll be like *Bowsher* before. So, I don't know. I'm very bad at predictions, usually wrong. But lots of stuff can happen in this case.

[00:26:46.4] Jeffrey Rosen: Matthew, do you agree or not that there might be five votes to overrule *Morrison v. Olson*? And then return to this question of how radical this decision is. How broadly would it sweep if the US Supreme Court were to affirm Judge Cannon and Justice Thomas and agree that Jack Smith is unconstitutional? How many other special prosecutors would be called into question?

[00:27:17.3] Matthew Seligman: I agree with Josh that Justice Scalia's dissenting opinion in Morrison has certainly convinced a lot of people. I think there's a pretty decent chance that there's five votes on the Supreme Court to overrule Morrison v. Olson. I think that fact also illustrates some parameters about how we should think about lower courts applying Supreme Court precedent. So, the two parameters that I'm thinking of are, one, the Supreme Court has said on numerous occasions that it reserves for itself the sole authority to overrule its own precedents. And that lower courts should follow Supreme Court precedent unless and until the Supreme Court itself overrules that precedent. And you can understand why that principle is really important for an orderly judiciary.

[00:28:06.5] Matthew Seligman: So, what the lower federal courts are not supposed to do is say, well, I think times have changed. There have been some really persuasive law review articles that I think might convince a majority of the courts. So, I'm not going to follow this in the books of precedent because I'm predicting that the current Supreme Court would rule differently. That's not the way, according to the Supreme Court, it's not the way that lower courts are supposed to treat Supreme Court precedent. So, that's one parameter. The other parameter is that, sometimes there's some fuzziness about whether a case has been overruled or not, whether its underlying rationale has been undermined, et cetera.

[00:28:45.4] Matthew Seligman: And so, there are situations where lower courts are put in the challenging position of trying to figure out, okay, so how much am I bound by this prior case? Has the Supreme Court really abrogated it in some way? But when lower courts, and this is the second parameter, when lower courts are evaluating that question, they have to be really careful about making sure that they look carefully at what that prior case actually held if they're going to say that it's been implicitly overruled. And Morrison v. Olson is a perfect example of this. Morrison v. Olson was a case that upheld the independent counsel in which there was a statute that passed by Congress that limited the president's ability to appoint and then remove that special prosecutor.

[00:29:32.7] Matthew Seligman: And so, the issue that was raised in Morrison v. Olson was about the interaction between Congress and the president. That issue is not posed by the special counsel now. And the reason is because the special counsel's protections against being fired can only be fired by cause. It's not a congressional statute at all. The attorney general has promulgated some regulation that says, as a matter of policy, that I'm not going to fire the special counsel unless there are these circumstances, dereliction of duty, things like that. Congress doesn't have any role in setting those protections.

[00:30:08.5] Matthew Seligman: And so, the constitutional question that was raised by Morrison v. Olson is completely absent in the special counsel here, which means that even if we say Justice Scalia wrote this opinion, which we think now is really the law because implicitly it's been adopted in these other Supreme Court cases, even if we think that's true, that wouldn't support Judge Cannon's decision at all. And so, I think the lower courts and we as lawyers and constitutional observers need to be very careful about making sure that we are extremely parsimonious about understanding how prior Supreme Court precedents, if they've been overruled, how that then expands out into the way that it might affect other issues like the one here.

[00:31:02.3] Jeffrey Rosen: Josh, what is your response to Matt's two points? First, he says lower courts are supposed to apply existing precedents and not predict how the Supreme Court might rule. And then he says when applying contested precedents, they should be careful not to discard them ahead of schedule. And in any event, Morrison doesn't cover this case. What are your thoughts?

