"They're Crazy, These Americans": Legal Issues of Special Counsel Appointment in 2024

by Luigi Melica

Abstract: *"Sono pazzi, questi americani": Questioni giuridiche sulla nomina del Procuratore Speciale nel 2024* – This paper explores the legal framework and constitutional implications of the Special Counsel's appointment in the United States. Through a historical analysis of seven key investigations (1870–1978) and related statutes, it traces the evolution from informal practices to formal regulations. The analysis highlights the implications of the 1978 Ethics in Government Act and current Department of Justice rules, addressing their impact on the separation of powers and the autonomy of the Attorney General. Recent cases involving Donald Trump and Hunter Biden underline unresolved constitutional dilemmas, suggesting the necessity of re-evaluating the legal basis for Special Counsel appointments to ensure fair and effective governance.

Keywords: Special Counsel; Presidential Immunity; Constitutional Law; Ethics in Government Act (1978); Separation of Powers

1. Introduction

In my recent book, "Special investigations e comparabilità dagli U.S.A. all'America Latina", I have argued that the legal foundation of the statute of the special counsel cannot solely rely on the internal regulation enacted in 1999 by the Department of Justice, which is currently in force. Based on the history of the phenomenon, I proposed the existence of a constitutional convention among Attorney Generals, who, in case of an inquiry against high-ranking officers (including presidential staff) or politicians within the executive branch (including the President), must appoint a special counsel or prosecutor selected from outside the Executive power due to the conflict of interest of the Prosecutorial Office. The President of the State must refrain from boycotting the investigation, even if it affects his political fellows, and the Congress is responsible for overseeing the inquiry "in order to the American people to have full confidence in the outcome". I also emphasized the crucial role of the press in uncovering scandals and reporting all details of the special investigations, acting as a cohesive force that guarantees success.

Observing the longstanding practice followed by the constitutional actors mentioned above, I argued that, in the seven special investigations carried out from 1870 to 1978, a constitutional custom gradually formed,

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establishing that this *modus procedendi* is perceived as mandatory in similar circumstances.

It is not incorrect to state that the US special investigations originated with the Constitution itself.

The first instance dates back to the 1870, when several high-ranking officials in the Ministry of Treasury were implicated in a massive tax fraud known as the "Whiskey Ring". Due to the involvement of the head of the presidential staff, the Attorney General (hereinafter, AG) and the President of that time appointed a few investigators from outside the executive power. This was essential to maintain the credibility of the inquiry in the public eye, especially considering the widespread media coverage of the fraud. From that moment and until 1978, as outlined in the book, and following the dogma that the executive branch cannot investigate itself and the prosecutors (who are a political appointee) cannot prosecute or investigate their patron, seven investigations took place in the country. Each was regulated solely by *ad hoc* orders from individual AGs. Every time, the AG issued an order appointing the Special Counsel (hereinafter, SC), granting them the authority to investigate and defining the scope of the inquiry. Meanwhile, US Presidents, though fearful of the investigations, refrained from interfering. The AGs consistently selected special counsels who were not only skilled jurists – "investigators of high degree and character" – but also individuals politically distant from the presidential ideology. This occurred in the following cases:

- *Whiskey Ring* (1870): President Ulysses S. Grant, Attorney General Edward Pierrepoint;

- *Star Routes* (1881): President G. A. Garfield, Attorney General Isac W. MacVeagh;
- *Corruption in the Postal Service* (1903): President T. Roosevelt, Attorney General Philander C. Knox;
- *Lands' Ring fraud* (1903): President T. Roosevelt, Attorney General Philander Knox;
- *Teapot Dome* (1923): President Calvin Coolidge, Attorney General Harry M. Daugherty and Harland F. Stone;
- *Top officers' Tax advice* (1952): President Harry S. Truman, Attorney General J. Howard McGrath.
- *Watergate* (1973): President Nixon, Secretary of Defense Elliot Richardson.

2. From Watergate to the MOJ' s internal regulation

All the above happened until the *Watergate* scandal.

At that point, the unwritten source of law was replaced by a federal law: the *Ethics in Government Act of 1978*.

The collapse of the previous system occurred in 1973 when President Richard Nixon, unlike his seven predecessors, refused to accept the special investigation and ordered the AG Eliot Richardson to fire Harvard professor Archibald Cox, who had been appointed as special prosecutor. After the AG refused, Nixon made the same request to the deputy Attorney General, and

when that too was refused, he went to the third-ranking official in the Justice Department's chain of command, who finally carried out the order.

