AILEEN CANNON MAKES CLARENCE THOMAS' CALVINBALL NEWLY SIGNIFICANT

Aileen Cannon's order throwing out the stolen documents prosecution may make some Calvinball Justice Thomas engaged in more important in days ahead.

Cannon actually *didn't* give Trump his preferred outcome: a ruling that Jack Smith would have had to be senate-confirmed and also that he was funded improperly. Aside from the timing, neither is this outcome one (I imagine) that Trump would prefer over a referral of Jack Smith for investigation or a dismissal on Selective Prosecution or spoilation or some other claim that would allow Trump to claim he was victimized.

Rather, she adopted a second part of Trump's argument, that Merrick Garland didn't have the legal authority to appoint a Special Counsel, of any sort, whether someone from outside the Department or someone (like David Weiss) who was already part of it. She punted on most of the question on whether a Special Counsel is a superior officer requiring Senate confirmation or an inferior one not requiring it.

Cannon's argument lifts directly from Clarence Thomas' concurrence, which she cites three times (though that is, in my opinion, by no means her most interesting citation). Thomas argues that the four statutes that Garland cited in his appointment of Jack Smith are insufficient to authorize the appointment of a Special Counsel.

> We cannot ignore the importance that the Constitution places on *who* creates a federal office. To guard against tyranny, the Founders required that a federal office be "established by Law." As James Madison cautioned, "[i]f there

> is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers and offices." 1 Annals of Cong. 581. If Congress has not reached a consensus that a particular office should exist, the Executive lacks the power to create and fill an office of his own accord.
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> It is difficult to see how the Special Counsel has an office "established by Law," as required by the Constitution. When the Attorney General appointed the Special Counsel, he did not identify any statute that clearly creates such an office. See Dept. of Justice Order No. 5559–2022 (Nov. 18, 2022). Nor did he rely on a statute granting him the authority to appoint officers as he deems fit, as the heads of some other agencies have.3 See supra, at 5. Instead, the Attorney General relied upon several statutes of a general nature. See Order No. 5559–2022 (citing 28 U. S. C. §§509, 510, 515, 533).
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> None of the statutes cited by the Attorney General appears to create an office for the Special Counsel, and especially not with the clarity typical of past statutes used for that purpose. See, e.g., 43 Stat. 6 ("[T]he President is further authorized and directed to appoint . . . special counsel who shall have charge and control of the prosecution of such litigation"). Sections 509 and 510 are generic provisions concerning the functions of the Attorney General and his ability to delegate authority to "any other officer, employee, or agency." Section 515 contemplates an "attorney specially appointed by the Attorney General under law," thereby suggesting that such an attorney's office must have already been

> created by some other law. (Emphasis added.) As for §533, it provides that "[t]he Attorney General may appoint officials . . . to detect and prosecute crimes against the United States." (Emphasis added.) It is unclear whether an "official" is equivalent to an "officer" as used by the Constitution. See Lucia, 585 U. S., at 254–255 (opinion of THOMAS, J.) (considering the meaning of "officer"). Regardless, this provision would be a curious place for Congress to hide the creation of an office for a Special Counsel. It is placed in a chapter concerning the Federal Bureau of Investigation (§§531–540d), not the separate chapters concerning U. S. Attorneys (§§541–550) or the now-lapsed Independent Counsel (§§591–599).4
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> To be sure, the Court gave passing reference to the cited statutes as supporting the appointment of the Special Prosecutor in United States v. Nixon, 418 U. S. 683, 694 (1974), but it provided no analysis of those provisions' text. Perhaps there is an answer for why these statutes create an office for the Special Counsel. But, before this consequential prosecution proceeds, we should at least provide a fulsome explanation of why that is so.
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> 4Regulations remain on the books that contemplate an "outside" Special Counsel, 28 CFR §600.1 (2023), but I doubt a regulation can create a federal office without underlying statutory authority to do so.

Cannon takes Thomas' treatment of Nixon as a "passing reference" as invitation to make truly audacious analysis of it as dicta.

> D. As dictum, Nixon's statement is unpersuasive.

