No. 03-_____

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE UNITED STATES OF AMERICA,

Petitioner,

v.

HONORABLE JOHN C. SHABAZ, United States District Judge, Western District of Wisconsin,

Respondent.

PETITION OF THE UNITED STATES OF AMERICA
FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Relates to United States v. Bitsky, No. 03-CR-0002-S (W.D. Wis.))

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RELIEF SOUGHT

The United States of America petitions this Court for a writ of mandamus requiring the Honorable John C. Shabaz, United States District Court for the Western District of Wisconsin, to dismiss Count 1 (the remaining count) of the indictment in *United States* v. *Bitsky*, No. 03-CR-0002-S (W.D. Wis.), and vacate the court's order purporting to appoint a "special counsel."

ISSUE PRESENTED

Whether the district court exceeded its authority and usurped the executive power of the Attorney General when it refused the government's request to dismiss the remaining count of the indictment and instead appointed a "special counsel" to prosecute it.

ORDERS TO BE REVIEWED

After the defendant in the underlying criminal prosecution pleaded guilty to one felony count of the three-count indictment and was sentenced to 16 months imprisonment, the United States, pursuant to Fed. R. Crim. P. 48(a), sought dismissal of the other two counts. On June 27, 2003, the District Court dismissed only one of the remaining two counts and ordered the United States to proceed to trial on the other count. 6/27/03 Order (Attachment 1). On July 9, 2003, after the government informed the court that it did not intend to proceed to trial, the court entered an order finding the government to be acting in bad faith and rescheduled the trial for September 8, 2003. 7/9/03 Order (Attachment 2). On July 16, 2003, the court entered an order purporting to appoint a private attorney as "special

counsel" to prosecute the remaining count, which prosecution is to be paid for by the Department of Justice. 7/16/03 Order (Attachment 3).

FACTS

Kenneth Bitsky was charged in a three-count indictment on January 7, 2003, with one count of violating 18 U.S.C. 242 and two counts of violating 18 U.S.C. 1512(b)(3). See Indictment (Attachment 4). Each count carried a statutory maximum penalty of ten years in prison.

This indictment resulted from an incident that occurred on February 11, 2001, when Bitsky was the Undersheriff of Adams County, Wisconsin. Steven Vosen was arrested during the early morning hours of February 11 and transported to the Adams County Jail for booking; Vosen was extremely intoxicated and had been fighting with a neighbor. While Vosen was in the booking room, he cursed at Bitsky, and Bitsky slammed Vosen into a wall, scraping his face against the wall and a chart on the wall. Vosen suffered cuts to his face and head. The obstruction charges in the indictment were based on Bitsky's attempt to persuade a fellow officer to write a false report and his attempts to intimidate another officer so that she would not reveal what she had seen during the jail incident.

Jury selection and trial were scheduled to begin April 14, 2003. On March 31, 2003, the United States proposed a plea agreement calling for Bitsky to plead guilty to Count 3 (an obstruction count) and for the United States to move to dismiss the remaining charges after sentencing. See Letter Agreement (Attachment 5). Bitsky accepted the plea agreement and, on April 11, 2003,

pursuant to Fed. R. Crim. P. 11(c), Bitsky entered a conditional plea of guilty to Count 3 of the indictment.

At the scheduled sentencing hearing on June 20, 2003, the district court rejected the plea agreement citing United States Sentencing Guideline (U.S.S.G.) 6B1.2(a). The court concluded that the plea agreement would undermine the sentencing guidelines since it precluded the court from imposing a higher sentence. Tr., 6/20/03 Hr'g, at 6-8 (Attachment 6). Bitsky, through his counsel, indicated that it was his preliminary intention to proceed to sentencing on the one count without any plea agreement. The attorney for the government stated that if Bitsky chose not to withdraw his plea, and to proceed without any plea agreement, the United States would make an independent decision regarding the dismissal of the remaining two charges. *Id.* at 8-10.

On June 25, 2003, Bitsky informed the court that he did not wish to withdraw his guilty plea and intended to proceed to sentencing without a plea agreement. The district court then sentenced Bitsky to a term of 16 months in prison. Tr., 6/25/03 Hr'g, at 20 (Attachment 7); Judgement of Conviction (Attachment 8). Following Bitsky's sentencing, the district court scheduled trial on the remaining two counts for July 16, 2003. Tr., 6/25/03 Hr'g, at 21.

