

“expressly address[ed]” the statutory authority for the Special Prosecutor’s appointment. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).<sup>2</sup>

The district court’s supposition that *Nixon*’s appointment discussion was dicta because the issue was not presented or contested is likewise flawed. Dkt. 672 at 59-62. Both President Nixon’s justiciability challenge and the question presented in the Special Prosecutor’s certiorari petition (whether the President “is subject” to a subpoena issued by the Special Prosecutor, *see* Dkt. 672 at 60), necessarily required the Court to determine whether the Attorney General had a lawful basis to appoint the Special Prosecutor. *See Six Companies of Cal. v. Joint Highway Dist. No. 13 of Cal.*, 311 U.S. 180, 187 (1940) (a court’s “statement of the ground of its decision” is not “a mere dictum”). The government expressly argued the point and cited the same statutes that the Court cited. Brief for the United States, at 27-28, *United States v. Nixon*, Nos. 73-1766, 73-1835 (filed June 21, 1974). President Nixon’s acknowledgement of that point in his reply only strengthens the basis for the Court’s determination. *See United States v. Kaley*,

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<sup>2</sup> The district court relied on (Dkt. 672 at 54, 56, 61, 66) the statement in *Verdugo-Urquidez* that the Supreme Court “often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, . . . and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions.” 494 U.S. at 272. As explained above, however, the Court in *Nixon* did not assume as an antecedent proposition the Attorney General’s authority to appoint the Special Prosecutor.