> Having determined that the disputed passage from Nixon is dictum, the Court considers the appropriate weight to accord it. In this circuit, Supreme Court dictum which is "well thought out, thoroughly reasoned, and carefully articulated" is due near-precedential weight. Schwab, 451 F.3d at 1325–26 (collecting cases); Peterson, 124 F.3d at 1392 n.4. Additionally, courts are bound by Supreme Court dictum where it "is of recent vintage and not enfeebled by any subsequent statement." Id. at 1326 (quoting McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991)). The Nixon dictum is neither "thoroughly reasoned" nor "of recent vintage." Id. at 1325–26. For these reasons, the Court concludes it is not entitled to considerable weight.

She then reviews the cited statutes one by one and deems them all insufficient to authorize a Special Counsel, with special focus on 28 USC 515 and (because Garland cited it for the first time) 533.

> The Court now proceeds to evaluate the four statutes cited by the Special Counsel as purported authorization for his appointment—28 U.S.C. §§ 509, 510, 515, 533. The Court concludes that none vests the Attorney General with authority to appoint a Special Counsel like Smith, who does not assist a United States Attorney but who replaces the role of United States Attorney within his jurisdiction.
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> [snip]
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> Section 515(b), read plainly, is a logistics-oriented statute that gives technical and procedural content to the position of already-"retained" "special attorneys" or "special assistants" within DOJ. It specifies that those

> attorneys—again already retained in the past sense—shall be "commissioned," that is, designated, or entrusted/tasked, to assist in litigation (more on "commissioned" below). Section 515(b) then provides that those already-retained special attorneys or special assistants (if not foreign counsel) must take an oath; and then it directs the Attorney General to fix their annual salary. Nowhere in this sequence does Section 515(b) give the Attorney General independent power to appoint officers like Special Counsel Smith—or anyone else, for that matter.

Cannon twice notes her order applies only to the indictment before her (perhaps the only moment of judicial modesty in an otherwise hubristic opinion).

> The instant Superseding Indictment—and the only indictment at issue in this Order—arises from the latter investigation.
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> [snip]
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> The effect of this Order is confined to this proceeding.

This is obvious — but it is also a way of saying that if the Eleventh backs this ruling, it would set up a circuit split with the DC rulings that she dismisses in cursory fashion.

Effectively, this represents one Leonard Leo darling, Cannon, dropping all her other means of stalling the prosecution for Trump, to act on seeming instructions from a more senior Leonard Leo darling.

A bunch of lawyers will dispute Cannon's recitation of Thomas' reading of the law. Indeed, Neal Katyal has already done so in an op-ed for the NYT.

> Judge Cannon asserts that no law of Congress authorizes the special counsel. That is palpably false. The special counsel regulations were drafted under specific congressional laws authorizing them.
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> Since 1966, Congress has had a specific law, Section 515, giving the attorney general the power to commission attorneys "specially retained under authority of the Department of Justice" as "special assistant[s] to the attorney general or special attorney[s]." Another provision in that law said that a lawyer appointed by the attorney general under the law may "conduct any kind of legal proceeding, civil or criminal," that other U.S. attorneys are "authorized by law to conduct."
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> Yet another part of that law, Section 533, says the attorney general can appoint officials "to detect and prosecute crimes against the United States." These sections were specifically cited when Attorney General Merrick Garland appointed Mr. Smith as a special counsel. If Congress doesn't like these laws, it can repeal them. But until then, the law is the law.
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> I drafted the special counsel regulations for the Justice Department to replace the Independent Counsel Act in 1999 when I worked at the department. Janet Reno, the attorney general at the time, and I then went to Capitol Hill to brief Congress on the proposed rules over a period of weeks. We met with House and Senate leaders, along with their legal staffs, as well as the House and Senate Judiciary Committees. We walked them extensively through each provision. Not one person raised a legal concern in those meetings. Indeed, Ken Starr, who was then serving as an

> independent counsel, told Congress that the special counsel regulations were exactly the way to go.

This legal dispute will be aired in the Eleventh in Jack Smith's promised appeal.

Katyal's more salient point is in describing where this leads if Trump's Supreme Court gets to review Special Counsel appointments at some time after the November election will determine whether the rule applies to Trump or to a normal president.

> Imagine a future president suspected of serious wrongdoing. Do we really want his appointee to be the one investigating the wrongdoing? The potential for a coverup, or at least the perception of one, is immense, which would do enormous damage to the fabric of our law.