On June 26, pursuant to Fed. R. Crim. P. 48(a), the United States filed a proposed order dismissing the remaining two counts of the indictment along with a four-page affidavit of the Assistant United States Attorney, which set out the reasons for the requested dismissal. (Attachment 9). The affidavit explained in

detail the careful exercise of prosecutorial discretion that had led to the decision to seek dismissal of the remaining two counts of the indictment and explained that all prosecutors involved in the matter agreed that this was an appropriate disposition of the case. It noted that the primary goal of the prosecution of Bitsky was to obtain a felony conviction, carrying the possibility of a significant prison sentence, which would lead to Bitsky's immediate resignation and permanent bar from law enforcement. Aff. at ¶¶ 4 & 5. The affidavit also stated that the dismissal was with the consent of the defendant and not intended to subject the defendant to any prosecutorial harassment, and that the dismissal was not based on the acceptance of a bribe or personal dislike of the victim and that, in fact, the victim agreed that this was a fair resolution of the case. See Aff. at ¶ 6.

On June 27, 2003, the district court dismissed Count 2 (the other obstruction count), but refused to dismiss Count 1 (the Section 242 count). 6/27/03 Order (Attachment 1). The district court dismissed Count 2 because it concluded that if Bitsky were sentenced on Count 2, the sentence would be grouped with that of Count 3 and would therefore not result in a longer sentence. The district court stated that if Bitsky were convicted on Count 1 the Guideline range would be 24 to 30 months. *Id.* at 3.[1] The court characterized a dismissal as a "sweetheart deal" that was not "a reasonable resolve of this case." *Id.* at 1. The court did not

[1] The district court's hypothetical calculation of Bitsky's potential sentencing range is not a finding of what the actual range would be if in fact Bitsky were ever convicted on Count 1.

address the standard for dismissal under Fed. R. Crim. P. 48(a), but instead relied on U.S.S.G. 6B1.2(a) (Policy Statement), even though the plea agreement was no longer before the court. 6/27/03 Order at 2. The court concluded that when a range of 24 to 30 months is compared to the actual sentence of 16 months, "it is obvious that the remaining count did not adequately reflect the seriousness of the actual offense behavior" within the meaning of the Guidelines. *Id.* at 3.

The district court went on to state:

> It may very well be that the parties have been accommodated. The administration of justice has not, however, and this Court will continue to follow the guidelines and the intent of § 6B1.2(a) until so directed otherwise by a higher authority than the Department of Justice.
>
> Once charges are pursued when dismissal is dependent upon the Court's examination of a plea agreement, the more severe charge will not be dismissed either now or in the future unless extraordinary circumstances exist which are not found here. More than the government's discretion is necessary and certainly not an abuse thereof.
>
> The government is concerned with the risk of trial. If that is the case it should withdraw from litigation for all trials have the potential of risk.

Id. at 4.[2]

On July 8, 2003, the final pre-trial conference was held before a magistrate

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[2] The district court's rejection of a plea agreement would be reviewed only for an abuse of discretion. *United States* v. *Martin*, 287 F.3d 609, 621 (7th Cir.), *cert. denied sub nom. Alecia* v. *United States*, 123 S.Ct. 116, *sub nom. Matias* v. *United States*, 123 S.Ct. 116, *sub nom. Alecia* v. *United States*, 123 S.Ct. 303 (2002). The court need not address here whether the district court's assertion of a *per se* rule against accepting certain categories of plea agreements would in fact be an abuse of discretion.

judge. The assistant United States attorney informed the magistrate judge that the government did not intend to proceed to trial on Count 1 and provided the magistrate judge a letter stating the government's position. (Attachment 10.) The next day, the final pre-trial hearing was held before the district judge, and the government reiterated its position. Tr., 7/9/03 Hr'g (Attachment 11). The AUSA informed the court that the government was seeking authorization from the Solicitor General to petition this Court for a writ of mandamus to require the district court to dismiss Count 1. *Id.* at 3.