To prevent similar situations in the future – this regrettable phase of the United States constitutional history is sadly remembered as the "Saturday Night Massacre" – Congress enacted a new law, redesigning the SC statute, limiting the Executive's power, and conferring to the investigations a more robust legal foundation.

Notably, under the new regulation, the AG was no longer authorized to directly appoint special investigators. Instead, the AG could only request a panel of three federal judges appointed by the President of the Supreme Court. It is the law itself that establishes the SCs' jurisdiction[1] and, importantly, the AG can only dismiss the SC for "good cause, physical or mental disability [...], or any other condition that substantially impairs the performance of such independent counsel's duties".

Despite good intentions, the system did not work as expected. The special investigations conducted under the *Ethics in Government Act of 1978* are remembered more for their political impact than for their legal outcomes. Almost all of them were essentially used as political weapons by one party against another. Another criticism involved the excessive number of investigations ordered in a brief period of time. For these reasons, the law was allowed to be expired. The *Ethics in Government Act* contained a sunset clause, allowing Congress to extend it each year. While Congress extended it for twenty years, in 1999, they decided to let the law expire, without enacting a replacement.[2]

Subsequently, the Department of Justice decided to address the matter by incorporating a new section (number 600) into the *Code of Federal Regulation*, titled "The Office of the Special Counsel".

Art. 28, chapter VI, section 600 of the Code states that: "when the facts create a conflict so substantial or the exigencies of the situation are such that any initial investigation might taint the subsequent investigation [...] it is appropriate for the Attorney General to immediately appoint a Special Counsel".[3] It further specifies that, in such circumstances, "it would be in the public interest" for the investigation to be conducted by "an outside Special Counsel". As tradition dictates, the American people, in similar

[1] Specifically, they had "the full power and independent authority to: - exercise all investigative and prosecutorial functions and powers of the Department of Justice; - conduct investigations and grand jury proceedings; - engage in judicial proceedings, including litigation and appeals of court decisions; - review documentary evidence; determining whether to challenge the use of testimonial privileges; - receive national security clearances, if appropriate; - seek immunity for witnesses, warrants, subpoenas, and other court orders".

[2] It included a sunset clause, requiring yearly confirmation by the Congress.

[3] See, O.G. Hatch, *The Independent Counsel statute and questions about its future*, in 62(1) *Law and Contemporary Problems* 145, 152 ff. (1998); J. Maskell, *Independent Counsel Law Expiration and the Appointment of "Special Counsels"*, *Cong. Res. Serv*, USA, 4 ff. (2002); K. Gormley, *An Original Model of the Independent Counsel Statute*, in 8 *Duquesne University School of Law Research Paper* 602, 630 ff. (2012); C. Brown, J.P. Cole, *Special Counsels, Independent Counsels, and Special Prosecutors: Legal Authority and Limitations on Independent Executive Investigations*, *Cong. Res. Serv* 7-5700, USA, 8 ff (2018).

circumstances, expect a fair and impartial investigation "to have full confidence in the outcome".[4]

Technically, the Office of the Special Counsel Regulation vest the SC with a significant degree of autonomy and independence,[5] including prohibiting the AG from dismiss the SC at will.[6]

This regulation remains in force, but it has recently become a focal point in political and constitutional debates.

3. The Special counsels' investigations carried out against Donald Trump and R.H. Biden: beginnings and developments in 2024

As of now, two special counsels are on duty: Jack Smith, who is investigating Donald Trump, and David C. Weiss, who is conducting a special investigation into Robert Hunter Biden, the son of President Jo Biden.

a) Jack Smith

[4] This expression was included both in the decree issued at the origin of the phenomenon and more recently. For example, see Robert Muller's decree: U.S. Department of Justice, Office of Public Affairs, *Appointment of Special Counsel*, 17 May 2017, https://www.justice.gov/opa/pr/appointment-special-counsel.

[5] According to the law, SCs must be highly qualified, and must be: "(…) a lawyer with a reputation for integrity and impartial decision making, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly". Furthermore, in accordance with tradition, a SC must be selected from outside the U.S. Government and is required to give priority to the "responsibilities as Special Counsel", which must take first precedence in their professional life. As for jurisdiction, the regulation, in striking the *balance between independence and accountability*, sets out - 8 CFR § 600.4(a) - that the jurisdiction "shall be established by the Attorney General". However, the SC is empowered "to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted". Thus, the AG is due to include in the SC's jurisdiction those crimes typically committed to jeopardize such investigations. Similarly, the regulation confirms the autonomy and independence of the SC by assigning them the power to "determine whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of his or her duties and responsibilities".

