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Ediberto Román

Florida International University College of Law

Katryna Santa Cruz

Florida International University College of Law

Melissa Gonzalez

Florida International University College of Law

Dianet Torres

Florida International University College of Law

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PROFOUND SOPHISTICATION OR LEGAL SOPHISTRY?

EDIBERTO ROMAN,* KATRYNA SANTA CRUZ,† MELISSA GONZALEZ,‡ AND
DIANET TORRES§

In the midst of growing debate and—according to widely publicized news accounts—growing evidence against President Donald Trump’s impeachment, esteemed former Harvard Law Professor and public intellectual, Alan Dershowitz, recently published *The Case Against Impeaching Trump*.¹ In this brief, but passionate, defense of the President, Professor Dershowitz provides arguably the strongest legal argument against impeaching the Forty-Fifth President of the United States. Professor Dershowitz’s argument, while beautifully written, is largely a selectively applied textualist attempt to thwart the mounting evidence against President Trump and his administration.

Dershowitz argument boils down to the following: “[I]f a president has not committed any of these specified crimes [those specified in the Constitution], it would be unconstitutional to remove him, regardless of what else he may have done or may do.”² The Dershowitz defense focuses on the Constitution’s Impeachment Clause—Article II, Section 4—which provides: “The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”³ Dershowitz’s argument is based on the premise that because “the Constitution speaks in clear terms, [its] plain meaning must prevail over other considerations.”⁴

*. Professor of Law, Florida International University College of Law.
†. J.D. Candidate 2020, Florida International University College of Law.
‡. J.D. Candidate 2020, Florida International University College of Law.
§. J.D. Candidate 2020, Florida International University College of Law.
1. ALAN DERSHOWITZ, *THE CASE AGAINST IMPEACHING TRUMP* (2018).
2. *Id.* at 1.
3. U.S. CONST. art. II, § 4.
4. DERSHOWITZ, *supra* note 1, at 10.

This argument is interesting because Dershowitz himself examines all of the subtle ambiguities that the Constitution's lack of explanation creates, including: Can evidence be introduced? Who rules on admissibility? Common law? Exclusionary rule? Further, even Dershowitz recognizes the Constitution is missing a good deal of information on the issue of impeachment (in terms of Congressional trials for impeachment), but yet, according to Dershowitz, the Clause's plain meaning should only allow for impeachment for treason and bribery.⁵ Seems like his reading of the Constitution is a little too convenient.

According to Dershowitz's argument, the Constitution provides the only basis for impeaching and removing the President of the United States, and in Trump's case, there is no grounds for impeachment. The first part of his position—the Constitution provides the exclusive basis for impeachment—is uncontroversial. What is far more problematic is Dershowitz's use of textualism. Dershowitz is both a self-professed champion of civil liberties as well as a textualist reader of the Constitution. Yet in this defense of Trump, the good professor fails to recognize one of the Constitution's three stated grounds for impeachment, which is far from engaging in a textualist approach. In doing so, this champion of civil liberties fails to acknowledge a constitutional provision aimed at protecting the citizenry's rights from tyrannical executive power. Dershowitz's legitimate basis for impeachment focuses on only two of the three constitutional bases for impeachment: 1) treason and 2) bribery. Dershowitz's lack of focus on a recognized reading of the third stated basis for impeachment is nothing short of perplexing especially given his textualist leaning and prior textualist positions. For example, he does not believe the Constitution includes privacy rights that protect a right to abortion because the document fails to specifically provide for such a right.⁶

Indeed, Dershowitz's dismissal of the Constitution's third specifically stated ground for impeachment—"other high Crimes and Misdemeanors"—is insufficiently explained in the book. This blatant omission leaves the reader wanting for a less partisan analysis. But before focusing on this shortcoming, an analysis of Dershowitz's argument on what he views as the legitimate grounds for impeachment—treason and bribery—is in order.

