The special counsel investigation (2017-2019)

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Abstract: L'indagine del consulente speciale (2017-2019) – Unlike civil law systems, in the USA there are "special" investigations carried out against top officers and politicians belonging to the Executive branch. The application of the special investigations includes also exceptional derogations from the constitutional principle of separation of powers. The prediction of this peculiar mechanism in the US system has had a troubled history. Starting from its very first applications and following its evolution, the aim of this article is to highlight its characteristics and shadow points also in the current recent implementation of the years 2017-2019.

Keywords: USA, President, Special counsel investigation, Separation of powers, Mueller.

1. The Special Investigations: an exceptional derogation from the principle of separation of power in the interest of the American people

Interestingly, in civil law systems a *"special"* criminal law investigation may seem a contradiction in term. In these systems a criminal investigation cannot be "special", since only "natural" prosecutors are vested with the power to carry out investigations. In the USA, "special" investigations are those carried out against top officers and politicians belonging to the Executive branch[1]. The question that arises among legal scholars about

[1] See, *ex multis*, J.R. O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, in *American Criminal Law Review*, 1996, pp. 465 ff.; D.C. Smaltz, *The Independent Counsel: a view from inside*, in *Georgetown Law Journal*, 1998, pp. 2328 ff.; L.E. Bennett, *One Lesson From History: Appointment of Special Counsel and the Investigation of the Teapot Dome scandal One Lesson From History, 1999, can be downloaded from academic.brooklyn.cuny.edu/history/johnson/teapotdome.htm; E.W. Stone, The Genesis of the Independent Counsel Statute, can be downloaded from www.cov.com/~/media/files/corporate/publications/1999/06/oid6591.pdf, 1999*, p. 5; B.J. Priester, P.G., Rozelle, M.A. Horowitz, *The Independent Counsel Statute: a legal history*, in *Law and Contemporary Problems*, 1999, pp. 11 ff.; K.J. Harriger, *Damned If She Does and Damned If She Doesn't: The Attorney General and the Independent Counsel Statute, in Georgetown Law Journal*, 2012, pp. 2101 ff.; C. Brown, J.P. Cole, *Special Counsels, Independent Counsels, and Special Prosecutors: Legal Authority and Limitations on Independent Executive Investigations*, CRS 7-5700, USA, 2018, pp. 3 ff.; J. Maskell, *Independent Counsels, Special Prosecutors, Special Counsels, and the Role of Congress*, CRS 7-5700, USA, 2013.

these inquiries has always been: Should the Executive branch investigate itself? Or a prosecutor who is a political appointee, cannot prosecute or investigate her patron or his patron? Is it admissible, in presence of a clear *conflict of interest* to derogate from the constitutional principle of the separation of powers, appointing an *independent prosecutor* selected *"from outside the executive branch"*? Or, as asserted by Judge Scalia, *the separation of powers* prevents, in any case, from appointing an external, because the Constitution confers the authority for criminal investigations and prosecutions exclusively on the Executive branch? In the U.S. legal system, certainly, the President has the exclusive control of the Executive power and the basis of this principle is "political": "*prosecutors are accountable to, and can be removed by the President who is likewise accountable to the people*"[2] (Scalia). Thus, special investigators constitute derogation from this principle. In line with these arguments, the decree of appointment of Bob Mueller in the Russiagate was addressed to the American people "*in order to have full confidence in the outcome*"[3]. Therefore, the exceptional derogation is a form of protection of the American people's trust and interests.

Peculiarly, the U.S. special investigations were born with the Constitution itself and, for almost 150 years, they were carried out without being regulated by a written law, neither enacted by the Congress, nor by the Justice Department. Already in 1875, when several top officers of the Ministry of Treasury were involved in a maxi tax fraud - the "*Whiskey Ring*" -, the Attorney General and the then President sensed that only recruiting investigators from outside the Ministry of Treasury, and, more in general, from outside the Executive power, the investigation would have appeared fair and impartial in the eyes of the people[4]. From that moment on, for 150 years, in similar circumstances the various Attorneys General have proceeded in the same way, by selecting an investigator of high degree and character from outside the Executive power[5]. An inquiry against top officers

On the selection of the independent counsel, see, W.M. Treanor, *Independent Counsel and Vigorous Investigation and Prosecution*, Georgetown, 1998, pp. 153 ff.; B.M. Kavanaugh, *The President and the Independent counsel*, in *Georgetown Law Journal*, 1998, pp. 2146 ff.