[00:31:16.9] Josh Blackman: Well, I have chutzpah, Jeff. So, I went up in open court. Matt's smiling. You can't see this in the podcast, but he's smiling. So, I actually went up in open court. We argued and I said that I would like to preserve the issue for Morrison to be overruled. I think it should be overruled. I think it's been incorrectly decided. I know, of course, a trial court can't do this, but it's useful for a trial court to at least note that this precedent had issue, that way the parties have due notice. And, in fact, in a footnote, Judge Cannon cited me making that request. Of course, the district court can't overrule Morrison. The 11th Circuit can't overrule Morrison. Maybe the Supreme Court will.

[00:31:48.3] Josh Blackman: But I think Judge Cannon actually avoided the question whether Morrison should be overruled. She didn't even touch the issue of whether Smith was principal or inferior. She sort of assumed he was. I think that was sort of tactful on her part. But I do think that judges can sort of read the writing on the wall. I'll just give you an example. After the United States against Windsor, the court struck down the Defense of Marriage Act. And the majority opinion said, we are not saying anything about same-sex marriage. Just can you trust us? We're not talking about that.

[00:32:20.5] Josh Blackman: No one believed them at the time. But within like five seconds, all these district courts started saying, Aha Baker v. Nelson. This was a precedent that said there's no right to gay marriage, kind of, more or less. They said, we're just going to treat it as being abrogated. And all these district courts went wild. One after another said, no, gay marriage, gay marriage, gay marriage. So courts do this all the time. I don't think it's unusual to sort of read the writing on the wall. I think Judge Cannon was actually more careful than a lot of these other judges have been. But as this case goes upstairs, this will come up. Look, even if Trump loses the election. We will have an opportunity to attest this issue not in the Trump context. Robert Mueller never actually indicted Trump, so we never got to test that one, but someone will be prosecuted. I think this case will get to the Supreme Court sooner or later.

[00:33:09.3] Jeffrey Rosen: Matthew, as Josh mentioned, you both argued before Judge Cannon on this issue, and you also filed a powerful brief making a series of arguments for why Special Counsel Smith was appropriately appointed. Can you share the other arguments that you made in your brief and before Judge Cannon?

[00:33:31.4] Matthew Seligman: So there were several issues that came up that were implicated in this broader issue of the lawfulness of Special Counsel Smith's appointment. The first, which Josh has alluded to several times, is what is the proper categorization of the special counsel? Is the special counsel a principal officer? Is the special counsel an inferior officer? Or is the special counsel, as the cases call it, a mere employee? Because the legal procedures that are required for the appointment of these different levels of officials vary. And so all three positions were

asserted in the case. So as Josh mentioned before, Attorney General Meese and his co-amici argued that the special counsel is a principal officer. Why? According to Attorney General Meese, well, the special counsel has so much authority, isn't really answerable to anybody else, doesn't really have a boss, and as a result of that is a principal officer and thus must be appointed by the president with the advice and consent of the Senate.

[00:34:38.0] Matthew Seligman: On the other end of the spectrum, Josh, and I'll let him make his argument that he's already alluded to a couple of times, says no, special counsel Smith is a mere employee because he's not sufficiently continuous in his job and sufficiently permanent, although I know Josh says that permanence is not the real important factor here, and therefore the special counsel can't wield the level of power that the special counsel does. That's got to be done by somebody who's an officer of the United States, whether it's principal or inferior, and because Jack Smith is not an officer because he's only a kind of temporary gig employee, we might say, that's too much power for the prosecutorial equivalent of an Uber driver. So that's this threshold issue of the proper categorization of the special counsel. Now, Judge Cannon did say that she was bound by precedent on this. There is precedent that says that the independent counsel, the special counsel is an inferior officer. Why? Well, because the special counsel has a boss.