In terms of his first legitimate basis for impeachment, Dershowitz notes

5. See DERSHOWITZ, *supra* note 1, at 5.

6. Sandy Fitzgerald, *Alan Dershowitz: Constitution Doesn't Guarantee Right to Abortion*, NEWSMAX (Oct. 27, 2013), <https://www.newsmax.com/newsfront/dershowitz-constitution-abortion/2013/10/27/id/533294>.

that only treason is defined. The Constitution defines treason as “levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort.”⁷ This constitutional definition applies within Dershowitz’s textual approach, and is therefore a legitimate basis for impeachment. Though he admits that the second and third enumerated bases—bribery, and high crimes and misdemeanors—are not defined in the Constitution, it is only the high crimes and misdemeanors basis that Dershowitz apparently finds fatally vague and therefore is an unavailable basis for impeachment.⁸ Dershowitz apparently has less of a concern for bribery because it is a crime.⁹ Dershowitz doesn’t openly state his antipathy for the high crimes or misdemeanors basis for impeachment. Instead, in what is an overall cryptic and truncated analysis, which amounts to no more than thirty-two pages (including the book’s conclusion) of new materials (the remaining 114 pages of the book are excerpts of the professor’s previous editorials and interviews arguably related to his main thesis), Dershowitz spends the bulk of his argument addressing the purported procedural shortcomings of the high crimes impeachment basis—attempting to limit its use to crimes.¹⁰ Indeed, while Dershowitz spends virtually no time objecting to the bribery basis for impeachment—which he admits is not defined in the text of the Constitution, causing him to look to bribery’s common law definition—he harps on the high crimes basis, without effectively explaining this choice. Then instead of looking to what the drafters of the constitution stated concerning the high crimes or misdemeanor grounds for impeachment—or even looking to judicial or congressional pronouncements on the subject—Dershowitz shifts his focus to attacking those that advocate a broad interpretation of the “and other high crimes and misdemeanor” basis. He ultimately rejects any reading of the impeachment clause that does not make a crime a prerequisite to impeachment.¹¹ As a result, he rejects previous interpretations by both President Ford, when he served in Congress, and current Congresswoman Maxine Waters; each have argued that high crimes and misdemeanors is whatever the house of representatives deems appropriate.¹² Another questionable aspect of Dershowitz’s argument against impeachment is his effort at equating the process of impeachment to the procedural requirements of a criminal trial. Yet the Impeachment Clause does not call for a criminal proceeding for impeachment. Instead, it provides

7. U.S. CONST. art. III, § 3.

8. See DERSHOWITZ, *supra* note 1, at 3.

9. See DERSHOWITZ, *supra* note 1, at 2–3, 10.

10. *Id.* at 3–7.

11. *Id.* at 12.

12. *Id.* at 7–8.

for a trial by the House of Representatives, a political endeavor by definition. Thus, Dershowitz's criminal law and criminal procedure-based arguments may very well be misplaced. While the text of the Impeachment Clause is far from clear on this point, interestingly, Dershowitz does not consider that the very placement of "and other high crimes and misdemeanor" in the list of impeachable acts alone strongly suggests this clause is in fact the broadest, or even the catch-all, basis for impeachment.¹³ Further, as a matter of statutory interpretation and basic sentence construction, the fact the broadest language happens to be listed last similarly suggests this basis should be read broadly. Indeed, such a broad reading was exactly what the framers of the Constitution intended. While Dershowitz, as a self-professed textualist, is no fan of anything other than the text of the Constitution if the text is unambiguous,¹⁴ it is in interpreting the Constitution's Impeachment Clause where the shortcomings of his approach are highlighted. Indeed, it is here where textualism falls short because it utterly fails to seek or acknowledge what the drafters of the Constitution intended—evidently because, according to Dershowitz, the text is in fact unambiguous. If the text is in fact unambiguous, why is the debate over its language still the subject of dispute 200 years later? Protestations to the contrary, the legislative history of the Impeachment Clause makes clear that the third basis for impeachment—high crimes and misdemeanors—was drafted and intended to be a broad catch-all provision. As Yale Professor Thomas I. Emerson observed:

[T]he founding fathers did not wish to take over the English practice lock, stock and barrel. Impeachment was intended to be applicable only in a narrower set of circumstances and with more limited results. Hence, after some preliminary discussion, the proposal was made that the President could be removed from office by impeachment and conviction "for treason, or bribery." This was deemed too restricted and, after rejecting "maladministration" as a cause for impeachment, on the ground it was too broad, the Convention settled on the addition of "other high crimes and misdemeanors." The grounds for impeachment were thus intended to be limited but, apart from a narrow definition of treason elsewhere in the Constitution, the limits were not precisely delineated.¹⁵

Further, at the Constitutional Convention, the substitute phrase "high Crimes and Misdemeanors" was to be interpreted broadly. Madison in fact

13. Dershowitz's attack on the "ejusdem generis" argument is peculiar. He says that that the argument is built on a 'logical fallacy' but (1) that's absolutely untrue because this argument is based on the basics of grammar and (2) he doesn't back up his point. Further, he goes on to talk about how a crime is needed. But we have that in Trump's case: obstruction of justice.

