

After Congress did so, the Attorney General promulgated the regulations that currently govern Special Counsels “selected [by the Attorney General] from outside the United States Government,” 28 C.F.R. § 600.3(a), invoking “the authority vested in [her] as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509 and 510.” 64 Fed. Reg. 37,038, 37,042 (July 9, 1999). In the years since, Attorneys General have continued to appoint special counsels, including John Danforth, Patrick Fitzgerald, Robert S. Mueller III, John Durham, Robert Hur, and David Weiss—some from within the Department and some brought into the Department like Special Counsel Smith. Courts uniformly rejected challenges to those appointments, *see supra* at 16-17, until the district court’s decision in this case.

2. In the district court’s view (Dkt. 672 at 36-41), however, this history presents nothing more than a “spotty” picture of “an ad hoc, inconsistent practice” that “makes it near impossible to draw any meaningful conclusions

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*See American Enterprise Inst. & Brookings Inst., Project on the Independent Counsel Statute: Report and Recommendations*, at iii (May 1999). The resulting report explained that “[s]ince creation of the Department of Justice in 1870, the Attorney General has had standing statutory authority, now in 28 U.S.C. § 515, to retain a counsel as a ‘special assistant to the Attorney General’ or as a ‘special attorney.’” *Id.* at 5. Although the report recommended a legislative response to the Act’s expiration, it noted that the appointment provision in the proposed legislation merely “duplicates authority that exists in 28 U.S.C. § 515, and other U.S. Code sections.” *Id.* at 14 n.6, Appendix A-1.