

# George Conway is Wrong About Robert Mueller

By Steven G. Calabresi<sup>1</sup>

George Conway published an op-ed on Monday strongly disagreeing with my “SSRN Opinion on the Constitutionality of Robert Mueller’s appointment as Special Counsel.” In doing so Conway reveals himself to be a living constitutionalist, mangles my argument, and fails to confront the overwhelming evidence that the Mueller appointment is unconstitutional.

My first argument is an originalist argument – a form of argument that Conway studiously ignores. Section 35 of the Judiciary Act of 1789 set up federal prosecutors in each of the 16 federal district courts who were called District Attorneys. The first Congress treated the District Attorneys as being principal officers of the United States who had to be nominated by the President and confirmed by the Senate.

The first fifteen presidents of the United States, i.e. every single president from George Washington through James Buchanan, nominated federal District Attorneys and appointed them once they had been confirmed by the Senate. If one adheres to the originalism of Justices Antonin Scalia, Clarence Thomas, or Neil Gorsuch, it follows that for the first 74 years of American history every president from Washington through Lincoln, until 1863, believed that District Attorneys, now called U.S. Attorneys, were principal officers who had to be nominated by the President and confirmed by the Senate.

From 1863 to 2018, the U.S. Code has made it clear that every permanent U.S. Attorney must be a principal officer nominated by the President and confirmed by the Senate. From 1863 to the Reagan Administration and from 2007 to the present, the U.S. Code has erroneously, from an originalist point of view, allowed **Interim** U.S. Attorney to be inferior officers, while treating **Permanent** U.S. Attorneys as being principal officers. This non-originalist practice establishes at most that an **Interim** Special Counsel could be an inferior officer, but a **Permanent** Special Counsel, like Robert Mueller, must be a principal officer nominated by the President and confirmed by the Senate.

Conway cites erroneous court opinions and an OLC opinion saying U.S. Attorneys are inferior officers, but he does not confront the reality that the U.S. Code from 1789 to 2018 has always been construed by the President and the Senate as recognizing that **Permanent** U.S. Attorneys are principal officers nominated by the President and confirmed by the Senate. Senators have always insisted on having a say over who is a U.S. Attorney in their home states. They would never, and have never, given up this power to confirm home state U.S. Attorneys. In fact, Senators would be outraged if the Justice Department were to try to appoint inferior officer **Permanent** U.S.

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Attorneys in their home states. Conway is just plain wrong as to the principal officer status of **Permanent** U.S. Attorneys over the last 229 years of American history.

Moreover, Special Counsel Mueller is much more powerful than are any of the 93 U.S. Attorneys because he has national and international jurisdiction, and he is investigating the President of the United States, having indicted 13 Russian citizens, and three Russian business entities thereby affecting U.S. foreign policy with our most dangerous rival. Mueller is more analogous to the Assistant Attorneys General in the Department of Justice than he is to even a permanent U.S. Attorney. All of the Assistant Attorneys General are, unlike Mueller, principal officers who must be nominated by the President and confirmed by the Senate.

*Morrison v. Olsen*, which was not overruled by *Edmund v. United States*, says that to be an inferior officer Special Counsel you have to be prosecuting only one former government official for committing two crimes. Mueller, in contrast, is prosecuting over 20 officials for a multitude of crimes that affect both the presidency and our foreign policy. His office is simply too important and too powerful to be an inferior office. Mueller's power is analogous to the power of the Deputy Attorney General; the Associate Attorney General; the Solicitor General; and the Assistant Attorney Generals. These officers all have a principal officer boss who supervises their work, as Conway alleges is the case with Robert Mueller, but what they do is quite simply too important, and their offices are too powerful, to be inferior offices under the Constitution. The same might be said of federal court of appeals and district court judges.

George Conway is a Wall Street litigator and not a constitutional law professor who is deeply steeped in American history and tradition. He thus prioritizes judicial caselaw, in contexts not analogous to Mueller's, and he overlooks the fact that Mueller is behaving in practice like an Assistant Attorney General or a **Permanent** U.S. Attorney who must be nominated by the President and confirmed by the Senate.

The constitutional way to appoint a Special Counsel is to ask a Senate-confirmed U.S. Attorney to take on the "germane" task of investigating some unusual crime outside their district. This was done when U.S. Attorney Patrick Fitzgerald investigated the Valerie Plame affair and prosecuted Scooter Libby, and it was done more recently when U.S. Attorney John Huber was asked to investigate complaints that the FBI had been improperly politicized.

It turns out that in June of 2012, then Attorney General Eric Holder appointed then-U.S. Attorney Rod Rosenstein to be a Special Counsel to look into leaks to the press. In other words, Rosenstein of all people had first-hand knowledge that when you have a legal version of a hot potato, the right thing to do is to give it to a Senate-confirmed U.S. Attorney. All Rosenstein had to do when Trump fired Comey, and he needed a Special Counsel urgently, was to reflect on his own role as a Special Counsel under Obama.

Deputy Attorney General Rod Rosenstein's failure to tap a Senate-confirmed U.S. Attorney to investigate alleged Trump collusion with Russia dooms Robert Mueller's investigation to being an unconstitutional inquiry the fruit of which is null and void.