[00:35:48.8] Matthew Seligman: The boss is the attorney general. Now, unlike the old independent counsel, which is where that was Morrison v. Olson, which addressed this point among others, the independent counsel had a lot of independence from the attorney general. The special counsel has some independence, but that independence is something that the attorney general can reverse at any time. Merrick Garland today could issue a letter saying that, I am changing the rules for the special counsel. I can fire the special counsel at any time. Now, he hasn't done that as a matter of policy because Attorney General Merrick Garland, like many attorney generals previously, including Ed Meese, has made the policy decision that it's important to have a certain amount of discretion and independence for these politically sensitive types of investigations. That's exactly why Merrick Garland appointed Robert Hur as a special counsel to investigate the president's son, Hunter Biden. And so there's this threshold issue about what the proper constitutional categorization is. Judge Cannon said that she was bound by Supreme Court precedent to hold that the special counsel is an inferior officer. So that's one issue we have. And then there's the issue we've engaged with throughout today, which is, you know, okay, so if Smith is an inferior officer, what did the statute say?

[00:37:10.1] Jeffrey Rosen: So I'll try to summarize the different positions that we've discussed so far. Jack Smith argued, and Matthew, you agree that his appointment is constitutional 'cause he is an officer and his appointment is authorized by congressional statute. Justice Thomas and Judge Cannon argued that Smith is an officer and he's subject to the appointments clause, and Congress has not clearly authorized his appointment. And Josh, you argued before Judge Cannon making a third argument, which is that Smith is not an officer at all. And 'cause officers have to serve continuously, and 'cause his appointment is temporary, he's at most an employee. Tell us more about your argument and why you think it's correct.

[00:37:51.7] Josh Blackman: Sure, and I appreciate Matthew. He did actually a very careful job describing the position he disagrees with. That's a talent that people don't always have, so I'm

thankful for that. First off, it was unusual to have amicus make arguments in a district court. Not just one, not two, but three. So Matt was up there, I was up there, and also lawyer Jean Sher, who represented General Meese. And I'll make this point. I thought Judge Cannon was pretty tough in all the parties. She was curt with me a couple times. I lost. I may have annoyed her a bit, and that's fine. That was part of the process. But I thought it was actually a very thoughtful engagement. She was well-prepared. She knew all the arguments. She had a very good command of the law. Her opinion came out not too long after the argument, so I think she'd already done a lot of the hard work. And this was to sort of clean up some loose ends, so I'm grateful for the chance. My colleague and I, Seth Barrett Tillman and the Landmark Legal Foundation, we put an amicus brief in. And Seth and I have been writing about officers of the Constitution forever. I think I've been on your podcast, Jeff, several times.

[00:39:00.0] Josh Blackman: We've talked about the emoluments clause and officer stuff. We talked about Section 3 insurrection and officer stuff. And now we're talking about special counsel and officer stuff. I feel like I'm stuck in this time loop. I can't escape it. The argument's like this. What is an officer, right? The Constitution talks about officers of the United States, office under the United States. But what actually is an office? And there's a line of cases going back to the early 19th century saying that an office has what's called *durante* right? That is when the current holder of the office finishes his job and maybe he leaves or dies or retires, that the position continues and someone else holds that position. In our view, this phrase officer is a link to the phrase officer of the United States in the Constitution. So you cannot be an officer of the United States if your position lacks duration.

[00:39:52.5] Josh Blackman: Why does this matter? By the way, if I call an Uber and Jack Smith shows up, I'm calling another car. But Jack Smith has been here for a long time, for a couple of years now, but his position lacks any sort of duration. And what's unique about the independent counsel statute is actually there were provisions for duration. Everyone knows Alexia Morrison, but she wasn't the first one picked. It was actually a guy picked before her. And when he stepped down, it was a process for replacing her. It was actually baked into the regulations and what's called the Special Division of the DC Circuit to replace the person. So we argue that actually the independent counsel is different from the special counsel. There's different regimes of how there's continuity.

