SUPREME COURT OF THE UNITED STATES

No. 23–939

DONALD J. TRUMP, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[July 1, 2024]

JUSTICE THOMAS, concurring.

Few things would threaten our constitutional order more than criminally prosecuting a former President for his official acts. Fortunately, the Constitution does not permit us to chart such a dangerous course. As the Court forcefully explains, the Framers "deemed an energetic executive essential to . . . the security of liberty," and our "system of separated powers" accordingly insulates the President from prosecution for his official acts. *Ante*, at 10, 42 (internal quotation marks omitted). To conclude otherwise would hamstring the vigorous Executive that our Constitution envisions. "While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty." *Morrison* v. *Olson*, 487 U. S. 654, 710–711 (1988) (Scalia, J., dissenting).

I write separately to highlight another way in which this prosecution may violate our constitutional structure. In this case, the Attorney General purported to appoint a private citizen as Special Counsel to prosecute a former President on behalf of the United States. But, I am not sure that any office for the Special Counsel has been "established by Law," as the Constitution requires. Art. II, §2, cl. 2. By requiring that Congress create federal offices "by Law," the Constitution imposes an important check against the President—he cannot create offices at his pleasure. If there is

no law establishing the office that the Special Counsel occupies, then he cannot proceed with this prosecution. A private citizen cannot criminally prosecute anyone, let alone a former President.

No former President has faced criminal prosecution for his acts while in office in the more than 200 years since the founding of our country. And, that is so despite numerous past Presidents taking actions that many would argue constitute crimes. If this unprecedented prosecution is to proceed, it must be conducted by someone duly authorized to do so by the American people. The lower courts should thus answer these essential questions concerning the Special Counsel's appointment before proceeding.

I

The Constitution sets forth how an office may be created and how it may be filled. The Appointments Clause provides:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Department." Art. II, §2, cl. 2.

The constitutional process for filling an office is plain from this text. The default manner for appointing "Officers of the United States" is nomination by the President and confirmation by the Senate. *Ibid.* "But the Clause provides a limited exception for the appointment of inferior officers: Congress may 'by Law' authorize" one of three specified ac-

tors "to appoint inferior officers without the advice and consent of the Senate." *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 312 (2017) (THOMAS, J., concurring). As relevant here, a "Hea[d] of Department"—such as the Attorney General—is one such actor that Congress may authorize "by Law" to appoint inferior officers without senatorial confirmation. Art. II, §2, cl. 2.

Before the President or a Department Head can appoint any officer, however, the Constitution requires that the underlying office be "established by Law."[1] The Constitution itself creates some offices, most obviously that of the President and Vice President. See §1. Although the Constitution contemplates that there will be "other Officers of the United States, whose Appointments are not herein otherwise provided for," it clearly requires that those offices "shall be established by Law." §2, cl. 2. And, "established by law" refers to an office that Congress creates "by statute." *Lucia* v. *SEC*, 585 U. S. 237, 254 (2018) (THOMAS, J., concurring); see also *United States* v. *Maurice*, 26 F. Cas. 1211, 1213 (No. 15,747) (CC Va. 1823) (Marshall, C. J.).

The limitation on the President's power to create offices grew out of the Founders' experience with the English monarchy. The King could wield significant power by both creating and filling offices as he saw fit. He was "emphatically and truly styled the fountain of honor. He not only appoint[ed] to all offices, but [could] create offices." The Federalist No. 69, p. 421 (C. Rossiter ed. 1961); see also 1 W. Blackstone, Commentaries on the Laws of England 271 (T.

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[1] Although a Government official may also be a "nonofficer employe[e]," I set aside that category because it is difficult to see how an official exercising the Department of Justice's duties to enforce the criminal law by leading a prosecution could be anything but an officer. *Lucia* v. *SEC*, 585 U. S. 237, 253, n. 1 (2018) (THOMAS, J., concurring); see *SW General*, 580 U. S., at 314 (opinion of THOMAS, J.). If the Special Counsel were a nonofficer employee, the constitutional problems with this prosecution would only be more serious. For now, I assume without deciding that the Special Counsel is an officer.