[6] Indeed, the Department of Justice's regulation deprives the AG of the power to dismiss at will the SC, by imposing him or her to comply with specific requirements, which are: misconduct, dereliction of duty, incapacity, conflict of interest, or other compelling cause, including violation of departmental policies. In addition, the AG has also the duty not only to "inform the Special Counsel in writing of the specific reason for his or her removal", but also to notify the decision to the Chairman and Ranking Minority Member of the Judiciary Committees of each House of Congress, with the related explanation. The regulation also details the closing of the investigation, emphasizing the relations between the AG and the SC. To this end, as well as the SC is a "confidential employee" of the Department of Justice, it is set out that the final report is "a confidential report", in which the SC explain the prosecution or declination decisions. Then, it depends on the AG to make it public in a redacted or unredacted version.

On November 18, 2022, AG Merrick Garland appointed Jack Smith to oversee the investigation into Trump regarding both the January 6th events[7] and the handling of classified documents after his presidency. According to Order n. 5559-2022,[8] he was appointed under the rules of 28 U.S.C. §§ 509, 510, 515, 533 and 600.4(a), "in order to discharge (the AG) responsibility to provide supervision and management of the Department of Justice, and to ensure a full and thorough investigation of certain matters".[9] As reported in the order, the SC is authorized to handle "any matters that arose or may arise directly from this investigation or that are within the scope of 28 C.F.R. § 600.4(a)" as well as any federal crimes arising from the investigation. Notably, the prosecutions are delegated, not transferred, as they "remain under the authority of the United States Attorney for the District of Columbia",[10] as clarified in the order.

b) David C. Weiss

David C. Weiss's appointment was less straightforward.

As a US Attorney, he was already prosecuting Robert Hunter Biden for unlawful possession of a firearm under 18 U.S.C. § 922(g)(3). After the parties failed to resolve the charge through pretrial diversion,[11] the AG appointed Weiss as SC on August 11, 2023, to continue the ongoing investigations, which included tax-related offenses and any other matters that might arise. One month later, Weiss indicted R.H. Biden on three felony firearm offenses.

Then, in September 2023, Hunter Biden was indicted on gun-related charges arising from his purchase of a handgun in 2018, when he had an addiction to cocaine. Subsequently, one month later, Weiss indicted Biden on nine additional counts, all tax-related charges. The gun's gun trial concluded on June 3, 2024, with his conviction of all counts, making him the first child of a sitting U.S. president to be convicted in a criminal trial. On September 5, 2024, the trial related to tax charges started and it is still ongoing.

[7] "(…) (b) The Special Counsel is authorized to conduct the ongoing investigation into whether any person or entity violated the law in connection with efforts to interfere with the lawful transfer of power following the 2020 presidential election or the certification of the Electoral College vote held on or about January 6, 2021 , as well as any matters that arose or might arise directly from this investigation or that are within the scope of 28 C.F.R. § 600.4(a)".

[8] See Office of the Attorney General, Order No. 5559-2022, https://www.justice.gov/d9/press-releases/attachments/2022/11/18/2022.11.18_order_5559-2022.pdf.

[9] Technically (a) John L. Smith was appointed to serve as Special Counsel for the United States Department of Justice for the above investigations except for those "prosecutions that are currently pending in the District of Columbia, as well as future investigations and prosecutions of individuals for offenses they committed while physically present on the Capitol grounds on January 6, 2021".

[10] The order also provides that "further delineation of the authorizations between the Special Counsel and the United States Attorney for the District of Columbia will be provided as necessary and appropriate".

[11] More precisely, a plea agreement negotiated in July 2023 fell through after a U.S. district judge declined to approve it, due to disagreement between the defense and prosecution about the extent of the prosecutorial immunity offered.

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Biden's defense counsel rejected the indictment, arguing that Weiss's appointment was unlawful because it violates 28 C.F.R. § 600.3 of the US Department of Justice regulations, which state that "[t]he Special Counsel shall be selected from outside the United States Government". "Mr. Weiss", they added, "is a sitting United States Attorney at all relevant times".[12]

4. The Office of the Special Counsel to the test of the USA Constitution

During Donald Trump's criminal proceeding, several arguments were stirred up regarding the conformity of the presidential immunity's statute with the US Constitution, while others questioned the constitutionality of the SCs themselves.

In general, it is worth nothing that John Smith was a highly proactive SC. He did not limit himself to producing allegations and using typical procedural instruments, tactics, and strategies employed by criminal attorneys; he also took steps to avoid a Supreme Court ruling (see below).