The district court stated that the government's request to dismiss the remaining count was in bad faith. The judge issued a short order, stating:

> The United States Attorney is clearly motivated solely by a desire to usurp the Court's sentencing authority, particularly U.S.S.G. § 6B1.2. That purpose is clearly contrary to the public interest and a bad faith exercise of his authority. Were the government allowed to dismiss Count 1 of the indictment the public interest would not be served.

7/9/03 Order at 1-2 (Attachment 2).

On July 16, 2003, the district court entered a one-page order purporting to appoint a private attorney as "special counsel to prosecute the defendant on Count 1 of the indictment." 7/16/03 Order (Attachment 3). The court also ordered that the Department of Justice pay the expenses of the special counsel. *Ibid*.

REASONS THE WRIT SHOULD ISSUE

The district court has plainly usurped the executive authority of the Attorney General to decide whom to prosecute and on what charges. District courts have the authority to reject plea agreements and have the authority to set the

sentences for convicted persons. But the district court here failed to recognize that its authority to impose sentence extends only to counts upon which a defendant has been convicted. The Attorney General, exercising pursuant to statute the executive power that the Constitution vests in the President, has the exclusive authority to decide whether to expend limited prosecutorial resources to go to trial. Here the government attorneys determined that the possibility that Bitsky would receive a slightly longer sentence if convicted of the remaining count was simply not worth the expenditure of resources required to try him and so moved to dismiss the remaining counts. Because that decision is committed to the prosecutorial discretion of the Attorney General and his subordinates, the district court has no authority to substitute its judgment for that of the Attorney General, and the district court's decision to do so was an abuse of its authority. The government's only remedy for the district court's failure to dismiss the remaining count is a writ of mandamus.

1. A Writ of Mandamus Is the Only Available Remedy to Correct the District Court's Usurpation of Executive Authority.

The decisions of this Court establish that the district court's refusing to dismiss the remaining count and its orders requiring the defendant to stand trial on a charge the government believes should be dismissed are not subject to appeal by the government. In *United States* v. *Spilotro*, 884 F.2d 1003, 1006 (7th Cir. 1989), this Court held that the government's right to appeal in criminal cases is limited to orders specified by statute. Under 18 U.S.C. 3731, "[a]n appeal by the United

States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information * * * as to any one or more counts." Here the court *refused* to dismiss a count; such an order does not come within the statute. Where a district court's error cannot be remedied by the regular appellate process, the remedy of mandamus is available. See *In re Maloney* v. *Plunkett*, 854 F.2d 152, 154 (7th Cir. 1988).

Although "the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations," *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 289 (1988), the district court's invasion of the Attorney General's prerogative presents such an extraordinary situation. This Court has noted that a writ of mandamus is traditionally available "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Spilotro*, 884 F.2d at 1007 (internal quotation marks omitted). And this Court has noted that a judicial "usurpation of power" will justify granting the writ. *Ibid*. The district court's refusal to dismiss the remaining count of the indictment in this case amounts to just such a usurpation of power.

2. The Executive Branch, Not the Judiciary, Has the Exclusive Authority to Decide Whom It Will Prosecute and on What Charges.

The executive power of the United States is vested in the president. U.S. Const., Art. II, Sec. 1. Under 28 U.S.C. 516, except as otherwise provided by law, the Attorney General and the Department of Justice have the exclusive right to conduct litigation on behalf of the United States; see also *United States* v.

Palumbo Bros., Inc., 145 F.3d 850, 865 (7th Cir.) (government exercises its prosecutorial discretion through the "*exclusive* prerogative of the Attorney General") (emphasis added), *cert. denied*, 525 U.S. 949 (1998).

Criminal prosecution is an inherently executive function within the absolute discretion of the executive branch. See *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive authority and absolute discretion whether to prosecute a case"). The discretion to prosecute includes the discretion to dismiss charges. See *United States* v. *Martin*, 287 F.3d 609, 623 (7th Cir.) ("The decision to indict, allege specific charges, or dismiss charges is inherently an exercise of executive power, and the prosecutor has broad discretion in these matters."), *cert. denied sub nom. Alecia* v. *United States*, 123 S.Ct. 116, *sub nom. Matias* v. *United States*, 123 S.Ct. 116, *sub nom. Alecia* v. *United States*, 123 S.Ct. 303 (2002).

