



Written by [Steve Byas](#) on March 19, 2018

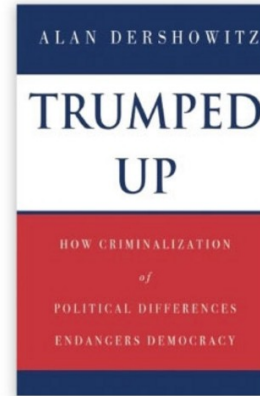
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## A Democrat Defending Trump

*From the print edition of The New American*

***Trumped Up: How Criminalization of Political Differences Endangers Democracy*, by Alan Dershowitz, New York: Post Hill Press, 2017, 193 pages, paperback.**



Alan Dershowitz, professor of law emeritus at Harvard Law School, is a well-known Democrat liberal. But he is also a fierce advocate of civil liberties — including the civil liberties of those with whom he disagrees. In fact, he dedicates *Trumped Up* to “the shrinking number of true civil libertarians who place more importance on the rights and liberties of all Americans than on the partisan benefits of distorting the law to target political enemies.”

And right now, this makes Dershowitz a frequent defender of President Donald Trump — in spite of his disagreement with Trump on many issues. For Dershowitz, this means that we should “substitute rational discussion for polemical demands for criminalization of political differences.”

It is clear that Dershowitz is deeply disappointed by many of his fellow Democrats, who have decided that it is more important to “get Trump” than to uphold civil liberties. He writes with disgust that former FBI Director James Comey “leaked the contents” of his communications with Trump “in a calculated, and successful effort to have a special counsel appointed.” Then, to compound the violation of fairness, Deputy Attorney General Rod Rosenstein “selected a close friend and longtime professional colleague of Comey [Robert Mueller] to be the special counsel.”

Dershowitz has made it quite clear that he is less than enthusiastic about the office of special counsel, at least the way it has operated in practice. “The role of the special counsel should be limited to investigating and prosecuting violations of federal criminal statutes. The special counsel is not an ombudsman; he is not a private investigator.” What he should be “is simply another prosecutor who, under our rule of law, should have a narrow jurisdiction.”

Yet, that is clearly not the case, not only with Mueller. Special counsels’ investigations seem to never end, and they usually branch out far beyond their original mission. In Trump’s case, of course, the naming of the special counsel was to investigate if any laws were broken by anyone in the Trump administration or his campaign involving the Russian government. “At the time of this writing,” Dershowitz wrote, “I have seen no evidence of any violation of federal criminal statutes by Trump or by any current members of his administration.”



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## The Firing of James Comey

In the course of his book, Dershowitz tends to ramble from topic to topic, while generally holding to his theme that civil liberties should be respected, regardless of a person's political views. In discussing the firing of James Comey, it is clear that Dershowitz has a rather low opinion of Comey. "FBI Director James Comey's statement recommending against prosecuting Hillary Clinton was unusual in several respects. First, it is not generally regarded as the job of the FBI to make judgment calls about whether or not to prosecute." Rather, it is the job of prosecutors. Dershowitz argues that the role of the FBI is to "investigate the facts and lay them out as objectively and completely as possible so that prosecutors can exercise their discretion and judgment."

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Of course, Comey did not simply report his findings to Attorney General Loretta Lynch, who met with former President Bill Clinton clandestinely on the tarmac of an airport in Arizona only a few days before it was announced that no charges would be brought against his wife, presidential candidate Hillary Clinton. Instead, Comey announced in a press conference *why* no charges would be brought against Clinton. This would be much like a police chief, instead of turning over the results of a criminal investigation to the district attorney, calling a press conference and announcing no charges would be brought.

At the time of Comey's intrusion into the 2016 presidential campaign, Dershowitz called on Comey to resign. "There is widespread consensus among both Democrats and Republicans that Comey discredited the office."