On August 1, 2023, after a swift but thorough investigation, Smith presented charges against Trump before a grand jury in the US District Court for the District of Columbia. The Court issued a four-count indictment of Trump for conspiracy to defraud the United States under Title 18 of the US Code, obstructing an official proceeding, conspiracy to obstruct an official proceeding under the *Sarbanes-Oxley Act*, and conspiracy against rights under the *Enforcement Act of 1870* for his conduct following the 2020 presidential election and the January 6th Capitol attack.[13] On October 5, 2023, Trump's attorneys filed a motion to dismiss the indictment, citing presidential immunity under *Nixon v. Fitzgerald*.[14] This motion was rejected by judge Tanya Chutkan, and, on December 7, Trump's defense counsels announced their intention to appeal to the Court of Appeals for the District of Columbia Circuit. Fearing that the legal proceeding would affect the upcoming presidential election in November 2024, the SC petitioned the US Supreme Court on December 11 to bypass the appeals court and expedite the resolution of the immunity dispute. Trump's attorneys requested that the Supreme Court reject the expedited timeline and allow the appeals court to first hear the case. On December 22,

[12] The Court reminded as, similarly, the appointment of John Durham by the former Attorney Barr mentioned only §600.4, jurisdiction, and §600.10, no creation of rights, but not §600.3, qualification of the special counsel.

[13] Furthermore, Trump, on June 8, 2023, was also indicted by a grand jury in the Southern Florida U.S. District Court on 37 felony counts including charges of willful retention of national security material, obstruction of justice and conspiracy, relating to his removal and retention of presidential materials from the White House after his presidency ended. Thirty-one of the counts fell under the Espionage Act.

[14] Defense attorney John Lauro argued that Trump's claims of electoral irregularities and voter fraud were "efforts to ensure election integrity", which he claimed were a responsibility of the president. According to Lauro, Trump's attempts to validate his claims through the Department of Justice and the fake electors plot cannot be criminally prosecuted because they fall under his "official duties" as president. Federal prosecutors asserted that Trump's claims of presidential immunity were not supported by the Constitution or legal precedent.

the Supreme Court denied the special counsel's request, leaving the case to the appeals court.

A) The "new" constitutional statute of presidential immunity

The Court of Appeal's hearing primarily focused on a hypothetical question posed by Judge Pan.

In commenting the defense counsel's arguments and allegations, he replied that, according to their reasoning, a US President could order SEAL Team Six to assassinate a political rival without facing any immediate legal consequence, as such an action would be covered by presidential immunity. In response to this paradoxical statement, Trump's lawyers reassured the judge by explaining that, in any case, the President would not escape the law, as he would subsequently be impeached and convicted for such an unlawful order. However, until that moment, the President could not be criminally prosecuted.

Therefore, the main legal issue was the scope of presidential immunity. Does it cover a President for all acts, or, in exceptional circumstances, can the President be legally prosecuted?

The same arguments were presented during the debate before the Supreme Court.

Once the Circuit Court of Appeals dismissed the defendant's arguments,[15] Trump's attorney appealed to the Supreme Court. The Court rejected the SC allegations[16] and, on February 28, 2024, agreed to hear the case, scheduling arguments for April 25.[17]

On July 1st, the Court issued an unexpected ruling, modifying the 1974 *United States v. Nixon*. Specifically, while Trump's attorney referenced the *Nixon v. Fitzgerald* ruling[18] in their favor, the SC cited *United States v. Nixon* of 1974, according to which the US legal order does not recognize "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances".

However, the Supreme Court reviewed this precedent and held that presidents have immunity from criminal prosecution for acts conducted under their core constitutional authority and presumptive immunity for all

[15] The Court of appeal concluded that Trump's alleged actions "lacked any lawful discretionary authority ... and he is answerable in court for his conduct" because "former President Trump has become citizen Trump ... [and] any executive immunity that may have protected him while he served as President no longer protects him against this prosecution.". Specifically, the panel added that while "the separation of powers doctrine may immunize lawful discretionary acts… [it] does not bar the federal criminal prosecution of a former President for every official act", and that absolute presidential immunity "would collapse our system of separated powers by placing the President beyond the reach of all three Branches". The panel finally asserted that "We cannot accept that the office of the Presidency places its former occupants above the law for all time thereafter".

