



Trump Lawyer Alan Dershowitz Abandons His Position That Impeachment Requires a Crime

Jacob Sullum

January 24, 2020

Harvard law professor Alan Dershowitz, a member of Donald Trump's legal team who has argued that "abuse of power" and "obstruction of Congress" cannot be grounds for impeachment unless they involve a crime, has been trying to explain the inconsistency between that position and what he said during Bill Clinton's impeachment in 1998. "It certainly doesn't have to be a crime," Dershowitz said on CNN back then. "If you have somebody who completely corrupts the office of president, and who abuses trust, and who poses great danger to our liberty, you don't need a technical crime."

Dershowitz says his view has changed because of historical research he has done since then. At the same time, he has modified his current position in a way that resolves the inconsistency at the cost of making his argument much less helpful to his client.

In his 2018 book *The Case Against Impeaching Trump*, Dershowitz says the text of the Constitution, including the phrase "high crimes and misdemeanors," "implies that cases of impeachment require *crimes*." He allows that the crimes might be violations of state law or common law rather than violations of federal statutes. But he is explicit in opposing what he calls "advocates of eliminating the requirement of a crime for impeachment," saying the Constitution does not "permit the inclusion of bad, even dangerous, 'misdeeds' that did not fit the definition of 'crime.'" He illustrates his point with an "extreme example":

Assume [Russian President Vladimir] Putin decides to "retake" Alaska, the way he "retook" Crimea. Assume further that a president allows him to do it, because he believed that Russia has a legitimate claim to "its" original territory. That would be terrible, but would it be impeachable? Not under the text of the Constitution. (It would, of course, be different if he did it because he was paid or extorted.)

The position Dershowitz takes in his 2018 book is plainly at odds with the position he took in 1998. Here is how Dershowitz explained that shift on Twitter this week:

(1 of 3) To the extent there are inconsistencies between my current position and what I said 22 years ago, I am correct today. During the Clinton impeachment, the issue was not whether a technical crime was required, because he was charged with perjury.

(2 of 3)

Therefore, I didn't research the issue; I relied on the academic consensus that a crime was not

required. In Trump impeachment, on the other hand, that is the critical issue, because abuse of power and obstruction of congress are neither crimes nor criminal- like behavior.

(3 of 3)So I have now thoroughly researched the issue and concluded that although a technical crime with all the elements may not be required, criminal like behavior akin to treason and bribery is required.

Crucially, Dershowitz is now conceding that "criminal-like behavior" could suffice for impeachment, even if it is not "a technical crime with all the elements." In a letter to *The New York Times* published yesterday, he likewise says "criminal-type behavior akin to treason and bribery is constitutionally required."

That standard seems pretty similar to the one embodied in the articles of impeachment against Trump, which allege that he betrayed the public trust in a way "akin to treason and bribery." In fact, the central charge against Trump—that he held up congressionally approved military aid to Ukraine in order to coerce the announcement of an otherwise unjustified investigation in the hope of discrediting a political rival—looks very much like extortion or bribery, even if it does not satisfy all the statutory elements of those crimes. It is, in other words, "criminal-like" or "criminal-type" behavior.

Confusingly, Dershowitz's letter to the *Times* says his current view is the same as the one that former Supreme Court Justice Benjamin Curtis endorsed when he defended Andrew Johnson during the 17th president's impeachment trial in 1868. Although Dershowitz did not cite Curtis in his 2018 book, he says his "independent research conducted over the past two years" has led him to conclude that Curtis was right. Yet Curtis took the position that Dershowitz staked out in 2018, not the modified position he is advocating now.

"There can be no crime, there can be no misdemeanor, without a law, written or unwritten, express or implied," Curtis said in his opening argument. "There must be some law; otherwise there is no crime. My interpretation of it is that the language 'high crimes and misdemeanors' means 'offenses against the laws of the United States.'"

That argument is consistent with what Dershowitz said in 2018, and it is consistent with what Trump lawyer Jay Sekulow and White House Counsel Pat Cipollone say in their trial memorandum, i.e., that "an impeachable offense requires a violation of established law." Curtis' argument is *not* consistent with what Dershowitz said this week, since Dershowitz now allows that "criminal-like behavior" could be impeachable even if it did not violate a criminal statute.

As scholars such as Cato Institute Vice President Gene Healy and Princeton political scientist Keith Whittington have shown, the weight of the historical evidence indicates that Curtis was wrong in 1868, that Dershowitz was wrong in 2018, and that Sekulow and Cipollone are wrong now. "That actual crimes are not a prerequisite for impeachment is a settled point among constitutional scholars," Healy writes. "The president can commit an impeachable high crime without violating the federal criminal law," Whittington says. "To conclude otherwise would be to ignore the original meaning, purpose and history of the impeachment power; to subvert the constitutional design of a system of checks and balances; and to leave the nation unnecessarily vulnerable to abusive government officials."

Dershowitz, after defending this view in 1998 and repudiating it in 2018, now seems to be reconsidering his repudiation. There are sound reasons for doing so, regardless of what you think about Trump's impeachment.