That's the kind of explanation, after all, why Cannon would drop all her *other* obstruction and pursue this angle: to ensure that a second Donald Trump administration could not be threatened with even the *possibility* of a Special Counsel.

But I'm interested in the way Thomas ended his concurrence, to an opinion about a prosecution involving official acts of a then-president. It is not dissimilar to the way John Roberts closed his majority opinion, by claiming this was all about separation of powers.

> Whether the Special Counsel's office was "established by Law" is not a trifling technicality. If Congress has not reached a consensus that a particular office should exist, the Executive lacks the power to unilaterally create and then fill that office. Given that the Special Counsel purports to wield the Executive Branch's power to prosecute, the consequences are weighty. Our

> Constitution's separation of powers, including its separation of the powers to create and fill offices, is "the absolutely central guarantee of a just Government" and the liberty that it secures for us all. Morrison, 487 U. S., at 697 (Scalia, J., dissenting). There is no prosecution that can justify imperiling it.
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> In this case, there has been much discussion about ensuring that a President "is not above the law." But, as the Court explains, the President's immunity from prosecution for his official acts *is* the law. The Constitution provides for "an energetic executive," because such an Executive is "essential to . . . the security of liberty." Ante, at 10 (internal quotation marks omitted). Respecting the protections that the Constitution provides for the Office of the Presidency secures liberty. In that same vein, the Constitution also secures liberty by separating the powers to create and fill offices. And, there are serious questions whether the Attorney General has violated that structure by creating an office of the Special Counsel that has not been established by law. Those questions must be answered before this prosecution can proceed. We must respect the Constitution's separation of powers in all its forms, else we risk rendering its protection of liberty a parchment guarantee.

Here, the Executive is sharply constrained, even in its prosecutorial function, by guardrails Congress has given it.

I'm not sure this is consistent with this language from Roberts' opinion, which reads maximalist authority for presidents to conduct criminal investigations (and cites to Nixon, with its assertion of great deference on Article

II issues).

> The Government does not dispute that the indictment's allegations regarding the Justice Department involve Trump's "use of official power." Brief for United States 46; see id., at 10–11; Tr. of Oral Arg. 125. The allegations in fact plainly implicate Trump's "conclusive and preclusive" authority. "[I]nvestigation and prosecution of crimes is a quintessentially executive function." Brief for United States 19 (quoting Morrison v. Olson, 487 U. S. 654, 706 (1988) (Scalia, J., dissenting)). And the Executive Branch has "exclusive authority and absolute discretion" to decide which crimes to investigate and prosecute, including with respect to allegations of election crime. Nixon, 418 U. S., at 693; see United States v. Texas, 599 U. S. 670, 678–679 (2023) ("Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" (quoting TransUnion LLC v. Ramirez, 594 U. S. 413, 429 (2021))). The President may discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to "take Care that the Laws be faithfully executed." Art. II, §3. And the Attorney General, as head of the Justice Department, acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to 'preserve, protect, and defend the Constitution.'" Mitchell v. Forsyth, 472 U. S. 511, 520 (1985) (quoting Art. II, §1, cl. 8).
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> Investigative and prosecutorial

> decisionmaking is "the special province of the Executive Branch," Heckler v. Chaney, 470 U. S. 821, 832 (1985), and the Constitution vests the entirety of the executive power in the President, Art. II, §1. For that reason, Trump's threatened removal of the Acting Attorney General likewise implicates "conclusive and preclusive" Presidential authority. As we have explained, the President's power to remove "executive officers of the United States whom he has appointed" may not be regulated by Congress or reviewed by the courts. Myers, 272 U. S., at 106, 176; see supra, at 8. The President's "management of the Executive Branch" requires him to have "unrestricted power to remove the most important of his subordinates"—such as the Attorney General—"in their most important duties." Fitzgerald, 457 U. S., at 750 (internal quotation marks and alteration omitted).
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> The indictment's allegations that the requested investigations were "sham[s]" or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials. App. 186–187, Indictment ¶10(c). And the President cannot be prosecuted for conduct within his exclusive constitutional authority. Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials. [my emphasis]

That is, Roberts has to read presidential authority to intervene in DOJ's prosecutorial functions in order to sanction Trump's plan to demand DOJ's participation in his fraud. But then Thomas argues that the president can only do so if Congress has given him authority.

Which is it?