ORAL ARGUMENT NOT YET SCHEDULED

No. 18-3052

IN THE

United States Court of Appeals for the District of Columbia Circuit

IN RE: GRAND JURY INVESTIGATION

ANDREW MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
GRAND JURY ACTION NO. 18-34 (BAH)

BRIEF OF AMICUS CURIAE CONCORD MANAGEMENT AND CONSULTING LLC IN SUPPORT OF APPELLANT SEEKING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Concord Management and Consulting LLC (Concord) certifies the following:

A. Parties

Appellant Andrew Miller was subpoenaed to testify before a grand jury empaneled in the United States District Court for the District of Columbia, No. 1:18-gj-00034-BAH. He filed a motion to quash the subpoenas, which the district court (Beryl A. Howell, C.J.) denied. Chief Judge Howell later found Mr. Miller in contempt for refusing to appear before the grand jury.

Appellee is the United States of America, which is represented by Special Counsel Robert S. Mueller III (the Special Counsel).

There were no intervenors or amici curiae in the district court, which held its proceedings under seal. On August 30, 2018, a two-judge panel of this Court denied Concord's motion to intervene but granted Concord permission to participate as an amicus curiae. Pursuant to Circuit Rule 26.1, the undersigned certifies that Concord is a Russian business entity with no parent companies. No publicly held company has a 10-percent or greater ownership interest in Concord.

B. Rulings Under Review

The rulings under review are the sealed contempt order entered against Mr. Miller on August 10, 2018, ECF No. 36, which was preceded by a sealed memorandum opinion entered on July 31, 2018, ECF No. 23, denying Mr. Miller's motion to quash. A redacted version of the memorandum opinion was released on August 8,

2018, ECF No. 32-3. The contempt order was unsealed and publicly released on September 7, 2018. ECF No. 46; Appellant's Appendix (App.) B.

There is no official citation for the contempt order. The official citation for the redacted memorandum opinion is *In re Grand Jury Investigation*, 315 F. Supp. 3d 602 (D.D.C. 2018). The unpublished version of the redacted memorandum opinion can be found at App. C.

C. Related Cases

The case on review has not previously been before this Court or any other court. There are no "related cases" within the meaning of Circuit Rule 28(a)(1)(c). However, the criminal action brought against Concord by the Special Counsel, No. 1:18-cr-00032-DLF (D.D.C.), involves one of the same parties (the United States of America) and legal issues similar to those presented here. On August 15, 2018, the district court (Dabney L. Friedrich, J.) issued a memorandum opinion denying Concord's motion to dismiss the criminal action. The official citation for Judge Friedrich's memorandum opinion is *United States v. Concord Management & Consulting LLC*, 317 F. Supp. 3d 598 (D.D.C. 2018).

/s/ James C. Martin
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STATEMENT OF INTEREST

Amicus Curiae Concord Management and Consulting LLC is a defendant in a criminal action brought by Special Counsel Robert S. Mueller III. *See United States v. Internet Research Agency LLC*, No. 18-cr-00032-DLF (D.D.C.). Concord moved to dismiss the indictment because the Special Counsel's appointment violated the Appointments Clause. Appellant Andrew Miller subsequently attached Concord's motion-to-dismiss brief to his motion to quash grand jury subpoenas issued by the Special Counsel. ECF No. 10 & Ex. 5. The district court (Howell, C.J.) denied Mr. Miller's motion to quash (App. C) and held him in contempt (App. B). After Mr. Miller appealed, the district court (Friedrich, J.) denied Concord's motion. *See United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598 (D.D.C. 2018). Because the Appointments Clause issues are dispositive in both cases, Concord moved to intervene in this appeal and this Court authorized its appearance as an amicus.[1]

SUMMARY OF ARGUMENT

The Appointments Clause provides mechanisms for appointing "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Principal officers must be appointed by the President "by and with the Advice and Consent of the Senate." *Id.* That is the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Concord states that no counsel for a party authored this brief in whole or in part, and no person other than Concord or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

default method for appointing all "Officers," though Congress "may" override it and "by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The district court found that 28 U.S.C. §§ 515(b) and 533(1) authorized the Attorney General to appoint a private attorney as an "Officer[] of the United States" to serve as the Special Counsel. But neither provision actually confers that appointment authority. There is, moreover, no controlling precedent that authorizes the appointment challenged here. Specifically, neither *United States v. Nixon*, 418 U.S. 683 (1974), nor *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), bind this Court on the Special Counsel's appointment. This Court should hold that his appointment is unconstitutional.

ARGUMENT

I. Congress Has Not "By Law" Authorized The Attorney General To Appoint A Private Attorney As A Special Counsel Who Is An Inferior Officer Of The United States.