[2] U.S. Supreme Court, *Morrison v. Olson*, 487 U.S. 654 (1988), 27 June 1988.

[3] U.S. Department of Justice, Office of Public Affairs, *Appointment of Special Counsel*, 17 May 2017, www.justice.gov/opa/pr/appointment-special-counsel.

[4] In *Whiskey Ring* a few officers of the Department of Treasure and the powerful head of the Cabinet of the President Grant were bribed. The latter, indeed, exceptionally offered to testify on behalf of an under investigation's person (i.e. his head of cabinet). It still remains the only precedent in the history of the country. See, H.V. Boynton , *The Whiskey Ring*, in *The North American Review*, vol. 123, 1876, pp. 280-327.

[5] These are the special investigations launched by the Attorneys General until Watergate which have been regulated by praxis without a written regulation. "*Whiskey Ring*": President Grant, Attorney General Pierrepoint; "*Star Routes*": President Garfield, Attorney General MacVeagh; "*Corruption in the Postal Service*: President T. Roosevelt, Attorney General Knox; "*Lands' Ring fraud*": President T. Roosevelt, Attorney General Knox; "*Teapot Dome*", President Coolidge, Attorney General Daugherty; "*Top officers' Tax advice*": President Truman, Attorney General McGrath.

or politicians belonging to the Executive power, therefore, creates a conflict of interest of those prosecutors of the Attorney's Office.

It is worth evidencing that also today, after 150 years, the point is the same: in the Special Counsel's decree of appointment for the Russiagate is asserted: "*the career professionals of the U.S. Department of Justice conduct tens of thousands of criminal investigations and handle countless other matters without regard to partisan political considerations*"[6], and however, if the inquiry affects the presidential staff, "*a Special Counsel is necessary, in order to the American people to have full confidence in the outcome*"[7].

In line with these arguments, it is possible, yesterday as today, that an inquiry against the President of the United States is decided and launched by a deputy Attorney General and carried out, impartially and independently, by a qualified lawyer selected from outside the Executive power.

2. From the special investigations of the origin to the "Watergate"

Currently, the definition of "conflict of interest" is enshrined in the art. 28, chapter VI, section 600 of the *Code of Federal Regulations* (*Offices of Independent Counsel*), which sets out: "*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, so that it is appropriate for the Attorney General to immediately appoint a Special Counsel*". The main actors of the procedure are: the Attorney General (hereinafter, AG), who is the holder of the criminal investigation authority; the Special Counsel (hereinafter, SC), who is selected from outside the Executive power; in the background, the American people, who have the right to "*have full* confidence *in the outcome*".

In a singular way, until Watergate the special investigations were carried out without a written regulation: case law after case law, since 1875, seven special investigations have been launched by the Attorneys General, and all of them have contributed to form a *de facto* regulation which has almost perfectly worked. Then, only for the determination of President Nixon to get rid of an overzealous investigator[8], the Congress considered necessary to enact a written legislation[9]. In order to avoid another "Saturday massacre" in the future, the *Ethics in Government Act* aimed at reducing the

[6] U.S. Department of Justice, Office of Public Affairs, *Appointment of Special Counsel*, cit.
[7] *Ibidem*
[8] F. Emery, *Watergate. The Corruption of American Politics and the Fall of Richard Nixon*, 1994, 357. N. Kossop, *Watergate and the decline of the separation of powers*, in *Watergate Remembered. The legacy for American politics*, 2012, pp. 53 ff.; Rudalevige, *The new Imperial Presidency: Renewing Presidential Power After Wateragate*, 2005.
[9] These words are evoked when an inferior refuses to obey an unlawful order issued by a superior. In the Watergate, indeed, the dismissal request regarding the SC Archibald Cox was refused first by the then Attorney General and then by the deputy Attorney General. Only the third responsible in the Justice Department's chain of command fired the SC.

discretionary power of the AG in the selection of the SCs. Differently from the past, the Attorneys General under that law were just entitled to make request of a SC when it was considered as necessary by a panel of three federal Judges appointed by the President of the Supreme Court. Furthermore, the SCs 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".