14. See DERSHOWITZ, *supra* note 1, at, 17.

15. Thomas Emerson, *Impeachment: The Constitutional Problems*, 74 COLUM. L. REV. 131, 131 (1974) (emphasis added).

believed that it allowed the President to be tried “for any act which might be called a misdemeanor.”¹⁶ Indeed, while debate remains on how broadly the high crimes or misdemeanors basis should be read,¹⁷ even a narrow reading of the clause allows for impeachment for a host of wrongs in a variety of settings:

[A] standard that the framers intentionally set at this extraordinarily high level to ensure that only the most serious offenses and in particular those that subverted our system of government would justify overturning a popular election. Impeachment is not a remedy for private wrongs. It is a method of removing someone whose continued presence in office would cause grave danger to the Nation.¹⁸

The weight of scholarly authority recognizes the “high Crime and Misdemeanors” Clause should be interpreted to address serious wrongs, but ultimately those wrongs can arise in a wide variety of ways.¹⁹ As one scholar observed, Congressional practice confirms that “high Crimes and Misdemeanors” is broad enough in scope to reach all misconduct that undermines fitness to serve.²⁰ Professor Stephen Presser, a leading scholar on this constitutional provision, for instance, agreed with Gerald Ford’s famous suggestion that “high Crimes and Misdemeanors” means anything the House of Representatives wants it to mean when arguing that the provision reflects the essential notion that the Constitution confers broad discretion on the House of Representatives to make up its own mind about what kinds of conduct should lead to an impeachment proceeding. “[W]hile giving members of Congress discretion to determine whether a particular act or series of acts amounts to grounds for impeachment, [the Constitution] requires them to move forward to impeach if they determine there are such acts.”²¹ Professor Gary L. McDowell, similarly found, “[i]n the end, the determination of whether presidential misconduct rises to the level of ‘high Crimes and Misdemeanors,’ as used by the Framers, is left to the discretion and deliberation of the House of Representatives. No small part of that deliberation . . . must address what effect the exercise of this extraordinary

16. John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 653 (1999).

17. See generally Mark Slusar, Comment, *The Confusion Defined: Questions and Problems of Process in The Aftermath of the Clinton Impeachment*, 49 CASE W. RES. L. REV. 869 (1999).

18. *Id.* at 872.

19. See generally, e.g., Lawrence Tribe, *Defining “High Crimes And Misdemeanors”*: *Basic Principles*, 67 GEO. WASH. L. REV. 712 (1999).

20. *Id.* at 712–15.

21. Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666, 676 (1999).

constitutional sanction would have on the health of the Republic”²² Imminent constitutional scholar, Professor Cass R. Sunstein, likewise observed: “[t]ext, history, and longstanding practice suggest that the notion of ‘high Crimes and Misdemeanors’ should generally be understood to refer to large-scale abuses that involve the authority that comes from occupying a particular public office.”²³

Dershowitz spends no time addressing either this legislative history or scholarly analysis. Instead of contending with the bulk of authority on the matter, he employs a tried and true lawyerly tact: instead of defending a difficult position, it is far easier and perhaps at times more persuasive to go the offensive and attack the position of others that take a differing view. Indeed, instead of examining the case law explaining and interpreting “other high Crimes or Misdemeanors,” which he briefly undertakes with respect to the bribery cases, Dershowitz proceeds to attack “the most extreme and reductionist” defenses of a broad reading of the high crimes and misdemeanor basis.²⁴ Yet, even under the tenets of his own textualist philosophy, his argument fails. Under a textualist approach, recourse to the ‘legislative history’ or intended ‘original meaning’ is inappropriate when the words are unambiguous. The plain meaning under such circumstances must prevail over all other interpretative mechanisms, since it was the word, not the intentions behind them, that were voted on and accepted. But even under a textualist approach, if the text is ambiguous—and the high crimes and misdemeanor language is far from unambiguous—further inquiry is necessary, particularly into the Framer’s intent.²⁵ It is here where the book’s analysis is weakest because Dershowitz fails to accept the value of further inquiry when text is ambiguous. Thus, a reader is left with a scant interpretation, lacking any significant legal reinforcement.