The parties and the district court agree that the authorization "by Law" in Article II means a statute. But the statutes relied on by the district court do not authorize the Special Counsel's appointment, which does not pass constitutional muster for that reason.

A. Section 515(b) does not vest the Attorney General with the authority to appoint a private attorney as Special Counsel.

The district court found that § 515(b) provides authority to appoint a private attorney as a Special Counsel. Section 515(b) states:

> Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney.

A review of § 515(b)'s plain text shows that it confers no appointment authority at all.

First, it uses the past-participle and passive-voice construction—"specially retained"—which refers to an attorney already retained. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39 (2008) ("past participle" is a "'verb form indicating past or completed action or time'") (citation omitted); *Dean v. United States*, 556 U.S. 568, 572 (2009) (passive voice conveys that "whether something happened, not how or why it happened—[is what] matters").

Second, it refers to some appointment authority *not* set forth in § 515 itself—"under authority" of the Department of Justice (DOJ)—a clause that would "become surplusage if § 515 provides standalone appointment power, for in that case the statute could have referred to attorneys 'specially appointed under this section' or simply attorneys 'specially appointed.'" *Concord*, 317 F. Supp. 3d at 621.

Third, § 515(b) "contrasts sharply" with the numerous neighboring appointment-power conferring provisions in §§ 542(a), 543(a), and 546(a), and similar provisions throughout the United States Code, which "*do* confer the power to appoint in a straightforward manner." *Id.* For example, § 542(a) provides that the "Attorney General may appoint one or more assistant United States attorneys[.]" Sections 543(a) ("Attorney General may appoint attorneys to assist United States attorneys") and 546(a) ("Attorney General may appoint a United States attorney" to fill a vacancy) are similar.

Thus, "[i]f Congress had wanted to give the" Attorney General the appointment power the district court found in § 515(b), "it knew exactly how to do so—it could have simply borrowed from the statute[s] next door." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). Congress's "choice to depart from the model of [those] closely related statute[s] is a choice" this Court should not "disregard." *Id.* (citation omitted); *see also United States v. Janssen*, 73 M.J. 221, 224, 225 (C.A.A.F. 2014) (rejecting Government's contention that a general statutory provision—there 5 U.S.C. § 301—vested the Secretary of Defense with appointment authority because that would "make[] no sense in the face of the statutory structure that Congress has enacted for the Department of Defense" and would "raise[] the obvious question of why Congress would go to the trouble of enshrining the positions in statute and providing for their appointment if . . . the Secretary already has the authority under" § 301).

While this plain-text construction should have ended the matter, *Concord*, 317 F. Supp. 3d at 621, the district court nevertheless embarked on a redrafting mission to expand the section. It first revised "retained" and "commissioned" to convey a present-tense "retain[]" and "commission[]," as if Congress meant to omit the "ed." App. C at 71, 80. But there is no evidence that Congress intended as much, and settled law forecloses this sort of redrafting to remake a statute. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018) ("[T]his Court is not free to 'rewrite the statute' to the Government's liking.") (citation omitted).

The district court's reliance on "commission[]," even as improperly redrafted, also is misplaced. "[C]ommission" cannot be read to mean "appoint." *Edmond v. United States*, 520 U.S. 651, 657 (1997) (holding that "assign" in statute did not vest appointment authority). And neither the power to commission, nor the § 515(b) requirement that one commissioned take an oath, signifies that Congress has vested the authority to appoint an inferior officer. *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 122 (2007) ("[A]lthough the holder of an office usually receives a commission, that characteristic too, like an oath or pay, is incidental rather than essential. . . . [I]t does not follow that a person not commissioned does not hold an office, or, conversely, that only officers have commissions.").

The district court veered even further off course when it determined that § 515(b)'s "attorney specially retained" language should be read to mean "attorney

who *is now* specially retained" purportedly because that reading was consistent with § 515(b)'s history. App. C at 71. The court's extraction of "attorney specially retained" omits the limiting phrase "under authority of the Department of Justice[,]" which plainly refers to some independent source of retention power separate from § 515(b) itself. *Supra* at 3.

Moreover, the adjectival, past-participle form of "retained" does nothing more than "describe the present state" of the attorney based on something that already has occurred; here, retention of the attorney under some other statute. Apart from that, since the meaning of § 515(b)'s text is clear, no "extra-textual evidence," such as the provision's purported history, should be considered. *Trump v. Hawaii*, 138 S. Ct. 2392, 2412 (2018) (citation omitted); *see also Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1288 (D.C. Cir. 2007) (""The best evidence of [the statutory] purpose is the statutory text . . . , which means the legislative history and earlier statutory language cannot trump the current statute's plain import[.]") (citation omitted).