It is well settled that, consistent with the constitutionally required separation of powers, the judicial branch may not invade the executive's exercise of prosecutorial discretion. As this Court noted, "[t]he judiciary cannot compel prosecutions, nor can a judge refuse to grant the prosecution's voluntary motion to dismiss charges *absent a specific finding of bad faith*." *Martin*, 287 F.3d at 623 (emphasis added); see also *United States* v. *Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992) ("A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them."). While a court has the power to check the executive's unconstitutional abuse of power, it has no authority

to review its otherwise constitutional exercise of discretion. "Prosecutorial discretion resides in the executive, not judicial branch, and that discretion, though subject of course to judicial review to protect constitutional rights, *is not reviewable for a simple abuse of discretion.*" *Giannattasio*, 979 F.2d at 100 (emphasis added); see also *ibid* ("Of course there are judicially enforceable checks on discretion to indict. But they are protections for defendants, not for judges.").

This Court has long recognized the severe limits the Constitution imposes on the judiciary's supervision of the executive's exercise of discretion. In *In re Goldberg* v. *Hoffman*, 225 F.2d 463 (7th Cir. 1955), this Court rejected a defendant's petition for a writ of mandamus to compel the government to dismiss a criminal prosecution because of the defendant's precarious health. This Court stated that "we are asked to review the exercise of administrative discretion, overrule the decision of the executive and direct the course which that discretion must take. We think such judicial control of an executive officer is beyond the power of this court." *Id.* at 465. This Court further explained that "[d]iscretion is always subject to abuse, but the framers of our Constitution have indicated their conviction that the danger of abuse by the executive is a lesser evil than to render the acts left to executive control subject to judicial encroachment." *Id*. at 466.

3. The District Court's Authority to Refuse the Government's Request to Dismiss Charges Is Extremely Narrow and Was Plainly Exceeded Here.

Pursuant to Fed. R. Crim. P. 11, a court has authority to accept or reject a plea agreement; an agreement between the prosecutor and defendant does not bind

the court. See *Martin*, 287 F.3d at 621. This Court has noted that in accord with U.S.S.G. 6B1.2(a) (policy statement), "the court has the responsibility to use its sound discretion to examine plea agreements." *Ibid*. The district court relied on U.S.S.G. 6B1.2(a) and the accompanying commentary in asserting the power to refuse to dismiss Count 1. 6/27/03 Order at 3 (Attachment 1).

But this Court has also recognized that the district court's discretion in reviewing plea agreements does not give it the power "'to intrude upon the charging discretion of the prosecutor.'" *Martin*, 287 F.3d at 621 (quoting commentary to Guideline). The commentary to the Guideline itself states that where the government's motion to dismiss charges is not contingent on the disposition of the remaining charges — as it was not in this case — "'the judge should defer to the government's position except under extraordinary circumstances. Rule 48(a), Fed.R.Crim.P.'" *Id.* at 622 (quoting commentary to Guideline). The commentary states that when a motion to dismiss charges is contingent upon acceptance of a plea agreement, "'the court's authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether or not dismissal of charges will undermine the sentencing guidelines.'" *Ibid.* (quoting commentary to Guideline). Because the requested dismissal in the underlying prosecution was not contingent, the district court's authority to reject it is narrow, and is governed, not by the Sentencing Guidelines, but by Fed. R. Crim. P. 48(a) and the case law interpreting it.

Rule 48(a), Federal Rules of Criminal Procedure, provides: "The

government may *with leave of court,* dismiss an indictment, information, or complaint." (Emphasis added.) This Court has recognized that although the Rule requires "leave of court," judicial discretion to withhold that leave is extremely narrow. The "leave of court" requirement

> checks the discretionary power of the prosecutor to seek a *nolle prosequi* and later reindict on the same charges. Rule 48 allows a court to ensure the fair administration of justice and prevent the harassment of a defendant. The leave of court requirement does not allow the judiciary to exercise executive powers * * *

Martin, 287 F.3d at 623 (citation omitted). The Supreme Court has noted that the "leave of court" requirement "is apparently to protect a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indictment *over the defendant's objection*." *Rinaldi* v. *United States*, 434 U.S. 22, 30 n.15 (1977) (emphasis added).