Cooley ed. 1871) ("[A]s the king may create new titles, so may he create new offices"). That ability to create offices raised many "concerns about the King's ability to amass too much power"; the King could both create a multitude of offices and then fill them with his supporters. J. Mascott, Who Are "Officers of the United States"? 70 Stan. L. Rev. 443, 492 (2018) (Mascott); see also G. Wood, The Creation of the American Republic 1776–1787, p. 143 (1969) (describing "the power of appointment to offices" as "the most insidious and powerful weapon of eighteenth-century despotism"); T. Paine, Common Sense (1776), reprinted in The Great Works of Thomas Paine 11 (1877) (explaining that "the crown . . . derives its whole consequence merely from being the giver of places and pensions"). In fact, one of the grievances raised by the American colonists in declaring their independence was that the King "ha[d] erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance." Declaration of Independence ¶12. The Founders thus drafted the Constitution with "evidently a great inferiority in the power of the President, in this particular, to that of the British king." The Federalist No. 69, at 421.

The Founders broke from the monarchial model by giving the President the power to *fill* offices (with the Senate's approval), but not the power to *create* offices. They did so by "imposing the constitutional requirement that new officer positions be 'established by Law' rather than through a King-like custom of the head magistrate unilaterally creating new offices." Mascott 492–493 (footnote omitted); see also 1 Annals of Cong. 581–582 (1789) ("The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation"); see also *ibid.* (describing the power to "designat[e] the man to fill the office" as "of an Executive nature"). The Constitution thus "giv[es]

Congress broad authority to establish and organize the Executive Branch." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 266 (2020) (KAGAN, J., concurring in judgment in part and dissenting in part). By keeping the ability to create offices out of the President's hands, the Founders ensured that no President could unilaterally create an army of officer positions to then fill with his supporters. Instead, our Constitution leaves it in the hands of the people's elected representatives to determine whether new executive offices should exist.

Longstanding practice from the founding to today comports with this original understanding that Congress must create offices by law. The First Congress, for instance, routinely and explicitly created offices by statute. See, *e.g.*, §35, 1 Stat. 92–93 (creating the offices of Attorney General and U. S. Attorney for each district); see also §§1–2, *id.*, at 50 (creating offices of Secretary of War and his Chief Clerk); ch. 12, §1, *id.*, at 65 (creating offices within the Department of Treasury for Secretary of the Treasury, a Comptroller, Auditor, Treasurer, Register, and Assistant to the Secretary). Still today, Congress creates the offices that the Executive Branch may fill. For example, Congress has created several offices within the Department of Justice, including the offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Solicitor General, and Assistant Attorneys General. See 28 U. S. C. §§503–506. For some agencies, Congress has also granted the agency head the power to "appoint such officers and employees . . . as are necessary to execute the functions vested in him." 7 U. S. C. §610(a) (Department of Agriculture); see also, *e.g.*, 20 U. S. C. §3461 (Department of Education); 42 U. S. C. §913 (Department of Health and Human Services).

In the past, Congress has at times expressly created offices similar to the position now occupied by the Special Counsel. Congress created an office for a "special counsel"

to investigate the Teapot Dome Scandal and pursue prosecutions. See ch. 16, 43 Stat. 6. And, a statute provided for "the appointment of an independent counsel" that we addressed in *Morrison* v. *Olson*. See 28 U. S. C. §592. That statute lapsed, and Congress has not since reauthorized the appointment of an independent counsel. See §599.[2]

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.

II

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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[2] To be sure, a few Presidents have appointed "special prosecutors" without pointing to any express statutory authorization. See generally T. Eastland, Ethics, Politics and the Independent Counsel 8–9 (1989) (describing past uses of special prosecutors). But, this Court had no occasion to review the constitutionality of those prosecutors' authority.

[3] In fact, Congress gave the Attorney General the power to appoint "additional officers . . . as he deems necessary"—but, only for the Bureau of Prisons. 18 U. S. C. §4041.

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]

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 consequen-

[4]Regulations 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.

tial prosecution proceeds, we should at least provide a fulsome explanation of why that is so.

Even if the Special Counsel has a valid office, questions remain as to whether the Attorney General filled that office in compliance with the Appointments Clause. For example, it must be determined whether the Special Counsel is a principal or inferior officer. If the former, his appointment is invalid because the Special Counsel was not nominated by the President and confirmed by the Senate, as principal officers must be. Art. II, §2, cl. 2. Even if he is an inferior officer, the Attorney General could appoint him without Presidential nomination and senatorial confirmation only if "Congress . . . by law vest[ed] the Appointment" in the Attorney General as a "Hea[d] of Department." *Ibid.* So, the Special Counsel's appointment is invalid unless a statute created the Special Counsel's office *and* gave the Attorney General the power to fill it "by Law."

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.