Although the firing of Comey led to the appointment of a special counsel, Dershowitz argues in his book that what Trump did was perfectly legal, and that criminal law should be the last resort, "not the opening salvo in a political knife-fight."

Besides that, the appointment of a special counsel is the wrong way to go about uncovering the truth of a matter, such as whether the Russians interfered in some way with the 2016 presidential election. "The accusations directed at the Trump campaign and administration are not primarily criminal. Accordingly, they fall outside the jurisdiction of the special counsel." Even if Trump did work closely with the Russians to ensure his election, which Dershowitz does not think happened, "there would be nothing criminal about it." He thinks it would have been wrong to do so, but "it is not the role of the special counsel to expose wrongdoings — only to investigate and prosecute crime," adding "not all wrongdoing is criminal."

### Problems of the Grand Jury

Perhaps one of the more interesting parts of the book is when Dershowitz discusses the role of the grand jury in an investigation involving any prosecutor, but especially a special counsel. "I care more about due process and civil liberties than I do about politics. As a civil libertarian I have long opposed the way even honest prosecutors use grand juries in a manner totally inconsistent with the original intent of the framers who wrote our Fifth Amendment that provides grand juries for all federal felonies."

Dershowitz directly challenges the romantic view some have of grand juries zealously watching out for the interests of the innocently accused. "The grand jury comes as close to a Star Chamber as any



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institution in America. It operates behind closed doors, denies targets and witnesses the right to have their counsel present, is presented only with inculpatory [material that tends to indicate guilt] and not exculpatory [material that tends to provide proof of innocence] evidence, and is supposed to decide only whether there is sufficient evidence to warrant a finding of probable cause." That is why, Dershowitz laments, it is said that "prosecutors can get a grand jury to indict a ham sandwich."

I should add this is particularly dangerous for Trump (and any other Republican) with a grand jury made up of D.C. residents — a jurisdiction in which Trump got less than five percent of the vote in the last election. And as Dershowitz notes, whereas a trial jury understands that the prosecution must prove guilt beyond a reasonable doubt, "the mantra of the grand jury is when in doubt indict."

And once a person is indicted, even if he is later found not guilty by a jury, the taint of indictment never goes away. To many undiscerning Americans, it is roughly the equivalent of being found guilty.

"No system of criminal justice should have to depend on good faith and integrity of individual prosecutors. There are too many opportunists within the ranks of prosecutors, who merely seek notches on their belt rather than real justice," Dershowitz notes. "A special counsel is even more dangerous for civil liberties than ordinary prosecutors, because they generally have only one target. Lavrentiy Beria, the notorious former head of the Soviet KGB, once reportedly said to Stalin, 'Show me the man, and I'll show you the crime.'"

Instead of a special counsel, Dershowitz believes that a nonpartisan commission should have been named to look into the Russia allegations. "The only way to find out what really transpired between Trump's associates and Russia is to have a probe overseen by nonpartisan — as distinguished from bipartisan — individuals who are competent, capable and respected in their relevant fields."

Finally, Dershowitz cautions against believing the testimony of underlings in the investigation of someone such as the president of the United States:

When I taught criminal law and constitutional procedure at Harvard Law School for fifty years, I told my students that, "the first rule for committing crimes in America is, 'always commit the crime with someone more important than you.'"

Dershowitz explains, "The reason is that you can trade testimony against the more important person for your own get out of jail card. The problem for some potential dealmakers is that they don't have anything to offer against the more important person. So instead of just 'singing,' these mendacious witnesses 'compose' as well."

If one can overlook Dershowitz's ramblings into other topics, and his occasional interjection of one of his liberal viewpoints, this a very entertaining and informative book. He also delves into issues such as Israel and Iran, abortion, and Trump's travel ban, which have little, if anything, to do with the overall theme of his book. His discussion of the American Civil Liberties Union (ACLU) is particularly interesting, however, considering his own devotion to civil liberties. The short of it is, Dershowitz sees the ACLU as being inconsistent in its defense of civil liberties.



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