[00:40:32.8] Josh Blackman: And why does this matter? It matters because Jack Smith keeps calling himself, I'm an officer, I'm an officer. But we really think he's an employee. And as an employee, we argue that he can exercise his broader power to exercise that of a United States attorney. And there'd be problems if that Congress can create these shadow US attorneys that don't do confirmation. They're just appointed for temporary positions to exercise this power. We think that that's problematic. Our position, I don't think, requires overruling Morrison. I think it's consistent with Morrison. Judge Cannon disagreed with us. Trump's lawyers disagreed with us. Not the first time that's happened to me and Seth. We've always been on the outside, but we always sort of go away into these various debates. It seems to happen over and over again.

[00:41:18.8] Jeffrey Rosen: Matthew, we've talked about the various positions ranging from whether or not Smith is an officer and whether he's subject to the appointments clause or whether he's not an officer. Step back, please and tell me, how broadly do you think Justice Thomas and

Judge Cannon's opinions would sweep if they were adopted by a majority of the court? Might they call into question special prosecutors, including the special prosecutor and Nixon itself? Or would you expect them to be limited to Jack Smith and outside counsels?

[00:41:51.1] Matthew Seligman: I think, as we discussed before, this decision is, I think, limited to or at least as it stands, this decision is limited to special counsels or other special prosecutors who are appointed directly from outside the Department of Justice. Now, when I say that, it's because it hasn't yet been contested whether the statute, Section 515A, gives the authority to take someone internal to the Department of Justice and then make them into a special counsel. Now, I suspect if the Supreme Court ruled in favor of Mr. Trump in this case, that would be the next thing that happens. So it's hard to predict exactly how far that would go. What's certainly true is that it's not limited to Smith. And so any other special counsel that's hired directly from outside the government, any other inferior officer in any other part of the Department of Justice that's hired directly from outside the government, like the deputy assistant attorneys general, like the deputy solicitor general, and so on.

[00:42:58.2] Matthew Seligman: And it also does raise questions about other departments, because if we're going to start looking very, very carefully at the statutes that other department heads, like the Secretary of Homeland Security or the Secretary of Defense, if we have to look very carefully at the statutes that have been relied on to appoint inferior officers in these other departments. Now, I think there is statutory authority in these other departments. And so I hope that those appointments would survive. But it certainly calls into question, well, okay, are these similar types of arguments can be made about actions taken by inferior officers in every other department of the United States government?

[00:43:43.5] Jeffrey Rosen: Josh, do you agree or not that the argument might sweep more broadly to call into question these other inferior officers? And does the radicalism of the suggestion or the fact that it would disrupt a great deal of settled practice count against embracing the argument or not?

[00:44:04.4] Josh Blackman: I tend to think that if the Supreme Court should ever get this and find Judge Cannon to be persuasive, they could cabinet to those appointed outside the government. And this is a point that's relevant. Jack Smith in his brief describes sort of this long history of special counsels being appointed by the government. But the history there is actually a bit more complicated. A lot of these were not actually prosecutors. They were just investigating. They were writing reports. Maybe they were working underneath a US attorney. They were assisting them. So really, there are not many examples of a person plucked from outside the government and given basically the entire panoply of powers of a United States attorney to prosecute someone. Before Watergate, it's tough to find a good example like that. And after Watergate, you had the independent counsel statute.

[00:44:49.1] Josh Blackman: So really, we're talking about Jack Smith, and sort of Mueller, and maybe one or two people from the '90s. And then, we have of course, Jaworski, but there are problems with that one as well. So there's not a long track record, if you will, of the history and tradition of these sorts of broad prosecutors. So I think you could write an opinion limiting it to

basically Smith, Mueller, Ron Hur, and maybe a couple others, and leave the poor DAGs and the deputy SG in peace and quiet.

[00:45:19.0] Jeffrey Rosen: Matthew, after US v. Trump, Justice Sotomayor and other critics of the majority suggested that it would make the Nixon prosecution itself difficult to introduce evidence of the tapes. To what degree is Judge Cannon's opinion and Justice Thomas's separate opinion part of a broader questioning of the legitimacy of special prosecutors against the president that might call into question the whole Watergate prosecution from beginning to end?