[16] The SC asked the Supreme Court to deny Trump's request, citing the urgency of the upcoming 2024 presidential election. He also requested that if the Supreme Court took the case, it treat Trump's request as a petition for a writ of certiorari and place the case on an expedited schedule.

[17] The court also maintained the stay of the trial until their decision was made.

[18] Fitzgerald's ruling, in fact, covered the President "only by civil suits and not by federal criminal prosecutions".

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official acts, but they do not have immunity for any private acts.[19] More precisely, according to the majority opinion,[20] a President "may not be prosecuted for exercising [core constitutional powers]" granted under the Article II of the United States Constitution, such as commanding the military, issuing pardons, vetoing legislation, overseeing foreign relations, managing immigration, and appointing judges. Thus, "neither Congress nor the courts have the authority to limit powers exclusively granted to the President under the Constitution". The Court further delineated the scope of absolute immunity when the president's acts fall outside of his core constitutional powers, stating that it does not extend to "conduct in areas where his authority is shared with Congress". As for other official acts, specifically those conducted in accordance with the President's "constitutional and statutory authority", US Presidents "are granted presumptive immunity but they may be prosecuted". However, prosecutors must "demonstrate that such charges would not threaten the power and function of the executive branch".

This – unexpected – extension of presidential conduct covered by immunity caused a significant sensation among legal scholars and public opinion.

B) The "unconstitutionality" of the Office of Special Counsel's regulation

No less important was Justice Clarence Thomas's concurring opinion. Questioning the legality of the special counsel's appointment, he observed that in the US legal order "there is no law establishing the office that the Special Counsel occupies"; thus, according to him, SC Smith "cannot proceed with this prosecution". He concluded that "The special counsel's role would need to be established by Congress and be confirmed as an appointment through the Senate".

Furthermore, in a footnote, he added that in the high court's presidential immunity decision, there are "serious questions whether the Attorney General has violated that structure by creating an office of the Special Counsel that has not been established by law. Those questions must be answered before this prosecution can proceed".

This was a significant boost for Trump's defense.

Indeed, on July 15, US District Judge Aileen Cannon avoided ruling on whether Trump's alleged mishandling of classified documents was proper. Instead, she dismissed the case, siding with the former president's argument that special counsel Jack Smith had been unlawfully appointed. Moreover, she criticized the excessive number of special counsels appointed in recent years, asserting that "the Executive's growing comfort in appointing 'regulatory' special counsels in the more recent era has followed an ad hoc pattern with little judicial scrutiny".

[19] It was a 6–3 decision.
[20] It was written by Chief Justice John Roberts.

5. Opposing legal arguments leading to the same result: the unconstitutionality of the Office of Special Counsel. A puzzle for AG Garland?

Today, pending the outcome of the SC's appeal against Aileen Cannon's ruling,[21] both Trump's and R.H. Biden's defense counsels have contested the legal basis of the special counsels' appointment, though with different arguments. Surprisingly, Biden's attorneys may benefit from Trump's arguments and legal allegations.

No one can predict the epilogue of this legal dispute, as legal scholars and the Supreme Court judges are divided on the issue. On one hand, the doctrine argues that a federal law is indispensable for the SC's constitutional conformity, while on the other hand, others believe that such a law would undermine the SC's role and functions. These two contrasting views depend on how one interprets the nature of investigators' activity. In *Morrison v Olson*, 487 U.S. 654 (1988),[22] Justice Antony Scalia dissented from the panel, asserting that the *Ethics in Government Act of 1978* weakened the Office of SC rather than strengthening it. He supported his opinion with a view opposite to that of Justice Clarence Thomas and Judge Aileen Cannon. Justice Scalia argued that appointing a prosecutor from outside the Government infringes upon the principle of separation of powers, observing that the remedy for an unfair prosecution can only be a political action.[23] Among his arguments, he emphasized the integrity and professionalism of US official public prosecutors, a quality highly regarded by the AGs. Indeed, most of their appointment decrees recalled "the career professionals of the U.S. Department of Justice to conduct tens of thousands of criminal investigations and handle countless other matters without regard to partisan political considerations".[24] However, due to the involvement of Executive branch politicians and/or staff, they often stated, "a Special Counsel is necessary, in order to the American people to have full confidence in the outcome".[25]

[21] The Justice Department has authorized the Special Counsel to appeal the court's order. AG Garland combatively reacted to the ruling saying: "do I look like someone who would make that basic mistake?".

[22] In Morrison v Olson, the defendant (Olson) contested the legality of the Independent Counsel's appointment (Morrison).

[23] "Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, not selectively, with a reasonable [487 U.S. 654, 729] sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors "pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted, if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office".