Here, the defendant has not opposed the dismissal of the remaining charge; indeed, such an opposition would be strongly against the defendant's interests. This Court has stated that if a defendant "joined a motion to dismiss with prejudice, the court would have been required to grant the motion, absent a specific finding that dismissal would be manifestly against the public interest." See *Martin*, 287 F.3d at 623.[3]

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[3] Although the government's requested order stated that the charges would be dismissed without prejudice, the government's request made clear that there would be no further prosecution of Bitsky. The district court understood the government to be seeking a permanent termination of the prosecution, and characterized the request as one to dismiss with prejudice. See 7/9/03 Order at 1 (Attachment 2).

The district court clearly exceeded its authority. The court's June 27, 2003, order, quoted above, indicates that the court refused to dismiss Count 1 because it believed the government had abused its prosecutorial discretion. As this Court has repeatedly held, the judiciary simply lacks the power to review that exercise of discretion for an abuse. See *In re Goldberg*, 225 F.2d at 465; *Giannattasio*, 979 F.2d at 100. Thus, the court's June 27 order provides no basis for its refusal to dismiss Count 1 of the indictment.

In its order of July 9, 2003, the district court, apparently to correct the inadequate basis for its June 27 order, stated that the government attorneys were acting in bad faith in seeking to dismiss the remaining count. As noted above, this Court has held that Fed. R. Crim. P. 48(a) permits district courts to deny the government's request to dismiss counts of an indictment where there is a specific finding of bad faith. See *Martin*, 287 F.3d at 623. In *United States* v. *Palomares*, 119 F.3d 556, 558 (7th Cir. 1997), this Court held that a district court "may presume the government has acted in good faith, but the government must provide more than conclusory reasons for seeking dismissal." Here, the government provided a detailed affidavit explaining its exercise of prosecutorial discretion. The district court found no facts to support its finding of bad faith. The court merely presumed that the disagreement between the government attorneys and the court as to the appropriate resolution of this prosecution was itself sufficient to show the government attorneys' bad fath. The court's "finding" lacks both factual and legal support.

The district court relied on two cases: *United States* v. *Hamm*, 659 F.2d 624 (5th Cir. 1981) (en banc), and *United States* v. *Smith*, 55 F.3d 157 (4th Cir. 1995). In both cases, the court of appeals reversed the district court's refusal of the government's request to dismiss counts *even though the defendants had already been convicted on them.* Those cases thus provide no support for the district court's refusal to dismiss the remaining count of the indictment on which Bitsky had not yet been convicted.

At the July 9, 2003, hearing, the district court read at length from the dissenting opinion in *United States* v. *Hamm.* In that case, the government had made promises to cooperating witnesses regarding the length of sentence they would receive. When the district court refused to accept the government's recommendation, the government moved to dismiss the counts to which the defendants had already pleaded. The Fifth Circuit *en banc* held that that refusal was error. What, if any, justification may have existed for the dissent's characterization of the government's the motion as "a camouflaged attempt to limit the sentencing authority reserved to the judge," 659 F.2d at 634 (Reavley, J., dissenting) (internal quotation marks omitted), given the substantially different facts in *Hamm*, it offers no support for the district court's conclusion that the government was attempting to usurp its sentencing discretion by seeking dismissal of the remaining count against Bitsky, a count on which he has not yet been convicted.

The Fourth Circuit, in *United States* v. *Smith*, like the Fifth Circuit in

Hamm, rejected the lower court's denial of the government's request to dismiss counts *to which the defendant had already pleaded guilty*. The court emphasized the deference the judiciary owed to the executive in its exercise of discretion: "'The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated.'" 55 F.3d at 159 (quoting *United States* v. *Cowan*, 524 F.2d 504, 513 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976)). The court went on to hold that "[a] motion [to dismiss] that is not motivated by bad faith is not clearly contrary to manifest public interest, *and it must be granted*." *Ibid*. (emphasis added). This Court cited this holding of *Smith* with approval in *United States* v. *Martin*, 287 F.3d at 623. The court in *Smith* gave examples of when the motives of the prosecutor would constitute bad faith and a disservice to the public interest: "the prosecutor's acceptance of a bribe, personal dislike of the victim, and dissatisfaction with the jury impaneled." 55 F.3d at 159. The district court did not refer to such conduct in this case. In short, the district court's finding of bad faith is spurious and in no way supports its decision to refuse to dismiss Count 1.