[00:45:48.4] Matthew Seligman: I think there are two ways to think about the collection, the array of decisions that you're talking about that are broadly skeptical of the prosecution of a former president here. One is that there is a potentially ideologically or politically motivated perspective that's driving a variety of different cases. Another is that these issues simply haven't been presented before because this is the first time we've had a former president who's been prosecuted. So, you know, different people are gonna read these trends in different ways.

[00:46:27.1] Matthew Seligman: I think it is certainly the case that the immunity decision would render the prosecution of Richard Nixon unlawful and the reason is because you know the conduct that Nixon would have been prosecuted for he resigned and was ultimately pardoned by President Ford and so this never came to pass question was never presented. But everybody at the time assumed that Richard Nixon was going to be prosecuted and the thing that he would have been prosecuted for is using the levers of government for his own political criminal political purposes including using the department of justice the FBI the CIA those are exactly the types of Presidential official actions that are core executive functions according to the supreme court for which, a president is absolutely immune So I think there's no question that the Nixon prosecution had the hypothetical Nixon prosecution would have been completely blocked So maybe Richard Nixon, shouldn't have resigned after all.

[00:47:41.1] Matthew Seligman: Now another important caveat to what we're talking about here, though in the the appointments clause issue is that The Mar-a-Lago classified documents case does not go away if Donald Trump wins on this issue in the supreme court and the reason is because it doesn't go to the Legal or factual soundness of the prosecution goes to this procedural question about the constitutionality of the special counsel's appointment. So let's say it turns out that the supreme court says no special counsel Smith. You never really had a job. You were unconstitutionally appointed. Indictment dismissed. Okay, he can be re-indicted by the US Attorney for the southern district of Florida the very same day, And this case goes ahead and there's absolutely no question of the lawfulness at the appointments of the US attorney for the southern district of Florida who was appointed by the president with the advice and consent of the senate. This is a procedural issue that even if former president Trump wins It does not make this case go away.

[00:48:31.8] Matthew Seligman: And I think that's an important context for something that Josh brought up before. You know, these constitutional issues are supposed to be decided in a political vacuum. It's difficult to really completely isolate the issues from the context here and that context is that holding aside whatever you think about the January 6th case, which does deal with novel factual circumstances and therefore novel applications of federal criminal statutes.

The classified documents case is really a run-of-the-mill Classified documents case. It happens many times a year where people are sent to jail for decades. And there's absolutely nothing that has happened in Judge Cannon's courtroom including in this decision that casts any doubt about the ultimate soundness of this prosecution, which means that the stakes of the election for the former president are whether he will face trial or not for unlawfully retaining national security secrets.

[00:49:29.5] Jeffrey Rosen: Josh, do you agree or not that the immunity decision would render the prosecution of Richard Nixon Unlawful and that this is part of a broader skepticism of the Watergate prosecutions and do you agree that if, the Mar-a-Lago case doesn't go away and that president Trump could be re-indicted by a US attorney?

[00:49:49.5] Josh Blackman: Yeah, I actually wrote recently that I think The Trump immunity case called into question Nixon's decision. I'm not so sure the case was correctly decided. Remember it was decided in a very compressed period In a very toxic volatile time the nation was kind of on the razor's edge And the court may allow sweeping assertions that were sort of then limited to these unique facts. This word unique keeps appearing. To use one example only a couple years after Nixon the court decided *Buckley v. Valeo*, which is sort of the birth of the modern appointment clause jurisprudence. There's tension between Buckley and Nixon that would never resolve. I think there's a serious problem with Nixon, there was actually an op-ed in the wall street journal about a week or two ago saying, Nixon shouldn't resign. He maybe could have held out. Maybe it was, I was around, I can't really tell. But I think the precedent has been sort of vitiated And this point might not be popular. But I think a lot of this is to blame is the lawfare against Trump for the last seven years or so.