The AG, for his/her part, maintained the power to start the special investigation and a limited power to end it up by dismissing the SC only for "*good cause, physical or mental disability [...], or any other condition that substantially impairs the performance of such independent counsel's duties*".

The *Ethics Act*, generally speaking, did not succeed and, despite the scrutiny of the Supreme Court in *Morrison – Olson*[10], it was not confirmed by the Congress in 1999[11]. Those investigations carried out under this law, indeed, had much more a political impact than a judicial one and the law was used as a weapon by a political party against another and *vice versa*: given the lack of any filter, an inquiry could be opened against any officer for any crimes[12]. Consequently, also for the political pressure, it was replaced by an

[10] See, U.S. Supreme Court, *Morrison v. Olson*, cit. The Supreme Court ruled that the SCs were not principal officers, but subordinate, who thus could be directly appointed by the Attorney General and not by the President with the Senate's consent. Furthermore, the law preserved on the executive branch a "*sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties*".

[11] It had a sunset clause according to which it was due to be yearly confirmed by the Congress.

[12] Interestingly, the prosecutor appointed in the Watergate, professor of Harvard Archibald Cox, referred that in contrast to the *Ethics Act* a new regulation should have affected "*a far narrower number of high officials in the executive branch - the President, the Vice President, the Attorney General, perhaps some, but not all, other Cabinet officers, and the very top echelon of a few White House officials*"; at the same time, it should have limited *"the crimes to abuse of official power, including criminal attempts to improperly influence executive, legislative, and administrative decisions*". See, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, in *Washington and Lee Law Review*, Chapter 4 | Issue 4 Article 6, 1997, p. 1601; M. Kelly, J.P. M. McEntee, *The Independent Counsel Law: Is There Life After Death?*, cit., pp. 563 ff.; J. Mokhibern, *A brief history of the independent counsel law*, in *Frontline*, May 1998; C.H. Schroeder, *Putting law and politics in the right places- Reforming the independent counsel statute*, in *Law and Contemporary Problems*, 62/1998, pp. 172 ff.; R.D. Rotunda, *The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Independent Counsel and the Charges of Leaking: A Brief Case Study*, in 68 *Fordham Law Review*, 1999; H.R. Uviller, *The Independent Counsel*

internal regulation which centralized newly on the Attorney General the power to launch special inquiries and to supervise them.

3. The status of Special Counsel under the Department of Justice's regulation

In 1999, as above, the Department of Justice included in the Code of Federal Regulation the section 600, regulating the Office of the Special Counsel with the scope "*to strike a balance between independence and accountability in certain sensitive investigations*", so that in case of conflict of interest – see *supra* –, "*it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter*"[13]. In theory, the regulation from the Department of Justice should have weakened those inquiries; on the contrary, the Russiagate seems to prove the opposite. Technically, the Office of the Special Counsel Regulation vest the SC with a significant degree of autonomy and independence. According to the law, SCs have to be highly qualified, and must be:

(a) (…) a lawyer with a reputation for integrity and impartial decision making,

(b) and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly.

Furthermore, in accordance with the 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 have to take first precedence in his or her professional life.

As for the 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*", but, in any case, 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*

Investigation, the Impeachment Proceedings, and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Poorer but Wiser: The Bar Looks Back at Its Contribution to the Impeachment Spectacle, in 68 *Fordham L. Rev.* 897, 1999 *A brief history of the independent counsel law*, in *Frontline*, May 1998, www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html; J. Barrett, *The independent counsel investigation, the impeachment proceedings, and President Clinton's defense: inquiries into the role and responsibilities of lawyers, symposium, the leak and the craft: a hard line proposal to stop unaccountable disclosures of law enforcement information*, in *Fordham Law Review* 613, Vol. 68, 1999.

