

**BOOK REVIEW****DERSHOWITZ ON PRESIDENTIAL IMPEACHMENT: AN ANALYSIS OF *THE CASE AGAINST IMPEACHING TRUMP***

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Alan Dershowitz, a strong Hillary Clinton supporter, received a lot of news coverage after coming out against Trump impeachment efforts. His July 2018 book, *The Case Against Impeaching Trump*, is a succinct overview of his position.<sup>1</sup> This review will summarize the main theme of the book as well as provide a critical analysis.

The first part of the book, and by far the most valuable, is a twenty-eight-page essay titled, “The Constitutional Case Against Impeaching Trump.”<sup>2</sup> Unfortunately, the other 118 pages that make up this 146-page book consist of repurposed op-eds, interview transcripts, and a Twitter exchange with Trump. This format leads to unnecessary repetition and segments that are, at best, tenuously related to the Trump impeachment issue. For example, there is a reprinted *Wall Street Journal* article that only covers the topic of Trump’s infamous comments following the 2017 Charlottesville riots where he said, “I think there is blame on both sides.”<sup>3</sup>

However, in the brief opening essay, Dershowitz is able to systematically lay out a strong case against the constitutionality of impeaching Trump (given the information available at time of publication, July 9, 2018). Dershowitz explains how the Constitution provides little explicit guidance into the intricacies of the impeachment process. For example, the text is silent as to procedures for impeachment by the House of Representatives. A simple majority is used (as opposed to the super

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1. ALAN DERSHOWITZ, *THE CASE AGAINST IMPEACHING TRUMP* (2018).
2. *Id.* at 1-28.
3. Rick Klein, *Trump Said “Blame on Both Sides” in Charlottesville, Now the Anniversary Puts Him on the Spot*, ABC NEWS, Aug. 12, 2018, <https://abcnews.go.com/Politics/trump-blame-sides-charlottesville-now-anniversary-puts-spot/story?id=57141612>.

majority required in the Senate) only because of implication and precedent.

Some have used these ambiguities to claim that there are no criteria that must be followed when it comes to impeachment. Congresswoman Maxine Waters claimed that “[i]mpeachment is whatever Congress says it is. There is no law.”<sup>4</sup> Others provide a façade of a standard for impeachment, while ultimately ending at the same place, that impeachment is whatever Congress says it is. For example, Allan Lichtman, distinguished American University history professor, says Trump’s “war on women” and climate change policies (which are “crimes against humanity”) are enough to warrant impeachment.<sup>5</sup>

Dershowitz’s position is that “a president can be impeached and removed only if he has committed a designated high crime and misdemeanor,”<sup>6</sup> and “a president cannot be convicted of a crime for merely exercising his constitutional authority to fire, pardon, or end an investigation. . . .”<sup>7</sup> Dershowitz is upfront about this not being the majority view, but he provides strong arguments for why it should be. He refutes many creative arguments for impeaching Trump, including:

1. Under a living Constitution theory, we must adapt to changing times and new developments by changing the standards for impeachment.
2. Both treason and bribery subvert the Constitution and are incredible abuses of presidential power. Therefore, other actions (even non-criminal actions) that share some of these same traits should also be impeachable offenses.
3. The impeachment criteria are forward looking rather than backward. Impeachment is less a punishment for past crimes and more an instrument for preventing future harm. Consequently, an actual crime should not be a prerequisite for impeachment.
4. Since the impeachment process occurs in Congress and not the judiciary, it is inherently political rather than legal.

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4. *Id.* at 8.

5. *Id.*

6. *Id.* at 143.

7. *Id.* at 144.

Therefore, the specifics mentioned in the Constitution (a legal document) are not controlling.

5. There should be a “corrupt motive” exception to the impeachment standards in the Constitution. Namely, if the president does something that is legal, but with corrupt motives, that action should be impeachable.

While Dershowitz is adamant on the issue of presidential impeachment, he is much more uncertain on the issue of a presidential self-pardon. He admits that “[n]o one knows, and we will probably never obtain a definitive answer. . . .”<sup>8</sup> He criticizes “pundits and academic know-it-alls”<sup>9</sup> who claim to know with certainty the answer to the question. “No president has ever tried it. No court has ever ruled on it. The framers of our Constitution never opined on it. History provides no guidance.”<sup>10</sup>

Dershowitz goes on to claim that this is ultimately a moot point because a presidential self-pardon “won’t ever happen. . . . I guarantee you no president will pardon himself or herself.”<sup>11</sup> But the evidence Dershowitz provides does not justify such an absolute claim, especially in light of Trump’s need to tweet about how he has the authority to pardon himself, and Rudy Giuliani’s statements supporting the substance of such tweets. The main reason provided for Dershowitz’s certainty seems to be that a presidential self-pardon would never be necessary. The president could simply resign a day before his term ends with the understanding that the new president for a day, the former vice president, would pardon him. While this would be preferable to a self-pardon in certain instances, having to wait until the last day of a presidency to pardon oneself may have downsides.