[00:50:48.7] Josh Blackman: From the moment he got into office You had the emoluments clause litigation and you had Robert Muller all these efforts to try to weaken Trump through the legal process. I think John Roberts said okay Basta enough, right? I've got enough of this, right? We need to let politicians be politicians. Let the process work itself out. We'll have an election. But stop trying to use the courts to cripple politicians. I mean I don't want to make this point too bluntly but on the same day Jack Smith filed an appellate brief and re-indicted Trump like 70 days before the election And this is just normal now. It's okay. Just another indictment.

[00:51:19.8] Josh Blackman: No big deal. I think there's something to be said that this lawfare is dangerous and I think the immunity decision said you can prosecute perhaps narrowly and I think that the indictment may actually clear the hurdle. We'll talk about that in a minute, but stop the broad efforts to try to criminalize all facets of politics. And that I think was lurking in John Roberts's mind when he wrote the opinion he wrote.

[00:51:41.3] Jeffrey Rosen: Well, it is time for closing thoughts in this excellent discussion of the merits of Judge Cannon's decision, Matthew first thoughts to you, tell We The People listeners why you believe that the appointment of Jack Smith was consistent with the constitution and federal statutes.

[00:52:01.1] Matthew Seligman: So to give my closing arguments here, I think Judge Cannon was correct in recognizing that binding supreme court precedent, Categorizes the special counsel

as an inferior officer. So neither a principal officer that has to be appointed by the president nor a mere employee who can't wield this level of prosecutorial power. And so then the question is just whether the, Whether the congress has passed a law that gives attorney general Merrick Garland the power to appoint an inferior officer. And I think that the answer is yes, and the simplest reason why is that 28 USC section 533 Says that the attorney general may appoint officials to detect and prosecute crimes against the United States. I have a simple straightforward interpretation of that. I think that statute gives attorney general Merrick Garland the authority to appoint Jack Smith to detect and prosecute crimes against the United States. So I think that the statute here is as crystal clear as you can imagine it being and that gives the attorney general the authority to appoint special counsels, including Jack Smith and for that reason his appointment was lawful.

[00:53:09.1] Jeffrey Rosen: Many thanks for that. Josh last word to you. Tell We The People listeners why you believe that Jack Smith's appointment was not consistent with the constitution and federal statute.

[00:53:17.1] Josh Blackman: In a nutshell Jack Smith is an employee. He's not an officer. He has a position that lacks duration. He's not an officer. Therefore he can not exercise the significant authority of being a United States attorney.

[00:53:32.4] Jeffrey Rosen: Thank you so much Matthew Seligman and Josh Blackman for a vigorous, illuminating and superb discussion of the merits of Judge Cannon's decision striking down special counsel Jack Smith. Matthew, Josh, thank you so much for joining.

[00:53:48.9] Matthew Seligman: Thank you so much.

[00:53:49.8] Josh Blackman: Thanks so much for having us.

[00:53:55.1] Jeffrey Rosen: Today's episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Daraiseh. Friends constitution day is coming up. September 17th will be such an exciting day at the national constitution center. Our honorary co-chair Justice Gorsuch will come to discuss his new book. And we will have all sorts of great activities come to Philly if you can. What an amazing time to share with you. And if you're not able to join in person, please join online go to constitutioncenter.org for all the exciting constitution day activities. And sign up for the newsletter constitutioncenter.org/connect. And always remember in your dreams in your prayers in your Waking and sleeping moments that the national constitution center is a private non-profit. We rely on the generosity, the passion, the engagement, and the devotion to lifelong learning of people like you from across the country who are inspired by our nonpartisan mission. There's so much meaningful learning to do together as the new school year and the supreme court term begins. And I'm still looking forward to sharing it with all of you. Support the mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including the podcast at constitutioncenter.org/donate. On behalf of the national constitution center, I'm Jeffrey Rosen.