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

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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 usually committed in order to jeopardise these kind of investigations. Along the same lines, the regulation confirms the autonomy and independence of the SC, by assigning to him/her 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*". Finally, the Department of Justice's regulation deprives the AG of the power to dismiss *ad nutum* the SC, by imposing him or her to comply with specific requirements, which are:

- misconduct, dereliction of duty, incapacity, conflict of interest,
- or other good 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 with particular regard to this relation within the Department of Justice. 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 has to explain the prosecution or declination decisions. Then, it depends on the AG to make it public in a redacted or unredacted version. This important provision may be differently interpreted as emerged in the debate conducted after the conclusions of the Russiagate investigation.

4. The Russiagate

According to Rosenstein's decree, Bob Mueller was in charge of "*investigating Russian interference with the 2016 Presidential election*", including all "*related matters*"; properly, his jurisdiction covered "*any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump*". Moreover, the decree, in line with the Special Counsel's regulation (see above), conferred him a broad autonomy and independence: as emphasized by the deputy Attorney General during the conference press: "*Mueller will have all appropriate resources to conduct a thorough and complete investigation, and I am confident that he will follow the facts, apply the law and reach a just result*"[14].

The inquiry lasts up to two years and its outcomes were very consistent: the SC determined that there were two main Russian efforts to influence the

[14] For more information see, US Office of the Deputy Attorney General, order no. 3915-2017, *Appointment of Special Counsel to investigate Russian interference with the 2016 Presidential election and related matters*, www.justice.gov/opa/press-release/file/967231/download; see also www.nytimes.com/2019/05/29/us/politics/mueller-transcript.html.

2016 election. The first involved attempts by a Russian organization, the Internet Research Agency (IRA), to conduct disinformation and social media operation in the United States finalised to sow social discord, potentially with the aim of interfering with the election. The second element involved the Russian government efforts to conduct computer hacking operations designed to gather and disseminate information to influence the election. More precisely, the SC found that Russian Government actors successfully hacked into computers and obtained emails from persons affiliated with the Clinton campaign and Democratic party's organizations, and then publicly disseminated those material through various intermediaries, including *Wikileaks*. Based on the investigations' results, Mueller brought criminal charges against a number of Russian military officers for conspiring to hack into computers for purposes of influencing the election. Despite these sensational results, which in a different historical moment would have had a great emphasis, the attention of the media and population was focused on the investigation about the Trump's staff: here, the inquiry found that the presidential staff did not conspired or coordinated with the Russian government in influencing the election. Finally, as for Trump's investigation for obstruction of justice, the conclusion was a rebus, a lexical and legal puzzle in the background of the *actio finium regundorum* among the constitutional actors of the investigation. Especially, Mueller's words reported in the final report[15], left the door opened to further discussion among the legal scholars, due to the divergent interpretation given to his words by the AG Barr and by the same AG. The phrase in question - "*this report does not conclude that the President committed a crime, it also does not exonerate him*" – was interpreted as an acquittal for lack of evidence from Barr and President Trump. Differently, from Mueller's side, Barr misunderstood his words which should have been interpreted within the "*context, nature, and substance of his Office's work*"[16]. In doing so, the AG, as referred by the SC, "*threatens to undermine a central purpose for which the Department appointed the Special Counsel: to assure full public confidence in the outcome of the investigations*". Honestly, at that time (it was 22 March), only insiders perceived the core meaning of the debate, also because the AG had restricted the publication of the content of the final report, distributing only a redacted version. Thus, a discussion arose on the ground of whether the publication of a redacted final report undermined the Congress authority and the right of the American people to be acquainted with the results of the investigations. The AG, from his part, offered a broader interpretation to the *confidential nature* of

[15] *Report on the Investigation Into Russian Interference in the 2016 Presidential Election*, known as *Mueller Report*, www.justice.gov/storage/report.pdf, vol. II, p. 78. See also the text of the letter sent to the Congress, that can be downloaded from en.wikisource.org/wiki/William_Barr_Letter_-_March_22_2019. See, M. Caro, *Special Counsel. The Mueller Report*, 2019.

