



Written by [Steve Byas](#) on June 8, 2018

## Dershowitz: We Never Needed a Special Counsel

Appearing as a guest on Fox News' *Fox & Friends* early on Thursday morning, retired Harvard Law professor Alan Dershowitz (shown) said that a leaked portion of the Justice Department Inspector General's report proves that "we never needed a special counsel" to investigate allegations of Russian collusion with the Trump presidential campaign.



Dershowitz has been a consistent critic of the abuse of the legal system in general, and in particular the appointment of "special counsels" to investigate alleged criminal activity by persons in the Executive Branch. Although a partisan Democrat, Dershowitz has defended Democrats and Republicans alike, and now he is defending President Donald Trump, though explaining that he does not agree with many of Trump's policies.

The IG's report was an analysis of the circumstances surrounding the firing of FBI Director James Comey, and Dershowitz had several thoughts on it. First, it was leaked, he noted, according to reports by ABC News. Unnamed sources told ABC that they had seen the draft, written by Inspector General Michael Horowitz.

"Number one, somebody leaked it because they are afraid it's going to get changed," Dershowitz said. "They want people like us to see the original," and he suggested that Horowitz hold onto the first draft.

"Second, it proves that we never needed a special counsel," Dershowitz contended. "We have the inspector general. He is independent. He does a great job. All of this could have been done through the Justice Department, regular lawyers. You don't need to bring in a multi-million-dollar group of people with a target on the back of specific individuals. That's not the way justice should operate."

Dershowitz then explained that the job of an inspector general, such as Horowitz, is to "make recommendations based on his report."

Congress, on the other hand, "has power to demand that he produce his original document and see if anything was changed and why."

Dershowitz conceded that there could be legitimate reasons to modify the report, offering an example that "if there is something negative about Comey and Comey's lawyer comes and says, no, this isn't accurate, here is proof it isn't accurate, it should be changed. That's due process. If it's changed for political reasons, that's very different."

The Senate Judiciary Committee has asked Andrew McCabe, who was recently fired from his high-ranking position in the FBI, to testify. McCabe was a deputy to former Director Comey before he was



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fired by President Trump. Facing possible criminal prosecution, McCabe has demanded immunity for testifying before the committee, but Dershowitz thinks it would be a mistake to grant it to him unless McCabe has “something substantial to offer.”

Dershowitz noted the example of Oliver North, an official in the National Security staff of President Ronald Reagan, who was granted immunity in exchange for his congressional testimony in the Iran-Contra Affair in the 1980s. In that case, the D.C. Circuit Court of Appeals overruled and reversed North’s criminal conviction, owing to his having been forced to testify against himself before Congress then having that testimony be used in the criminal prosecution against him — a violation of the Fifth Amendment.

“They don’t want to be Ollie North,” Dershowitz said.

Dershowitz predicted the Justice Department would refuse to grant immunity to McCabe if they believed he was guilty of a crime. “He has to proffer,” Dershowitz said of the possibility of McCabe getting immunity in exchange for his testimony. “His lawyer has to come in and say if you give me immunity, I’m going to give you A, B, C, D. They have to say wow, that looks pretty good. How about if you give us E and F, also. It’s a negotiation.”

Dershowitz also responded to questions about Trump’s lawyer, former federal prosecutor Rudy Giuliani. Dershowitz defended Giuliani from accusations that he is saying Trump, as president, is “above the law.”

“What he is saying is the law gives [the president] certain authority, like the law doesn’t allow you to prosecute members of Congress for what they said on the floor,” Dershowitz explained.

This is the argument that Dershowitz has been making for months — that Special Counsel Robert Mueller is attempting to turn constitutional actions by the Trump White House into criminal actions. Congress has been granted certain powers and privileges in the Constitution, and so has the president. “The president is entitled to fire the head of the FBI,” Dershowitz has said repeatedly. “The president is entitled to direct his attorney general who to investigate, who not to. I don’t see that the prosecutor should have a right to turn a constitutionally protected act of the president into a crime by speculating on what his motive might have been.”

Actually, the question is whether Mueller, in making a legitimate criminal inquiry, is going beyond the so-called Russian Collusion accusations. Should there ever even be a Special Counsel appointed by anyone other than the president of the United States?

In Article II, Section 2 of the U.S. Constitution, it is clearly stated that the president shall have the power to appoint “other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.” In other words, the selection of a Special Counsel was not properly made by Assistant Attorney General Rod Rosenstein, nor even by the attorney general himself, Jeff Sessions. Any such appointment was actually within the constitutional jurisdiction of the president of the United States — Donald Trump.

Oversight of the executive branch is properly in the hands of the legislative branch, rather than in the hands of a special counsel, using a grand jury in a judicial district in which the president garnered less than 10 percent of the vote. The proper remedy for presidential misconduct is an inquiry by the Congress, with members elected from districts across America. They can hold hearings, they can issue subpoenas, and demand testimony under oath. If they feel it is warranted, they can use the impeachment process, as the Constitution provides.



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If the public believes that members of Congress have over-stepped their bounds, then the voters can punish them at the ballot box. But in the case of “independent” counsels such as Mueller, prosecutorial overreach is far too tempting. The late Supreme Court Justice Antonin Scalia was troubled by the entire idea of a Special Counsel. He believed it both dangerous and unconstitutional, but he was the lone dissent in the case involving the legality of the creation of the office of independent counsels. He argued then that the statute was a dangerous limitation on the executive power that would lead to prosecutors bringing politically motivated cases.

While Trump could legally fire Mueller, the public has been so conditioned to think this very act would be of dubious legality that they would most likely take it out on Republican congressional candidates in November. But, it appears that Mueller intends to drag out the investigation past the elections, which will also affect the outcome of the off-year congressional contests.

It is past time for an end to this entire concept of “special counsels,” and for a return to the system created by the Founding Fathers.

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