In terms of President Trump’s potential impeachment, Dershowitz, somewhat unsurprisingly argues that impeachment would be inappropriate because the alleged wrongs purportedly committed by President Trump involve neither treason nor bribery—two of his legitimate enumerated wrongs under Article II’s Impeachment Clause.²⁶ While Dershowitz may be

22. Gary L. McDowell, “High Crimes and Misdemeanors”: *Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 649 (1999).

23. Cass R. Sunstein, *Impeachment and Stability*, 67 GEO WASH. L. REV. 699, 711 (1999)

24. See DERSHOWITZ *supra* note 1, at 7–8.

25. See generally Linda Jellum, *The Art of Statutory Interpretation: Identifying The Interpretive Theory of the Judges of the United States Court of Appeals for Veterans’ Claims and the United States Court of Appeals for the Federal Circuit*, 49 U. LOUISVILLE L. REV. 59 (2010); Elliot M. Davis, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 Harv. J.L. & Pub. Pol’y 983 (2007).

26. *Id.* at 23–24.

correct that any charges or claims against President Trump may not involve bribery, there are growing calls arguing President Trump has in fact committed treason.²⁷ Perhaps more importantly, Dershowitz's primary analytical flaw is that he simply ignores the text of the Constitution, its interpretation in terms of legislative history, and case law on the third impeachable basis under Article II's Impeachment Clause: high crimes or misdemeanors.

In the end, Dershowitz attempts to largely ignore a broad reading of "other high Crimes and Misdemeanors" either because he may appreciate they provide problems for his client,²⁸ or following his stated reasons, such wrongs are not defined in Article II or other parts of the Constitution and there are no procedural requirements set forth for convictions of such crimes.²⁹ Yet his stated reasons are supported with slight authority and scant analysis. Dershowitz's analysis is accordingly incomplete, thereby allowing the professor to accept bribery as a legitimate ground for impeachment (even permitting him to look to the common law, ever so briefly, on bribery), but in almost the same breath, he refuses to examine the legislative history of the Constitution, the common law, or the weight of authority on the high crimes or misdemeanor basis for impeachment. Any of these inquiries would have provided not only a more thoughtful undertaking, but also valuable guidance for interpreting the high crimes and misdemeanors basis for impeachment. It should not be forgotten, and he may himself point out, that he refuses to engage in an analysis that goes beyond the text's "plain meaning." However, in his own words, "'other Crimes and Misdemeanors' are not defined."³⁰ So, according to his own preferred interpretive approach, we should not become inflexible and inexplicably resort to the plain meaning when there is textual ambiguity in this case. Not only will case law and legislative history analysis provide the reader with a more thoughtful undertaking, they are essential to understanding the text itself.

27. See, e.g., Matthew Bell, *Did Trump Commit Treason in Helsinki?*, PRI (July 17, 2018), <https://www.pri.org/stories/2018-07-17/did-trump-commit-treason-helsinki>; Grace Panetta, *Former CIA Director John Brennan Said Trump's Press Conference with Putin Was 'Treasonous' — Here's What Legal Experts Say*, BUS. INSIDER (July 16, 2018), <https://www.businessinsider.com/did-trump-committ-treason-russia-summit-2018-7>; Ian Schwartz, *Ralph Peters: Trump "Committed Treason" if He Got Info from Russians, Attacking Press Like Goebbels*, REAL CLEAR POL. (Aug. 1, 2018), https://www.realclearpolitics.com/video/2018/08/01/ralph_peters_trump_committed_treason_if_he_get_info_from_russians_attacking_press_like_goebbels.html.

28. Though he has repeatedly denied he represents Trump, he at least takes the position of an apologist for Trump.

29. See DERSHOWITZ *supra* note 1, at 7–8.

30. See *The Clinton Impeachments*, JUSTIA: US LAW, <https://law.justia.com/constitution/us/article-2/55-the-clinton-impeachment.html> (last visited Nov. 5, 2018).

Ultimately, in what appears to be an apologist's vain effort, Dershowitz does not address historical precedent, including the obstruction of justice charges brought in President Clinton's impeachment proceedings,³¹ and the proposed charges against President Nixon,³² which were each based on "high Crimes and Misdemeanors," and specially contained obstruction of justice charges (the likely charges against President Trump if impeachment is recommended).³³ Moreover, in the four lengthy legal opinions on impeachment and criminal charges against a president drafted by the Justice Department's Legal Office and the Office of Special Counsel in the Nixon impeachment effort, as well as in Clinton's impeachment, there was no hesitation to accept that a president could be impeached under the "high Crimes and Misdemeanors" provision of the Impeachment Clause of Article II.³⁴ Despite these historical facts, in one chapter of the book, Dershowitz tries to defend the President against any impending charge by arguing Trump cannot be charged with obstruction of justice where he was just basically doing what he has the power to do.³⁵ The problem with this argument is that it not only disregards the law of obstruction of justice, on which there is extensive case-law and scholarship,³⁶ but also that Dershowitz, as a champion of civil liberties, astonishingly argues for a form of executive supremacy that would in fact make a sitting president above the law.³⁷