The district court's historical discourse, on analysis, fares no better. Pointing to the passage of § 515(b)'s predecessor—§ 17 of the Act to Establish the Department of Justice, ch. 150, 16 Stat. 162, 164–65 (1870) (1870 Act)—the court observed that "no other statute in existence at the time" of that Act's passage "authorized the Attorney General to appoint attorneys." App. C at 71. Consequently, it read § 17 to

provide appointment power so the provision would not be superfluous. *Id.* at 71, 73. This reasoning, too, is faulty.

First, the court overlooks § 17's juxtaposition of DOJ "officers," on the one hand, and counsel who are "specially retained," on the other. *See* 1870 Act § 17, 16 Stat. at 164–65. But the two classes—"officers" and "specially retained" counsel—are distinct: Congress intended to permit the Attorney General to retain special counsel in limited circumstances as employees, not as "Officers of the United States" with the expansive powers the Special Counsel claims.[2] This aligns with the Appointments Clause itself, which creates a particularized process for appointing "officers"—but not one for retaining non-officer employees.

Second, there are multiple examples of statutes that, unlike § 515, specifically provide for special counsel appointment. These statutes would be superfluous if § 515 is construed to provide the appointment authority the district court envisioned.

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[2] Congress repeatedly reaffirmed this officer/employee distinction in the decades that followed. The Act of June 30, 1906, ch. 3935, 34 Stat. 816, which gave rise to § 515(a), maintained a line between "any officer of" DOJ and "any attorney specially appointed" for a limited purpose. The report of the House Judiciary Committee that accompanied the 1906 Act confirmed as much. *See* H.R. Rep. No. 2901, 59th Cong., 1st Sess., 1–2 (1906) (noting the distinction between "any officer in [the Attorney General's] Department" and "any attorney specially employed by him"). The distinction again was preserved in 1925 when Congress enacted legislation that would later serve as the basis for the "[f]oreign counsel" language found in the current § 515(b). *See* Act of Feb. 27, 1925, ch. 364, tit. II, 43 Stat. 1014, 1029–30 (providing funds for "assistants to the Attorney General and to United States district attorneys *employed by* the Attorney General to aid in special cases[] . . . and for payment of foreign counsel *employed by* the Attorney General in special cases") (emphasis added).

The first would be the Act of August 5, 1909, ch. 6, 36 Stat. 11, which authorized the Attorney General to "employ and retain, in the name of the United States, such special attorneys and counselors at law in the conduct of customs cases as he may think necessary . . . ." *Id.* § 28, 36 Stat. at 108.

Two other later-enacted statutes—one in the 1920s relating to the Teapot Dome scandal; the other, the Ethics in Government Act passed in 1978 after Watergate and reauthorized throughout the 1980s and 90s—reinforce the point. The former expressly authorized the President to "appoint, by and with the advice and consent of the Senate, special counsel who shall have charge and control of the prosecution of such litigation [related to the scandal], anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding." S.J. Res. 54, 68th Cong., ch. 16, 43 Stat. 5, 6 (1924). The Ethics in Government Act of 1978 similarly conveyed power to the Attorney General and a Special Division court to appoint an independent counsel. *See* 28 U.S.C. §§ 591–593.

Congress is presumed to know "existing law" when it legislates, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (citation omitted), so it presumptively knew of § 515 when it made the separate statutory authorizations, reflecting that it did *not* believe that § 515 conferred that authority. Acknowledging as much, the district court tried to dismiss these enactments, without success. While admitting the 1909 Act authorized the appointment of special attorneys, the court concluded that it "casts no doubt on the Attorney General's authority to appoint special counsel under Section

515(b) and Section 533(1)" because it addressed a new class of litigation and any duplication of appointment authority was acceptable because "'[r]edundancies across statutes are not unusual events. . . .'" App. C at 82–83 (citation omitted). As for the Teapot Dome and Watergate legislation, the court said those "were enacted specifically to insulate politically-sensitive investigations from the Attorney General's influence, and thus imply nothing about the Attorney General's authority otherwise to appoint special counsel." App. C at 80.

This *post hoc* analysis, however, assumes its own conclusion. Section 515(b) does not provide any appointment authority, and there is no evidence the Congresses that enacted the Teapot Dome and Watergate legislation thought the Attorney General already had the power to appoint special counsels under § 515(b).

Section 515(b) accordingly does not expressly provide the appointment authority needed here and there is no legally cognizable basis to redraft the section to provide for it.

B. Section 533(1) does not vest the Attorney General with the authority to appoint a private attorney as Special Counsel.

The district court also found appointment authority for the Special Counsel in § 533(1), located in chapter 33 of title 28 of the United States Code, entitled: "FEDERAL BUREAU OF INVESTIGATION." That section states that the "Attorney General may appoint officials" "(1) to detect and prosecute crimes against the United States[.]" But no such authority exists in this section either.

