



## **Will Democrats Really Hold a Key Trump Nomination Hostage?**

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Democratic Senate Minority Leader Charles Schumer recently announced that Democrats wouldn't vote for a new director of the FBI until a special prosecutor was appointed to investigate President Trump.

Setting aside the astonishing idea that the Democratic Party would hold the nation's top law enforcement hostage to its own political agenda, the idea that a "special prosecutor" is needed implies that a crime worthy of prosecution is known to have been committed.

And in the various allegations against President Trump, especially the allegation of Russian "hacking" and "collusion," no one has identified a crime.

Indeed, back on May 3, Sen. Dianne Feinstein (D-CA) told CNN's Wolf Blitzer that there is so far no evidence showing collusion between Donald Trump's campaign aides and Russian officials.

Blitzer mentioned that Feinstein and other colleagues from the Senate Select Committee on Intelligence had visited CIA headquarters on Tuesday to be briefed on the investigation. He then asked Feinstein whether she had evidence, without disclosing any classified information, that there was collusion between the Trump campaign and Russia during the 2016 presidential campaign.

"Not at this time," Feinstein said.

"Well, that's a pretty precise answer," Blitzer said.

Even Rep. Adam "Shifty" Schiff (CA-28), the ranking member of the House Intelligence Committee who has constantly fanned the flames of "the Russians hacked the election" lie, said that there is no definitive proof of collusion between the Trump campaign and Russian intelligence.

So what is left for a "special prosecutor" to prosecute?

The firing of FBI Director James Comey perhaps?

Hardly.

Reason's Eric Boehm surveyed a number of legal scholars of a libertarian bent, and here's what they said:

**Ilya Shapiro**, senior fellow on constitutional studies at the Cato Institute; editor-in-chief of the Cato Supreme Court Review:

"The legal/constitutional issues here are really easy: there are none. The president has undisputed removal power over the FBI director and he can now appoint a successor. (Until that successor is confirmed by the Senate, deputy FBI director Andrew McCabe is the acting director.)

"In other words, nothing that President Trump has done or is contemplating here is beyond his powers and there is no constitutional crisis. Having said that, the political and policy issues at play—not to mention the optics—are extremely serious.

"Congress may now set up its own investigation, or Deputy AG Rod Rosenstein (at Trump's direction) could appoint an independent prosecutor—but one who by law would also be removable by the president—or all of these actors could do nothing, leaving the ultimate verdict to the voters in next year's midterm election."

**Ilya Somin**, professor of law at George Mason University, with a specialty in constitutional law:

"The President has the legal authority to fire an FBI director for almost any reason he wants. I don't think any serious legal commentator doubts that.

"What happens now is that Trump will nominate a replacement for Comey and the Senate will have to decide whether to confirm that person. That may turn out to be an extremely consequential decision."

Somin added that he did not want the first part of his answer to cause libertarians—or anyone else—to conclude there is no reason for concern:

"There is a danger that Trump will appoint someone who will look the other way on the Russia investigation (which is looking into allegations of possibly very serious lawbreaking by Trump and his associates), or someone who will condone abuses of civil liberties of the sort we saw in the earlier history of the FBI. Trump's disdain for freedom of speech and his threats to use the power of government to go after his critics are far from reassuring on that score."

**Josh Blackman**, associate professor of law at the South Texas College of Law in Houston, with a specialty in constitutional law and the U.S. Supreme Court:

"The actions are perfectly constitutional. What happens next is up to the political process. Congress can investigate as it sees fit, and use whatever remedies, up to impeachment, it deems necessary."

On his personal blog, Blackman detailed the crucial difference between Trump's firing of Comey and the so-called "Saturday Night Massacre" in 1973, when President Richard Nixon pushed for the firing of a special prosecutor investigating the Watergate break-in:

"Further, for those drawing analogies to the Saturday Evening Massacre, recall that Nixon never actually fired anyone himself. Instead, he had to ask a subordinate to fire the special prosecutor

for cause. Comey was fired by the president, directly, at will (though plenty of causes were given)."

**David Bernstein**, professor of law at George Mason University:

"I don't think there's any doubt that Trump has the constitutional and legal authority to fire Comey. As for what comes next, Trump will have to appoint a new FBI director, who will need to be confirmed by the Senate. If the Senate does its job, it will ensure that the new director is not a Trump crony, and indeed the hearings for that new nominee could shed light on the background to Comey's firing.

"There is definitely no constitutional crisis here. Indeed, by a proper understanding of how the executive branch is supposed to work, it would be absurd to think the president is obligated to keep an official he doesn't want, as they are all essentially his employees/agents.

"I can't really speak to how this will play out politically, but in Nixon's case, you had a special prosecutor who was getting close to revealing Watergate related secrets, and Nixon was trying to interfere with the investigation. Here, I don't think it's at all clear that the FBI, and any new FBI director, will be any less aggressive than Comey in pursuing the Russia investigation.

"Moreover, because such an individual will have been confirmed by a GOP Senate and not have Comey's baggage from the campaign, the results of that investigation will have additional credibility."

**Todd Gaziano**, senior fellow in constitutional law, Pacific Legal Foundation:

"Whether you think Comey's dismissal was justified or not, it is not a 'constitutional crisis' for the head of the FBI to be fired. Our republic and the constitutional separation of powers do not require an FBI director at all. The primary checks on executive error or abuse that the Framers created were political, electoral and judicial checks that do not require a 'special prosecutor' or other 'independent' figures in the executive branch."

**Tim Lynch**, the Cato Institute's director of criminal justice projects, highlights Comey's history of conducting "trial by news conference," a tactic that he used against Hillary Clinton last year. Though the removal was ham-fisted, Lynch says, it was probably the right thing to do.

"We can do much better than James Comey. If Trump can repeat the careful process by which he selected Neil Gorsuch for the Supreme Court and secure a fairly swift confirmation vote, this matter will soon be forgotten. If the selection process is mishandled, the political storm clouds will hang over the White House for quite some time."

What's more, as our friend Ken Klukowski, [writing for Breitbart noted](#), independent counsels or "special prosecutors" do not exist anymore because they were unconstitutional.

Another fake-news strawman echoed by various outlets, said Klukowski, is the talk about an independent counsel. They do not exist. They did for a couple of decades, until both parties decided that they were a bad idea, and on a bipartisan basis allowed the federal statute authorizing independent counsels—the Ethics in Government Act of 1978—to expire in 1999. Independent counsels have been illegal for 18 years now.

In fact, even when they were authorized by statute, independent counsels were always illegal. They are unconstitutional, for all the reasons the late Justice Antonin Scalia explained in his historic dissent in the 1988 Supreme Court case *Morrison v. Olson*.

The opposition party has taken opposing the elected government to new heights observed Klukowski, and we agree.

Democrats attempted the first partisan filibuster in American history of a Supreme Court nominee, forcing the Senate majority to invoke the nuclear option to restore more than 200 years of Senate practice. The minority attempted to block the president's Cabinet nominees, and would be wreaking havoc with filibusters had they not already abolished the filibuster for all executive nominees back in 2013. Now they take routine executive functions, such as a president replacing an FBI director, and cast it in a sinister light, demanding a special counsel.

All this talk of a "Special Prosecutor" is hyperpartisan politics at its worst.

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