In essence, despite the wealth of authority stating the contrary, Dershowitz asserts that a president can only be impeached for a crime. Yet

31. *Approved Articles of Impeachment*, WASH. POST, <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/articles122098.htm> (last visited Oct. 23, 2018) (presenting the text of the articles of impeachment against Bill Clinton).

32. Dan Nonicki, *In 1974, Goldwater and Rhodes Told Nixon He Was Doomed*, AZCENTRAL (Aug. 2, 2014), <https://www.azcentral.com/story/azdc/2014/08/03/goldwater-rhodes-nixon-resignation/13497493>.

33. *Articles of Impeachment*, WATERGATE.INFO, <http://watergate.info/impeachment/articles-of-impeachment> (last visited Oct. 23, 2018) (presenting Article 1 of the Articles of Impeachment against Richard Nixon adopted by the House Judiciary Committee on July 27, 1974, contain an obstruction of justice charge).

34. Charlie Savage, *Newly Discovered Clinton-era Memo Says Presidents Can Be Indicted*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Start-memo-presidential.html> (Appendix to the article); see also JACK MASKELL, CONG. RES. SERV., STATUS OF A SENATOR WHO HAS BEEN INDICTED FOR OR CONVICTED OF A FELONY (2015), <https://fas.org/sgp/crs/misc/RL34716.pdf>; *A Sitting President's Amenability to Indictment and Criminal Prosecution*, DEP'T OF JUSTICE, <https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution> (last visited Oct. 23, 2018).

35. DERSHOWITZ *supra* note 1, at 24.

36. See Ediberto Roman et al., *Collusion, Obstruction of Justice, and Impeachment*, 45 NOTRE DAME J. LEGIS. (forthcoming 2018).

37. DERSHOWITZ *supra* note 1, at 24.

his textual argument falls flat under its own weight—Dershowitz wants the interpretation of the Constitution’s Impeachment Clause to follow the enumerated wrongs listed in the Clause while also completely ignoring a specifically stated basis for impeachment that has historically and repeatedly been interpreted to be the broadest basis for impeachment. In the end, Dershowitz asserts that it would be dangerous to use a broad reading of “high Crimes and Misdemeanors” because doing so could jeopardize our system of government.³⁸ How it would do so remains unclear, however. And even for somewhat playful arguments’ sake, if Dershowitz is correct in his selective reading of Article II’s Impeachment Clause, as he himself admits, more than one political candidate, including Professor Richard Painter, who is running for the U.S. Senate, has asserted that Trump’s actions amount to Treason.³⁹ Dershowitz harshly criticizes Painter, saying that he “should read the words of the Constitution, rather than making up crimes for partisan and personal advantage.”⁴⁰ Interestingly, Dershowitz defends his own “pure motives” for writing the book by noting how many individuals and even legal scholars have accused him of doing the very same thing: “My motives have also been questioned by some of my academic and political colleagues. Am I being paid? Am I auditioning to be Trump’s lawyer?”⁴¹

In conclusion, Dershowitz asserts that he merely wants to focus on the importance of following precedent,⁴² arguably the most interesting assertion in the book. Yet in his defense of President Trump, Professor Dershowitz fails to examine the legal precedent on the law concerning impeachment. Much like his attacks on those he differs with in this book, Professor Dershowitz is being selectively principled with his arguments and review of the law. Perhaps the following best highlights a flaw in this book: it is evidently shameless for Painter to attack President Trump while Painter is running for office, but it is not shameless for Dershowitz to defend Trump while Dershowitz is selling books? Further, by his own admission, Dershowitz wants all to appreciate the importance of precedence,⁴³ but he fails or refuses to address legal precedence when dismissing “high Crimes and Misdemeanors” as a basis for impeachment, despite said basis being used against both President Clinton and President Nixon.

38. DERSHOWITZ *supra* note 1, at 5–6.

39. *Id.*

40. *Id.*

41. *Id.* at 54.

42. *Id.* at 27.

43. *Id.* at 3.