The district court failed to recognize the difference between its discretion to sentence convicted persons — which was implicated in *Hamm* and *Smith* — and the government's discretion to decide whom to bring to trial. The district court fully exercised its sentencing discretion — within the confines imposed by the Sentencing Guidelines — to sentence Bitsky to sixteen months imprisonment *on*

the count for which he pleaded guilty. It then fell to the Attorney General and his subordinates to decide whether the *potential* for a 24 to 30 month sentence was worth the expenditure of the government's limited prosecutorial resources, and as the government explained to the district court in detail, it concluded that it was not.[4] A simple disagreement with the government attorneys' conclusion cannot be the basis of a finding of bad faith.

4. The District Court Has No Authority to Appoint a "Special Counsel" To Prosecute on Behalf of the United States.

The district court judge entered an order purporting to delegate to a "special counsel" executive power that the court simply does not have. See *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive authority and absolute discretion whether to prosecute a case"); see also 28 U.S.C. 516 (Attorney General and the Department of Justice have the exclusive right to conduct litigation on behalf of the United States except as otherwise provided by law). Just as the district court lacks the power to direct the executive in its exercise of discretion, it lacks the power to appoint a third-party to exercise that discretion for the executive.

The Attorney General's power to delegate his prosecutorial authority to a special counsel is an exercise of his authority to appoint subordinate officers.

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[4] Although in this case the government attorney submitted a detailed affidavit describing how the United States exercised its discretion and its reasons for deciding as it did, no decision of this Court has suggested that such a detailed statement is at all necessary to support a dismissal under Rule 48(a).

Nixon, 418 U.S. at 694. There is no provision of law empowering district courts to appoint prosecutors. Nor is such authority ancillary to any judicial function. Cf. *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987) (courts have a limited authority to appoint attorneys to prosecute criminal contempt). Indeed, the district court cited no precedent or authority for its order.[5]

5. The Issuance of a Writ of Mandamus Is Appropriate.

The district court's attempt to exercise the executive power of the Attorney General is precisely the type of usurpation of power or gross abuse of discretion that this Court and other courts of appeals have concluded justifies the issuance of the writ. See *In re Balsimo*, 68 F.3d 185, 187 (7th Cir. 1995) (writ of mandamus issued in criminal case where district court's application of incorrect standard to review transfer motion under Fed. R. Crim. P. 21(b) had effectively "truncate[d] the right conferred by the [rule]"); *United States* v. *Spilotro*, 884 F.2d 1003, 1009 (7th Cir. 1989) (writ of mandamus reversed district court's reduction of defendant's sentence under Fed. R. Crim. P 35(b) when it had no jurisdiction to do so); *In re Maloney* v. *Plunkett*, 854 F.2d 152, 155-156 (7th Cir. 1988) (writ of mandamus issued where district court denied parties their statutory right to use

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[5] The general power assumed by the district is in stark contrast with the narrow power to appoint independent counsels that Congress, by statute, delegated to a panel of the D.C. Circuit. See 28 U.S.C. 593(b)(1) (statute now lapsed). The court could only appoint independent counsels when requested to do so by the Attorney General. Indeed, the Supreme Court in *Morrison* v. *Olson*, 487 U.S. 654, 681-682 (1988), narrowly construed the court's statutory authority to avoid violating the constitutionally mandated separation of powers.

peremptory challenges and where order placed "exceptional burdens" "on the orderly resolution of [the] lawsuit"); see also *In re United States*, 267 F.3d 132, 146 (2nd Cir. 2001) (court granted government's petition for mandamus in criminal prosecution where district court, in ordering disclosure of impeachment evidence, failed to properly exercise its discretion under the Constitution and applicable statute); *In re United States*, 197 F.3d 310, 316 (8th Cir. 1999) (government's petition for mandamus granted in criminal case where district court improperly ordered Attorney General and Deputy Attorney General to testify regarding their decision not to withdraw death notice); *In re United States*, 877 F.2d 1568 (Fed. Cir. 1989) (government's petition for mandamus issued where court of claims judge exceeded his authority under applicable statute and rule by ordering trial outside the United States). This Court should issue the writ in this case as well.

CONCLUSION

This Court should issue a writ of mandamus compelling the district court to dismiss the remaining count of the indictment and vacate its order appointing a special counsel.

Respectfully submitted,

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