[16] See the text of the letter sent from Mueller to Barr, that can be downloaded from www.justsecurity.org/wp-content/uploads/2019/06/mueller-letter-to-barr-march-27.pdf.

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the final report (see *supra*). Technically, according to the Department of Justice's regulation, it was his duty to distinguish, among the final report's allegations, those to make public in order to preserve the public interest from those which, instead, "*could impact other ongoing matters, including those that the Special Counsel referred to other officers*". The latter must be hidden. The President of the House Judiciary Committee, Jerry Nadler, disagreeing with Barr's interpretation, issued a *subpoena* requiring Barr to produce the unredacted version of the final report[17]. Barr replied by asking President Trump to preserve him from the accusation of contempt of court by issuing an *executive privilege*. The notification regarding the contempt of court against Barr, issued by the Judiciary Committee on 5 May 2019, was explained by President Nadler as a defence of the Congress' rights "*as an independent branch, to hold the president accountable*"[18].

In more details, the two constitutional positions have focused on the extent of the transparency, concerning respectively the open matters, the ongoing investigations, the criminal prosecutions and in particular the internal Department of Justice's prosecutorial deliberations contained in the final report. Namely, Barr recalled the *U.S. v. Nixon* Supreme Court's ruling, according to which "*putting such materials at disposal of the legislative branch would make it a «partner» in what is a uniquely executive branch function: criminal law enforcement*"[19]. Moreover, it was added, the expectation of a President to the confidentiality of his conversations and correspondence needs a special protection: a President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and such a privilege is "*inextricably rooted in the separation of powers under the Constitution*"[20]. Those Democrats sitting at the Judiciary Committee, on the contrary, thought that the final report's "omissions" may hide Trump's serious political responsibilities[21]. Mueller, finally, took the decision to

[17] See, the text of the subpoena: judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Mueller%20Report%20Subpoena%204.18.19.pdf: "You are hereby required to produce the following in accordance with the attached Definitions and Instructions: 1. The complete and unredacted version of the report submitted on or about March 22, 2019 by Special Counsel Robert Mueller [...]. This includes, but is not limited to, all summaries, exhibits, indices, tables of contents or other tables or figures, appendices, supplements, addenda or any other attachments whether written or attached in a separate electronic format. 2. All documents referenced in the Report. 3. All documents obtained and investigative materials created by the Special Counsel's Office".

[18] *Ibidem.*

[19] U.S. Supreme Court, United States v. Nixon (no. 73 1766), 418 U.S. 683, 24 July 1974, www.law.cornell.edu/supremecourt/text/418/683.

[20] *Ibidem.*

[21] This is just an example of the *omissis* which, effectively, could have hidden Trump's political responsibilities. "*[REDACTED] Manafort also [REDACTED] wanted to be kept apprised of any developments with WikiLeaks and separately told Gatesto keep in touch [REDACTED] about future WikiLeaks releases. According to Gates, by the late summer of 2016, the Trump Campaign was planning a press strategy, a communications campaign, and messaging based on the possible release of Clinton emails by WikiLeaks. [REDACTED] while Trump and Gates were driving to LaGuardia Airport. [REDACTED], shortly after the call*

