

about Congress’s approval of modern special counsels like Special Counsel Smith.” *Id.* at 36-41. To reach that conclusion, the district court attached undue weight to several superficial variations in historical practice that shed no light on the question at hand.

To begin, the district court erroneously relied on variations in the mechanism by which special counsels have been appointed, emphasizing (Dkt. 672 at 36-38) that (1) not every special counsel in history has been appointed by the Attorney General, and (2) not every Attorney General who appointed a special counsel explicitly relied on Section 515. But the question is not whether Attorneys General “were *solely* and *exclusively* responsible for the act of appointment.” *Id.* at 37 (emphasis added). The question is whether Congress has vested Attorneys General with the power of appointment; the fact that the President has, at times, *also* exercised appointment power, and that on one occasion the President’s selections were made subject to Senate confirmation,²³ sheds no light on the Attorney General’s power. Nor is it significant that Attorneys General have cited different statutory provisions when appointing a special counsel. Sections 515, 533, and 509/510 each independently authorize

²³ See Jerome J. Shestack, *Foreword: The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2012 (1998) (noting that the Teapot Dome scandal was “the first and last time Senate consent was involved” with a special counsel’s appointment).