[24] U.S. Department of Justice, Office of Public Affairs, *Appointment of Special Counsel*, *supra*, note 4.

[25] U.S. Department of Justice, Office of Public Affairs, *Appointment of Special Counsel*, *supra*, note 4.

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Another important argument of Scalia's dissenting opinion regarded the quality of "inferior" of the SCs stressed by the other Judges of the panel. The panel, recalling the Appointments Clause[26] ruled that the appellant is "subordinate" to the Attorney General (and the President). Although she possesses a degree of independent discretion to exercise the powers delegated to her, the fact that the Act authorizes her removal by the Attorney General indicates that she is to some degree "inferior" in rank and authority. Another sign in the same direction is that the AG decides the jurisdiction and powers (…) "only certain, limited duties, restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes" and that her task is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by counsel herself or by action of the Special Division.

These arguments, in Scalia's view, lacks legal foundation. In general, he cleared up, an officer not appointed by the Executive power – i.e., the Attorney general – cannot be considered – as the Supreme Court did – an inferior officer, subordinated to the Attorney General's instructions. The appellant, he explained, is removable only for "good cause" or physical or mental incapacity and by contrast, most (if not all) principal officers in the Executive Branch may be removed by the President at will. "I fail to see", he added "how the fact that appellant is more difficult to remove than most principal officers help to establish that she is an inferior officer". Thus, the thesis of the "inferior officer" is a *fictio* unsupported by concrete basis. Conclusively, Scalia argued that the *Ethics in Government Act of 1978* was unconstitutional because it weakened the Attorney General role and functioned as the holder of investigatory power, which in the US legal order is an unquestionable priority of the Executive power.

Based on these arguments, it is likely that Justice Scalia would have also found the current MOJ regulation unconstitutional, as it prevents the AG from dismissing a special counsel at will.

As for Justice Clarence Thomas's and Judge Aileen Cannon's opinions, it is worth noting that they were anticipated by G. Calabresi during the *Russiagate* investigation in 2017. Focusing on the legal nature of section 600 (see above), the prominent constitutional law professor observed that it is uncertain to what extent this regulation ultimately constrains the executive branch. He emphasized that no statute appears to require the Department of Justice to promulgate regulations concerning a Special Counsel, and therefore, the Department could hypothetically rescind them at will. Based on these arguments, Calabresi considered the appointment of Robert S. Mueller to investigate Trump unlawful, as it lacked Congressional authorization.[27] This gap transformed the Special Counsel into a "superior"

[26] "(…) the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments".

[27] See G. Calabresi, *Opinion on the Constitutionality of Robert Mueller's Appointment*, in 18-14 *Northwestern Public Law Research Paper* 1 (2018); see also G. Calabresi, G. Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, in 95 *Notre Dame L. Rev.* 87 (2019). "First", it was asserted, all federal offices must be "established by Law" and, it was added, "there is no statute authorizing such an office in the DOJ". Thus,

rather than an "inferior" officer. Consequently, he concluded that a "superior" officer "cannot be appointed by any means other than presidential appointment and senatorial confirmation regardless of what any statutes purport to say".[28]

To sum up, according to Scalia a federal law authorizing the Special Office Counsel transforms the investigator in a "superior" officer, thereby infringing the principle of separation of powers. Conversely, according to G. Calabresi, without a federal law, the appointment of a "superior officer" becomes unconstitutional.

A real puzzle, although both views share a critical concern: the bad habit of appointing numerous SCs within a restricted period of time.

Thus, the ball is now firmly in AG Garland's court. According to media reports, he reacted with surprise and disappointment to the judge's ruling. First, he reminded the press that he "for more than 20 years [he] was a federal judge"; second, he stated that he is ready to do what he has done for most of his life: retreat in his "favorite room", the law library of the Justice Department.

From my perspective, he should ask himself why and how for almost 150 years, seven special investigations were conducted adequately and fairly without a written regulation, neither enacted by Congress nor by the Department of Justice.

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analyzing the above statutory provisions, it does not authorize neither "the creation and appointment of Special Counsels to "assist" United States Attorneys" (…), nor (…) "the creation of the kind of Special Counsels represented by Robert Mueller who replace rather than assist United States Attorneys". See R. Piol, *Trump a Sessions sul Russiagate: "Fermate l'inchiesta: Mueller è in conflitto d'interesse"*, in *Huffpost* del 06.08.2018.

[28] See G. Calabresi, G. Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, *supra*, note 27, 88.

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