clarify the sense of his reply to Barr's conclusions, because it "*did not fully capture the context, nature, and substance of his Office's work*"[22]. On 29 May 2019, first in a conference press and then in front of the House Judiciary Committee, he targeted directly at the President's behaviour, saying "*when a subject of an investigation obstructs that investigation or lies to investigators, it strikes at the core of their government's effort to find the truth and hold wrongdoers accountable*"[23]. Then, he sank the shot asserting: "*if we had confidence that the President clearly did not commit a crime, we would have said that*"[24], but "*the Justice Department guidelines did not allow me to charge a sitting President […] and, as a result, my office did not determine whether Trump had committed obstruction of justice*"[25]. These arguments, as declared by the SC, were part of the "Introduction to the Volume II of the report", which mentioned the longstanding departmental policy, according to which "*a president cannot be charged with a federal crime while he is in office*"[26]. As reported in the final report, such an act, if adopted, would have been *unconstitutional* and the Special Counsel's office, being a *part of the Department of Justice*, must abide by this policy. Thus, Mueller revealed the legal arcane: one way or the other, he couldn't charge the President with a crime. Therefore, the dilemma persists: "innocent for lack of evidence" - "*Nothing changes from the Mueller Report. There was insufficient evidence and therefore, in our Country, a person is innocent*"[27]; or an assist from Mueller to follow a different procedure? - "*the Constitution requires a process other than the criminal justice system to formally accuse a sitting president of wrongdoing*"[28].

5. The constitutional impact of the special investigations in the USA legal order

Mueller's last declarations introduce two subjects of particular interest. The first concerns the debate opened among Democrats about whether to start the impeachment procedure against Donald Trump. In this respect,

candidate Trump told Gates that more releases of damaging information would be coming. [REDACTED]".

[22] U.S. Department of Justice, *Letter from Mueller to Barr*, 27 March 2019, www.justsecurity.org/wp-content/uploads/2019/06/mueller-letter-to-barr-march-27.pdf.

[23] U.S. Department of Justice, *Special Counsel Robert S. Mueller III Makes Statement on Investigation into Russian Interference in the 2016 Presidential Election*, 29 May 2019, www.justice.gov/opa/speech/special-counsel-robert-s-mueller-iii-makes-statement-investigation-russian-interference.

[24] *Ibidem*.

[25] See Mueller's public statement on 29 May 2019, reported by media, edition.cnn.com/2019/05/29/politics/robert-mueller-special-counsel-investigation/index.html.

[26] U.S. Department of Justice, *Special Counsel Robert S. Mueller III Makes Statement on Investigation into Russian Interference in the 2016 Presidential Election*, cit.

[27] See Trump's reaction on Twitter on 29 May 2019, twitter.com/realdonaldtrump/status/1133759237136494592.

[28] U.S. Department of Justice, *Special Counsel Robert S. Mueller III Makes Statement on Investigation into Russian Interference in the 2016 Presidential Election*, cit.

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President of the House Judiciary Committee, Nadler, given that Special Counsel Mueller was unable to pursue criminal charges against the President, believed that *"falls to Congress to respond to the crimes, lies and other wrongdoing of President Trump"*[29]. In the same sense, Democrat Cory Broker from New Jersey, was convinced that the Congress had *"a legal and moral obligation to begin impeachment proceedings immediately"*[30]. But, as is known, the uncertain outcome convinced Democrats not to start the impeachment procedure: while in the House they could win a majority, on the contrary in the Senate, Republicans still prevailed.

The second theme of reflection concerns the nature of the special investigations. Above, we referred that those investigations carried out since 1875 until Watergate weren't covered by a written legislation; thus, we have supposed that these seven investigations may have created a not written regulation based on constitutional conventions, stipulated, respectively, by the AGs - who in certain circumstances, given the conflict of interest of the prosecutorial Office, appoint an outsider from the Executive power -, the President of the State - who must refrain from boycotting the investigation even if it affects his political fellows -, the Congress, the public opinion - who have to monitor the investigation -, and the press - which support the investigations by informing the public opinion -.

But that is not all: the longstanding practice followed by the above constitutional actors suggests that more than a constitutional convention the rules in question are based on a constitutional custom, according to which, in similar events, the above *modus procedendi* is perceived as mandatory. In support of this suggestion, I would like to recall a legal debate aroused during the Russiagate. With the aim to support a very worried President Trump, some legal scholars emphasized the legal nature of section 600 regulating the Office of the Special Counsel. More broadly, it was observed, it is uncertain to what extent the above regulations ultimately constrain the Executive branch, since, it was argued, no statute appears to require the Department to promulgate regulations concerning a Special Counsel. Consequently, the Department likely enjoys discretion to rescind them. Basing on these arguments, a prominent legal scholar affirmed that the appointment of Robert S. Mueller to investigate the Trump campaign,

[29] fr.reuters.com/article/us-usa-trump-russia-nadler/house-judiciary-chairman-vows-to-respond-to-trump-crimes-idUSKCN1SZ20O.

