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Special Counsel Jack Smith delivers remarks on an unsealed indictment against former U.S. President Donald Trump on August 1, 2023 in Washington, D.C.

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## **KEY TAKEAWAYS**

- 1 **Was Special Counsel Jack Smith illegally appointed by Attorney General Merrick Garland and is his prosecution of former Pres. Donald Trump unlawful?**
  
- 2 **What the law and the Constitution “do not allow,” argues the brief, “is for the Attorney General to appoint a private citizen.”**
  
- 3 **While this important issue remains unresolved for now, it is lurking in the background, and the Supreme Court may well address it in the future.**

Was Special Counsel Jack Smith illegally appointed by Attorney General Merrick Garland and is his prosecution of former Pres. Donald Trump unlawful? That is the intriguing issue raised in an [amicus brief](#) filed in the Supreme Court by Schaerr Jaffe, LLP, on behalf of former Attorney General Ed Meese and two law professors, Steven Calabresi and Gary Lawson, in the case of *U.S. v. Trump*.

We won't get an immediate answer to this question because on the Friday before Christmas, the Supreme Court issued a [one-line order](#) refusing to take up Smith's request that the court review Trump's claim of presidential immunity, which was denied by the trial court, in the federal prosecution being pursued by Smith in the District of Columbia. The special counsel had petitioned the court to take the case on an expedited basis, urging the justices to bypass review by the Court of Appeals for the D.C. Circuit.

The Supreme Court may still get the opportunity to consider this issue, though, either on appeal from a ruling on the immunity claim by the D.C. Circuit or if Trump is convicted and appeals the verdict.

The amicus brief raises serious and fundamental issues of whether Garland had the constitutional and statutory authority to appoint Smith as special counsel in the first place. Jack Smith, a private citizen, was appointed as a special counsel by Garland to investigate whether anyone violated the law in “efforts to interfere in the lawful transfer of power following the 2020 presidential election or the certification of the Electoral College vote held” on Jan. 6, 2021. In August of 2023, a grand jury directed by Smith [indicted](#) Trump for conspiring to defraud the U.S., disenfranchising voters, and obstructing an official proceeding on Jan. 6.

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But Meese, Calabresi, and Lawson argue that Garland lacked the power to appoint Smith because the attorney general has no authority to appoint a “private citizen to receive extraordinary criminal law enforcement power under the title of Special Counsel.”

First, they point out that there is no federal statute establishing an “Office of Special Counsel in DOJ.” Second, even if one ignores the absence of such a specific statute, there is also no statute authorizing the “Attorney General, rather than the President by and with the advice and consent of the Senate, to appoint such a Special Counsel.”

The special counsel, they note, has more power than any of the 94 U.S. Attorneys who prosecute cases across the country. Their authority is limited to the jurisdictions in which they are appointed. Moreover, U.S. Attorneys are nominated by the president and have to be approved by the Senate under the [Appointments Clause](#) in Section 2 of Article II of the Constitution.

Yet Jack Smith has nationwide authority to pursue his prosecutions, and indeed has indicted Trump in two separate jurisdictions (D.C. and Florida), and was neither nominated by the president nor confirmed by the Senate. This, according to the amicus brief, violates basic constitutional requirements.

The former attorney general and his colleagues acknowledge “there are times when the appointment of a Special Counsel is appropriate.” But federal “statutes

and the Constitution” only allow such appointments through “the use of existing United States Attorneys.” They cite the appointments as special counsels of Patrick Fitzgerald, Rod Rosenstein, John Huber, and John Durham, all of whom were Senate-confirmed U.S. Attorneys at the time of their appointments, as examples of valid and lawful appointments.

But what the law and the Constitution “do not allow,” argues the brief, “is for the Attorney General to appoint a private citizen, who has never been confirmed by the Senate, as a substitute United States Attorney under the title ‘Special Counsel.’” “Under the Appointments Clause, inferior officers can be appointed by department heads only if Congress so directs by statute,” and there is no such statute giving Attorney General Merrick Garland such authority to appoint an “inferior officer” like the special counsel.

Meese and the law professors argue that regulations that were promulgated by former Attorney General Janet Reno after the Independent Counsel law lapsed and was not renewed, which allow the appointment of someone who is not a federal employee as a special counsel, are unconstitutional and were beyond her power to create. The attorney general, they say, can appoint a private citizen to assist a U.S. Attorney acting as a special counsel, but not to replace him.

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This issue was previously [raised](#) by Attorney Paul Kamenar in his representation of Andrew Miller, who was held in contempt for failing to comply with a grand jury subpoena served on him by Robert Mueller, who was also a private citizen when he was appointed as a special counsel to investigate the Russia/Trump collusion hoax. Kamenar made the same arguments, but a three-judge panel of the Court of Appeals for the D.C. Circuit [ruled](#) against Miller. However, that decision was never appealed and the Supreme Court has never addressed the issue.

If the D.C. Circuit is wrong and the amicus brief is correct, then Jack Smith was unlawfully appointed and his investigation and prosecution of Trump, in two jurisdictions no less, was void from the start. But because the Supreme Court

rejected Smith's petition to immediately review the presidential immunity claim, we will not get an answer from the court anytime in the near future on the legality of his appointment as special counsel in this case. The amicus brief's conclusion is quite harsh:

Not clothed in the authority of the federal government, Smith is a modern example of the naked emperor. Improperly appointed, he has no more authority to represent the United States in this Court than Bryce Harper, Taylor Swift, or Jeff Bezos. That fact is sufficient to sink Smith's petition, and the Court should deny review.

While this important issue remains unresolved for now, it is lurking in the background, and the Supreme Court may well address it in the future should the opportunity present itself.

*This piece originally appeared in the Daily Caller*