First, by its plain text, the section makes no reference to attorneys and offers no indication that the word "official" refers to the delegation of prosecutorial authority to a private attorney outside DOJ to serve as an "Officer[] of the United States." Nor, as with § 515(b), is there any basis to redraft the statute to authorize something it does not even address.

Second, § 533(1)'s reference to "official"—and not "officer"—is significant. As *Concord* explained, "official" can refer to a "mere employee, functionary, or agent," whereas an "'officer' holds the more substantial responsibility of an 'office of trust, authority, or command[.]'" 317 F. Supp. 3d at 619. And numerous statutes "specifically confer the power to appoint 'officers,' not 'officials.'" *Id.* (citing statutes). Thus, "had Congress meant to confer 'officer'-appointing power via § 533 or another provision, 'it easily could have done so.'" *Id.* (citation omitted). It did not.

Third, the surrounding statutes, and § 533(1)'s placement in the FBI chapter, confirm its limited scope. Multiple provisions in the same chapter—some just two sections away—use the term "officer," not "official." "Reading 'official' as synonymous with 'officer' . . . risks running afoul of the 'usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Concord*, 317 F. Supp. 3d at 619 (quoting *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011) (citations omitted)). If § 533(1) had the sweep the district court claimed, it would be impossible, as with

§ 515(b), to explain much of the rest of the statutory scheme governing the appointment of DOJ officers.

As for § 533(1)'s placement in the chapter titled "FEDERAL BUREAU OF INVESTIGATION," along with its subsections (2), (3), and (4), that, too, evokes a narrow construction. "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (citation omitted). Moreover, statutory headings can—and do—"supply cues that Congress" intended a particular meaning, *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015), and that is especially true where the very next chapter—"UNITED STATES ATTORNEYS"—contains provisions that *do* specifically authorize the Attorney General to appoint attorneys as DOJ "officers." *Concord*, 317 F. Supp. 3d at 620. Section 533's other subsections likewise refer to protective and investigatory functions akin to those of the FBI—not the sort of functions carried out by the Special Counsel. *Id.*[3]

In finding that § 533(1) nevertheless contained express appointment authority, the district court, citing *Edmond*, 520 U.S. 651, reasoned that a statute could confer such authority without mentioning particular officers. App. C at 68. But the statute

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[3] That a few courts have concluded that § 533(1) authorizes the appointment of ATF agents (App. C at 69–70) is fully consistent with this reading, and certainly does not suggest the provision authorizes the Special Counsel's appointment. *Concord*, 317 F. Supp. 3d at 620 n.10 ("An ATF agent . . . is a far cry from a Special Counsel.").

in *Edmond*, 49 U.S.C. § 323(a), expressly authorized the appointment of "officers," while § 533(1) indisputably does not. *See Concord*, 317 F. Supp. 3d at 619 n.9.

The district court also found, without analysis, that § 533(1)'s reference to "official" must include attorneys because the section "authorizes the appointment of officials to 'prosecute crimes,' and only attorneys prosecute crimes." App. C at 69. Yet, this observation still fails to account for Congress's disparate use of "official" and "officer," both within the 500 series and throughout the United States Code. It also overlooks that Congress used "prosecute crimes" *after* imposing a duty to "investigate" so that members of the FBI would be "required to do something more than listen and take notes." *Bergman v. United States*, 565 F. Supp. 1353, 1395 (W.D. Mich. 1983). Therefore, § 533(1)'s use of the word "prosecute" simply means that members of the FBI have an obligation to "follow to the end; to press to execution or completion; to pursue until finished; as, determined to *prosecute* the investigation." *Webster's New International Dictionary* 1987 (2d ed. 1934).

As with § 515(b), therefore, there is no express authorization in § 533(1) for the appointment of the Special Counsel as an inferior officer. The Special Counsel's appointment thus is not supported by statute and this Court should say so. The stated limitations on the methods for appointing "Officers of the United States" imposed by the Appointments Clause are "among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. The Framers "carefully husband[ed] the appointment power" both to "limit its diffusion" and prevent the

"manipulation of official appointments." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991). Fidelity to these principles establishes that Congress has not authorized the Attorney General to appoint a private attorney as Special Counsel.

II. No Controlling Decision Holds That Congress Has "By Law" Authorized The Attorney General To Appoint A Private Attorney As Special Counsel.

The district court here and in *Concord* concluded that *Nixon* and/or *Sealed Case* required it to conclude that Congress had vested the Attorney General with the authority to appoint the Special Counsel. App. C at 69 (*Nixon*); *Concord*, 317 F. Supp. 3d at 623–24 (*Nixon* and *Sealed Case*). Neither case is controlling.