The more interesting aspect of the book is not the legal arguments, which are fairly straightforward; rather, it is the pragmatic argument. Throughout the book Dershowitz touts the “shoe on the other foot” test. Meaning, since Democrats would not call for impeachment under a President Hillary Clinton counterfactual, they should not do so with Trump. Dershowitz goes to great lengths to make it clear that, whether you agree with him or not, he is at least consistent. He opposed the naming of Richard Nixon as an unindicted co-conspirator, did not call for any

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8. *Id.* at 131.

9. *Id.*

10. *Id.*

11. *Id.* at 135.

legal action against George H. W. Bush for the potentially self-serving pardon of six Iran Contra defendants, opposed the prosecution of Bill Clinton, and opposed efforts to criminalize Hillary Clinton's mishandling of emails. Furthermore, despite accusations of being a hired mouthpiece of the Trump administration, Dershowitz has endorsed every Democratic presidential candidate since campaigning for Adlai Stevenson in 1952.<sup>12</sup>

This “shoe on the other foot” standard has a major practical disadvantage. Namely, if you implement the standard and your opponent does not, you are at a significant disadvantage. Dershowitz is clearly aware of this shortcoming, as he criticizes Ralph Waldo Emerson's statement that “foolish consistency [is] the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”<sup>13</sup> But Dershowitz's disagreement never materializes into a coherent argument as to why political effectiveness should be sacrificed in the name of consistency.

Dershowitz's military metaphors used to support his “shoe on the other foot” standard seem to illustrate a disconnect with political reality. “We must declare an armistice in this divisive war of words. . . .”<sup>14</sup> He also calls for a “ceasefire on the mutually destructive criminalization of political difference.”<sup>15</sup> But ceasefires are effective because the decision can be made by one individual vested with the authority to make decisions on behalf of others. This is not analogous to what Dershowitz is proposing, that Democrats should unilaterally disarm in the hopes that Republicans will reciprocate at some future time.

Particularly interesting to anyone who has attended law school is Dershowitz's examination analogy. He compares the Trump impeachment efforts to his criminal law issue-spotting exams where students frantically try to come up with every crime that could have conceivably been committed, often utilizing great imagination. Dershowitz concludes, “[L]et's not treat the criminal justice system as a law school exam in which students are asked to catalog every possible violation of our accordion-like laws.”<sup>16</sup>

Dershowitz seems to revel in playing the victim. He touts the criticism he has received by including in the book some of the more vitriolic hate mail sent to him. His complaint that he is no longer invited to parties at Martha's Vineyard is unlikely to garner much sympathy. But

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12. *Id.* at 35.

13. *Id.* at 32.

14. *Id.* at 33.

15. *Id.* at 42.

16. *Id.* at 49-50.

his description of how he was significantly less socially toxic when defending O. J. Simpson against double murder charges than defending the president from an unconstitutional impeachment is intriguing.

At some points in the book, this outsider mentality results in exaggerated claims. For example, Dershowitz says, “There are no civil libertarians left on the left. Certainly not the American Civil Liberties Union. . . . The ACLU is dead in the water when it comes to defending the civil liberties of people who they don’t agree with.”<sup>17</sup> This is clearly hyperbole, as the ACLU has recently represented the white supremacist group denied a permit in Charlottesville, alt-right provocateur Milo Yiannopoulos, anti-gay activists, and pro-life activists. As Dershowitz points out, the ACLU did receive a spike in donations after Trump was elected, but the claim that this resulted in a significant change in their activism does not seem to be supported by the evidence.

Overall, the book provides a succinct analysis of impeachment standards and refutes some of the arguments proposed for Trump’s impeachment. Unfortunately, this predominantly takes place in the first twenty-eight pages. The majority of the book, which contains only repurposed op-eds, interview transcripts, and Twitter exchanges, leaves much to be desired.

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17. *Id.* at 45.