

the Attorney General to appoint a special counsel, and the fact that the Attorneys General have cited different statutes at different times supports, rather than undermines, their authority to do so.

The district court also attached undue weight to the fact that some special counsels have been appointed from within the Department, while others have been appointed from outside the Department. *See* Dkt. 672 at 38-39. The district court erroneously derived that distinction from Section 515(b)'s use of the past participle "retained," while offering no theory for why Congress would have built such a distinction into the statute. The district court compounded its error by fundamentally mischaracterizing the Special Counsel's role. According to the district court, "Mr. Smith is *a private citizen* exercising the full power of a United States Attorney." *Id.* at 41 (emphasis added). But he is not a private citizen: he is a sworn officer of the Department of Justice. There was a period in American history when "private citizens" prosecuted some of the most consequential cases of the day, such as the prosecution of Jefferson Davis. But that has not been the practice for more than 150 years. And to the extent the district court used the term "private citizen" to refer to someone who was not *already* a member of the Department of Justice before receiving his commission, that definition applies equally to every member of the Department and has no