A. *Nixon*

In the midst of Watergate-related investigations, Attorney General Elliot Richardson issued an order establishing the Office of Watergate Special Prosecution Force "[b]y virtue of the authority vested in [him] by 28 U.S.C. 509, 510 and 5 U.S.C. 301[.]" DOJ Order No. 517-73 (May 31, 1973), *reprinted in* 38 Fed. Reg. 4688 (June 4, 1973). On the same day and citing the same three statutes, Mr. Richardson issued another order designating Professor Archibald Cox to head the new office with the title "Special Prosecutor." DOJ Order No. 518-73 (May 31, 1973).

Mr. Cox later obtained a grand jury subpoena directing President Nixon to produce certain tape recordings. *See Nixon v. Sirica*, 487 F.2d 700, 704–05 (D.C. Cir. 1973) (en banc). In October 1973, this Court refused to set aside a district court

order instructing the President to comply with the subpoena, but stayed issuance of its mandate to give him an opportunity to seek Supreme Court review. *Id.* at 722.

President Nixon chose not to do so. Instead, he proposed that he be allowed to produce edited transcripts of the recordings. *See* Br. for U.S. at 7, *United States v. Nixon*, 418 U.S. 683 (1974) (No. 73-1766), 1974 WL 174854 (Jaworski Br.). When Mr. Cox rejected that compromise, the President ordered Mr. Richardson to fire him. Mr. Richardson resigned instead. *Id.* Deputy Attorney General William Ruckelshaus also refused to carry out the President's directive and he was fired too. Eventually, Solicitor General Robert Bork, serving as Acting Attorney General, carried out the order and abolished the Special Prosecutor's office. *See* Remarks of Press Secretary Ziegler, October 20, 1973, 9 Weekly Comp. Pres. Doc. 1271 (Oct. 29, 1973); *see also* DOJ Order No. 546-73 (Oct. 23, 1973), *reprinted in* 38 Fed. Reg. 29,466 (Oct. 25, 1973).

When the Senate threatened to investigate Mr. Cox's termination, 119 Cong. Rec. 34,785 (Oct. 23, 1973) (reproducing telegram); 119 Cong. Rec. 34,775 (Oct. 23, 1973) (statement of Sen. Byrd), and scheduled a hearing for October 29, 1973, *see Special Prosecutor: Hearings Before the S. Comm. on the Judiciary*, 93d Cong. (1973), President Nixon changed course. He announced that Mr. Bork would appoint a new Special Prosecutor. *See* President's News Conference of October 26, 1973, 9 Weekly Comp. Pres. Doc. 1287, 1289 (Oct. 29, 1973). Mr. Bork then appointed Leon Jaworski, a private attorney, as Special Prosecutor. *See* Watergate Special Prosecutor, November

1, 1973, 9 Weekly Comp. Pres. Doc. 1303 (Nov. 5, 1973). He also issued an order reestablishing the Special Prosecutor's office, citing the same three statutes (§§ 301, 509, 510) that were cited as authority for the office's creation. *See* DOJ Order No. 551-73 (Nov. 2, 1973), *reprinted in* 38 Fed. Reg. 30,738 (Nov. 7, 1973). Lastly, he issued an order confirming that President Nixon would not discharge Mr. Jaworski without first consulting with congressional leaders. *See* DOJ Order No. 554-73 (Nov. 19, 1973), *reprinted in* 38 Fed. Reg. 32,805 (Nov. 28, 1973).

Five months later, Mr. Jaworski obtained a trial subpoena directing President Nixon to produce certain tape recordings and documents. *See United States v. Mitchell*, 377 F. Supp. 1326, 1328 (D.D.C. 1974). Although the governing regulations expressly gave Mr. Jaworski the power to contest any claim of executive privilege, President Nixon moved to quash the subpoena on the ground that, among other things, the controversy was a non-justiciable, intra-branch dispute. *See id.* at 1328–29. The district court denied the President's motion, but in doing so, it did not address whether Mr. Jaworski's appointment complied with the Appointments Clause. *See id.* at 1329 n.7 (noting §§ 301, 509, and 510 were cited as authority but not deciding whether they provided appointment authority). The President appealed, and Mr. Jaworski preemptively filed a petition for a writ of certiorari before judgment. *Nixon*, 418 U.S. at 689–90. That petition was granted and, as is relevant here, Mr. Jaworski's opening merits brief asserted that

> Congress has organized the Department of Justice and provided that the Attorney General is its head. 28 U.S.C. 501, 503. *Under Article II, Section 2, Congress has vested in him alone the power to appoint subordinate officers to discharge his powers. 28 U.S.C. 509, 510, 515, 533.* Among the responsibilities given by Congress to the Attorney General is the authority to conduct the government's civil and criminal litigation (28 U.S.C. 516) . . . .

Jaworski Br. at 27–28 (emphasis added). The President's briefing, in turn, made no effort to rebut Mr. Jaworski's statutory assertions. *See* Br. for Resp't, 1974 WL 174855; Reply Br. for Resp't, 1974 WL 159435. In particular, it did not address the fact that two of the statutes cited by Mr. Jaworski—28 U.S.C. §§ 515 and 533—had *not* been cited by Mr. Richardson or Mr. Bork as authority for their respective orders establishing, abolishing, and reestablishing the Special Prosecutor's office.

At oral argument, Mr. Jaworski emphasized that his authority was not in dispute. Oral Argument at 36:58, *United States v. Nixon*, 418 U.S. 683 (1974) (No. 73-1766) (stating that President's briefing, "by accepting the proposition that the President and the Attorney General can delegate certain executive functions to subordinate officers, implicitly has conceded, so we think, the validity of the regulations delegating prosecutorial powers to the Special Prosecutor").[4] The President's counsel made no argument to the contrary. *See id.* at 56:01, 2:53:19. Instead, he conceded that the regulations governing the Special Prosecutor had the force of law. *Id.* at 1:25:41. At

[4] *Available at* https://apps.oyez.org/player/#/burger4/oral_argument_audio/17517.

no point during oral argument was any question raised as to the validity of Mr. Jaworski's appointment.

In issuing its decision, the Supreme Court rejected President Nixon's justiciability argument. *See Nixon*, 418 U.S. at 692–97. In a discussion preliminary to its justiciability analysis, the Court borrowed directly from Mr. Jaworski's merits brief:

> Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. § 516. *It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533.* Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.

418 U.S. at 694 (emphasis added) (footnote omitted). No further comment was made concerning the Special Prosecutor's authority or any of the cited statutes.

B. *Sealed Case*

In *Sealed Case*, Lawrence Walsh, also an attorney in private practice, was appointed by a special division of this Court to serve as an independent counsel under the Ethics in Government Act. *See Sealed Case*, 829 F.2d at 51–52. He was tasked with investigating whether Lieutenant Colonel Oliver North had committed crimes related to selling arms to Iran. *See id.* After Mr. Walsh empaneled a grand jury, Colonel North challenged the independent-counsel provisions in the Ethics in Government Act as unconstitutional. *See id.* at 52. In response, Attorney General Edwin Meese issued a final rule establishing the Office of Independent Counsel: Iran/Contra and promulgating regulations for the governance thereof, citing 28

U.S.C. §§ 509, 510, and 515, as well as 5 U.S.C. § 301. *See* General Powers and Establishment of Independent Counsel—Iran/Contra, 52 Fed. Reg. 7270, 7271 (Mar. 10, 1987).

Mr. Walsh thereafter accepted a parallel appointment under the new regulations. *Sealed Case*, 829 F.2d at 53. At the time, DOJ considered persons holding independent-counsel appointments under the Ethics in Government Act, such as Mr. Walsh, to be employees within DOJ. *See* S. Rep. No. 100-123, at 13 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2150, 2162 (explaining that the month of Mr. Walsh's parallel appointment, it became known that DOJ believed that "independent counsels [under the Ethics in Government Act] were to be considered Justice Department employees").

The grand jury eventually subpoenaed Colonel North and he moved to quash, arguing that Mr. Walsh's appointments were unlawful. *See In re Sealed Case*, 827 F.2d 776, 776 (D.C. Cir. 1987) (per curiam). The district court denied Colonel North's motion on ripeness grounds, held him in contempt, ordered him confined without bail, and denied a stay pending appeal. *See id.* This Court, however, found that Colonel North's motion was ripe, vacated the contempt order, and remanded the matter with instructions to consider the merits. *Id.* at 779.

The district court once again denied the motion to quash. *See In re Sealed Case*, 666 F. Supp. 231 (D.D.C. 1987). Asserting that the "first question raised in this matter is whether the Attorney General had the authority to seek assistance from an

Independent Counsel in the function of his official duties" pursuant to the final rule, the district court found that it "need not prolong the discussion of this issue as the Supreme Court acknowledged in *Nixon* . . . that the Attorney General has such authority." *Id.* at 233. Colonel North appealed again, maintaining that *Nixon* was not binding on whether the Attorney General had the statutory authority to create, via regulation, the Office of Independent Counsel: Iran/Contra and appoint Mr. Walsh to lead that office. *See* Br. of Appellant at 10–11, No. 87-5247 (North Br.); Reply Br. of Appellant at 27–28, No. 87-5247. Mr. Walsh, together with the United States acting as amicus, argued that *Nixon* controlled the answer to that authority question. *See* Br. of Appellee Indep. Counsel at 17, 20–21, 24–26, No. 87-5247; Br. on Behalf of Amicus Curiae U.S. at 13, 22–23, No. 87-5247.

Notably, Colonel North did not argue that Mr. Walsh's parallel appointment exceeded the authority provided by the plain language of the statutes cited by the Attorney General in the final rule: i.e., 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515. Instead, he focused on whether those statutes authorized the regulations' limitation of removal power. *See* North Br. at 12–13 (arguing that "[t]he Attorney General has no authority, particularly under any of the statutory provisions on which he purports to rely in promulgating the regulation, to limit this constitutionally protected removal power") (footnote omitted). He also argued that the parallel appointment violated a provision of an entirely different statute: the Ethics in Government Act, 28 U.S.C. § 597(a), which requires the "Attorney General, and all other

officers and employees of the Department of Justice [to] suspend all investigations and proceedings regarding" a matter once it has been accepted by an independent counsel under the Ethics in Government Act. *See* North Br. at 13–14.

This Court affirmed. In doing so, it did not endorse the district court's conclusion that *Nixon* controlled the inquiry with respect to the statutory validity of the final rule creating the Office of Independent Counsel: Iran/Contra. Nor did it even imply that *Nixon* had analyzed that issue. On the contrary, this Court concluded that *Nixon* had simply "presupposed" the validity of Mr. Jaworski's appointment. 829 F.2d at 55 n.30.[5]

This Court then made an independent evaluation of the appointment-authority question on the record before it, noting: "We have no difficulty concluding that the Attorney General possessed the statutory authority to create the Office of Independent Counsel: Iran/Contra and to convey to it the investigative and prosecutorial functions and powers described in [the regulations promulgated by the final rule]." *Id.* at 55 (internal quotation marks and citation omitted). After acknowledging that the final rule had cited 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515, *id.*, the Court included a lengthy footnote quoting portions of those statutes and stating that they

[5] That the Supreme Court in *Nixon* made such an assumption is hardly surprising given that President Nixon was in no position to challenge the statutory validity of Mr. Jaworski's appointment. That appointment was made at the direction of the President himself in response to congressional furor over Mr. Cox's firing, thereby rendering any potential defect in that appointment invited error.

authorized the Attorney General to delegate functions and powers "to others *within* the Department of Justice," *id.* at 55 n.29 (emphasis added). The Court then acknowledged that while those statutes "do not explicitly authorize the Attorney General to create an Office of Independent Counsel virtually free of ongoing supervision," it would "read them as accommodating the delegation *at issue here*." *Id.* at 55 (emphasis added).

C. *Nixon* and *Sealed Case* do not control.

The law of this Circuit—embodied in *Sealed Case*—instructs that *Nixon*'s observation regarding the statutes cited in Mr. Jaworski's merits brief does not constitute binding precedent. Rather, as this Court noted, *Nixon* did not analyze whether the statutes it cited actually conferred the requisite appointment authority because it was not in dispute—the Supreme Court simply assumed it. *Sealed Case*, 829 F.2d at 55 n.30; *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("assumptions" about "the validity of antecedent propositions . . . are not binding in future cases that directly raise the questions") (citations omitted); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (decisions are not controlling when issue was not "squarely addressed" and was "at most assumed").

This Court also correctly concluded that the appointment-authority question before it had to be analyzed on its own merit without regard to *Nixon*'s passing reference on the record before the Supreme Court. *See De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1105 (D.C. Cir. 2017) (no holding where issue "was completely

unaddressed by the district court and neither raised nor briefed on appeal—a deficiency that, as then-Judge Scalia reminded us, deprives the court of the benefits of the adversarial system") (citation omitted).

The district court here found that "[w]hile no party in *Nixon* had disputed that Congress had authorized the Attorney General to appoint the Watergate Special Prosecutor, *Nixon*'s determination that Section 533 provided such authority was necessary to the Court's conclusion that a justiciable controversy existed between the President and the Watergate Special Prosecutor, and thus was not mere dicta." App. C at 68–69. This is wrong.

The appointment-authority issue was not disputed in *Nixon* and did not go to the Supreme Court's subject-matter jurisdiction. Nor was its resolution necessary for framing a justiciable controversy. Instead, the *Nixon* Court's holding that the clash between two Executive Branch officials over the subpoenaed material was justiciable was predicated on the "'concrete adverseness'" those officials' dispute engendered—not on the Court's earlier, unelaborated statement that § 533 (and other provisions) authorized the Attorney General, in the abstract, "to appoint subordinate officers to assist him." *Nixon*, 418 U.S. at 694, 697 (citation omitted).[6] That statement was,

[6] Indeed, the particular position held by the Executive Branch official feuding with the President, and whether he had been properly appointed, was entirely irrelevant to the justiciability question the Supreme Court decided. Justiciability arose from the feud itself.

instead, dicta because it was "made casually[,] without analysis [or] due consideration of the alternatives, [and as] a prelude to another legal issue"—justiciability of an intra-branch dispute—"that command[ed]" the Court's attention. *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (defining dicta); *see also Zenith Radio Corp. v. United States*, 437 U.S. 443, 459–62 (1978) (rejecting contention that "broad language" in prior opinion was controlling where the issue it addressed "was not in question" and "neither the parties nor this Court focused carefully" on it).

As with *Nixon*, *Sealed Case* presents a distinct factual record and does not control the validity of the appointment made here. Unlike Mr. Mueller, who was a private citizen at the time of his appointment, Mr. Walsh already held an appointment as an independent counsel under the Ethics in Government Act at the time of his parallel appointment. That factual distinction matters. DOJ's official position at the time was that Mr. Walsh's independent-counsel appointment already placed him *inside* DOJ, and that fact—by the *Sealed Case* Court's explicit reasoning—proved pivotal to this Court's decision. *Supra* at 20–21. Since this Court was not faced with the question whether the statutes cited as authority for Mr. Walsh's parallel appointment authorized the appointment of someone *outside* DOJ, *Sealed Case* should not be viewed as binding in this case.[7] *See UC Health v. NLRB*, 803 F.3d 669, 682 (D.C. Cir. 2015)

[7] A few months after *Sealed Case* was decided, Congress amended the Ethics in Government Act to provide independent counsels with independence from DOJ. *See* (continued)

(Edwards, J., concurring) ("[A] judicial decision 'attaches a specific legal consequence to a detailed set of facts'" and "'is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts.'") (internal quotation marks and citations omitted); *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990) ("[J]udicial discussions of issues that are not contested are not holdings.") (Posner, J.) (citations omitted).[8]

The Supreme Court's intervening decision in *Edmond* also authorizes this Court to take a fresh look. There, the Court found that the type of language in the statutes cited in *Sealed Case*—5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515, none of which use the word "appoint"—is insufficient for vesting appointment authority. *Edmond* thus held that for Appointments Clause purposes, a statute granting the power to "assign" officers did not vest appointment authority. 520 U.S. at 657. "The difference between the power to 'assign' officers to a particular task and the power to

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Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1302.

[8] Unlike the district court here, the district court in *Concord* concluded that *Sealed Case* held that § 515 conferred authority to appoint the Special Counsel—or, at least, that its reasoning to that effect is dicta entitled to respect. *See Concord*, 317 F. Supp. 3d at 623–24. But the *Concord* court did not acknowledge that in *Sealed Case*, the appointed person—Mr. Walsh—was *not* a private attorney at the time of appointment; he was, as *Sealed Case* itself indicated, already within DOJ, so the case is not controlling. And, to the extent it is dicta, this Court owes it no fealty. *See Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017) ("'Binding circuit law comes only from the holdings of a prior panel, not from its dicta[.]'") (citation omitted).

'appoint' those officers," Justice Scalia explained, "is not merely stylistic." *Id.*; *see also Janssen*, 73 M.J. at 224 ("Words have meaning, and we interpret *Edmond* to require statutory language specifically granting the head of a department the power to appoint inferior officers."). *Sealed Case*'s statutory analysis thus can be revisited in light of *Edmond*'s now-controlling approach. *See Amfac Resorts, L.L.C. v. U.S. Dep't of Interior*, 282 F.3d 818, 827 (D.C. Cir. 2002) ("When an intervening Supreme Court decision alters the law of the circuit, a panel of our court must follow the Court's decision in all later cases.") (citations omitted), *vacated in part on other grounds sub nom. Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003); Bryan A. Garner et al., *Law of Judicial Precedent* 38 (2016) ("[A] panel may depart from or overrule an earlier panel's decision when it has been repudiated or undermined by . . . an intervening Supreme Court decision.").

Accordingly, this Court should conduct its own *de novo* analysis of the statutory-authority issue presented in this appeal and, having done so, reach the conclusion the undisputed facts compel: the Attorney General lacked the statutory authority needed to appoint a private attorney as Special Counsel under the Appointments Clause.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's orders.

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CERTIFICATE OF COMPLIANCE

On this fourteenth day of September, 2018, the undersigned certifies that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,484 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

/s/ James C. Martin
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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and Circuit Rule 31(b), the undersigned certifies that on this fourteenth day of September, 2018, he caused eight (8) paper copies of the Brief of Amicus Curiae Concord Management and Consulting LLC in Support of Appellant Seeking Reversal to be transmitted to the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit via hand delivery. The undersigned also certifies that on this same date, he caused two (2) paper copies of the foregoing amicus brief to be served on the following counsel by UPS next-day delivery:

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Lastly, the undersigned certifies that on this same date, he caused the foregoing amicus brief to be filed using the Court's electronic case filing system, which will automatically serve a notice of docket activity upon the above-listed counsel.

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