[30] www.theguardian.com/us-news/2019/may/29/trump-impeachment-mueller-statement-cory-booker-democrat-demands-latest.

is unlawful[31]. Practically, the lack of a Congress authorization[32] transforms the Special Counsel in a superior rather than inferior officer, which, by definition, *"cannot be appointed by any means other than presidential appointment and senatorial confirmation regardless of what any statutes purport to say"*[33]. Well, although, according to this interpretation, the AG Barr was in a position to *de facto* cancel the Russiagate special investigation - and, for sure, it would have made President Trump happy -, he did not apply the above legal principles. In my view, he, as well as other AGs of the past, based their decisions about the special investigations on the binding force of a constitutional custom other than the Regulation enacted by the Department of Justice. Definitively, since 1870, in the American legal system, when a top officer or a politician in office in the Executive power is suspected of a serious crime, a special rule is applied with a view to protecting the right of the American people to have *"full confidence in the outcome of the investigation"*[34]. This constitutional right, I would add, must be balanced with the fundamental principle of the separation of powers, according to which the AG, in these circumstances, while conferring to the selected SC a significant autonomy and independence, must maintain the supervision of the inquiry. In this sense, the SC is subjected to the same general policy and rules, as compatible, applied to other prosecutors. Furthermore, given the Supreme Court *Morrison-Olson* ruling, this custom can be considered a *praeter constitutionem* custom. But that's not all. As a result of the interpretation offered by the *Framers* to the impeachment procedure, according to which any offenses committed by the President of the United States, is, first of all, an *"abuse or violation of some public trust"*[35], the nature of the impeachment procedure tend to be more *"political"* than *"judicial"*. In line with this view, only the Congress should be entitled to investigate a sitting President, who,

[31] See, G. Calabresi, *Opinion on the Constitutionality of Robert Mueller's Appointment*, in *Northwestern Public Law Research Paper* No. 18-14, 25 May 2018 (last revised: 19 Jun 2018), downloaded from *papers.ssrn.com/sol3/papers.cfm?abstract_id=3183324*; see also G. Calabresi, G. Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, in *Scholarly Commons at Boston University School of Law*, 1-2019, downloaded from *scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1584&context=faculty_scholarship*.
"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, 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"*. R. Piol, *Trump a Sessions sul Russiagate: "Fermate l'inchiesta: Mueller è in conflitto d'interesse"*, in *Huffpost* del 06.08.2018.
[32] *Ibidem*. Since, *"under the Appointments Clause, inferior officers can be appointed by department heads only if Congress so directs by statute* (…)".
[33] See, G. Calabresi, G. Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, cit., p. 88.
[34] U.S. Department of Justice, Office of Public Affairs, *Appointment of Special Counsel*, 17 May 2017, cit.
[35] See, A. Hamilton, *The Federalist No. 65, at 396* (Alexander Hamilton), 1961.

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therefore, can be formally prosecuted only once removed from the office – he "*would afterwards be liable to prosecution and punishment in the ordinary course of law*"[36]. Notably, this vision of the impeachment procedure has been concurred, whether by Judge MacKinnon in *Nixon v. Sirica* – a sitting President "*is subject to the criminal laws, but only after he has been impeached by the House and convicted by the Senate and thus removed from office* (…)"[37] and by legal advice published by the Department of Justice[38]. Well, applying this approach to the special investigations carried out against a sitting President, we can deduce that the constitutional custom has a *contra constitutionem* nature.

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[36] *Ibidem*.
[37] U.S. Court of Appeals, District of Columbia Circuit, *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), 12 Oct 1973. *Ibidem*: "(…) *the real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties*".
[38] See, U.S. Department of Justice, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 2, 24 Op. O.L.C. 222 (16 Oct 2000), www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution.