

Why Alan Dershowitz is wrong about impeachment



Your Turn
Jake Greear
Guest columnist

The esteemed professor of constitutional law, Alan Dershowitz, has shouldered a good deal of opprobrium lately from his fellow liberals for the legal arguments he has lobbed from the ivory tower in support of Donald Trump. A lifelong Democrat, Dershowitz may seem like an unlikely defender of the president. But there is a certain delight some take in playing the above-the-fray contrarian. And established academics are among those known to indulge in it. Dershowitz, with the publication of a new book, *The Case Against Impeaching Donald Trump*, may now be at the point of basking in the disdain of his peers.

The problem with Dershowitz's argument is that he wants it both ways. He selectively interprets the removal of a sitting president as, by turns, a political and a legalistic decision. To see why, one needs to analyze two different arguments that he makes, both of which are central to the looming constitutional crisis.

First, he argues that a sitting president cannot be charged with a crime. He must be impeached, says Dershowitz, before he can be indicted.

This position is based on a sound principle. It is the principle that the most powerful decision makers in the American system should be subject to both democratic legitimation through elections and to the system of further checks and balances ensured by the Constitution. If a sitting president can be charged with a crime, tried, and possibly convicted in a federal court, then the prosecutor, judge, and jury in such a case would wield an extraordinary power, essentially unchecked. They would wield the power to over-ride the democratic election of a president.

Law is never black and white. Legal arguments, including the successful

arguments of prosecutors, are based on the decision to classify actions and behaviors within certain legal categories. And however plain the evidence of a case may be, judgement is always required in deciding which acts fall into which category, be it treason, defrauding the United States, or otherwise.

We routinely entrust such decisions to our federal courts, partly because those courts are ultimately accountable to the Supreme Court, and the Supreme Court is subject to the checks and balances of the other branches, the president and Congress, who are ultimately accountable to the people. However, having the federal courts unseat a president arguably short circuits this system of checks and balances, and veers too far from one of the fundamental principles of the US Constitution, that the authority of government shall ultimately come from the people.

To try a president in federal court would be to set up a *tete-a-tete* between two branches of government, and to defer to the only branch not elected by the people. The problems of such a scenario are indicated by the absurdity of the ensuing question of a presidential "self-pardon." It all illustrates the wisdom of the impeachment procedure set up by the Framers, which appeals to a third branch, Congress.

Dershowitz, in arguing against the constitutionality of indicting a sitting president, is standing on the solid pluralistic principle of democratic accountability through checks and balances and elections.

But, are we then saying that the president is above the law? No, because "the Law" at this high level is embodied in the branches of government and the Constitutional relations between them. Not solely in the courts.

The problem is that Dershowitz, in his new book, is now continuing his pontifications in a way that violates the very principles on which the above argument is based.

Here, Dershowitz is addressing the separate question of the proper constitutional basis of impeachment and removal of a president. The Constitution says the president may be removed for "Treason, Bribery, or other high Crimes and Misdemeanors." Dershowitz not only interprets high crimes and misdemeanors very narrowly, but he also, in a selective deferral to legalistic rather than principled reasoning, argues that the Supreme Court should be the ultimate arbiter of whether the Senate has correctly interpreted this freighted phrase. This latter argument is inferred from the unelaborated stipulation, also in Article II of the Constitution, that the Chief Justice of the Supreme Court shall preside over the Senate during the impeachment trial.

This is quite a tenuous jump to make. It is an altogether unjustified jump, and a dangerous one in the present context, given that it contradicts the professor's better reasoning on the question of indicting a president. And it should be sufficient grounds for pundits, journalists, and those in power to begin looking elsewhere for wisdom on this matter.

What would be more consistent with Dershowitz's earlier, more well reasoned argument (which incidentally is plenty contrarian on its own in his left leaning social circles) would be the position of Cass Sunstein, another esteemed legal scholar, who advises that "a crime is neither necessary nor sufficient" grounds for impeachment. When it comes to impeachment, Sunstein's position implies, we should defer to Congress alone, the "First Branch," the most plural and democratic branch, which the Founders trusted best, and to whom they explicitly gave the principal check on presidential power.

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Your Turn
Bridget Seelinger
Guest columnist

Nowhere to go: WNC's mental health crisis

When one envisions Western North Carolina, one imagines stunning vistas and the luxury of the Omni Grove Park Inn and Biltmore. They think of Linville Falls and the gentle quiet of Boone and the sound of trains as the Great Smoky Mountains Railroad winds its way through one of America's most beautiful National Parks. Those who have had the chance to visit this end of the state over the past couple years, however, have witnessed the growing problem that is metastasizing across the region and bringing home a reality that more and more is being trumpeted on newsreels and TV broadcasts...mental health.

The homeless are the most obvious sign of the problem. One cannot walk the streets of Asheville on a night in the summer and not stumble past someone sleeping on a bench or under a tree or asking passersby for money. In 2017, approximately 562 people were living on the streets, up about 10 percent from the year prior. Of those 562, about 239 were veterans. This is following a ten year plan that Asheville had embarked on in 2005 to end homelessness in the city which included the construction of shelters, food pantries, and other resources. Although this plan brought in more resources, it did not make the problem any better.

Rev. Michael Woods, the executive director of Western Carolina Ministries put it aptly, "You would never solve homelessness only by creating enough houses. There are always other issues that are there, and I think we need to address those things."

Those things are larger issues within the community that are not being addressed adequately, particularly in the realm of mental health.

Mission Hospital, the area's largest hospital and containing the area's largest emergency room has long been attributing the long wait times to the congestion of mental health patients crowding the department. In 2017, Mission saw approximately 547 mental health patients which was up 31 percent from the year prior. One patient in particular ended up boarding in the emergency department for about 19 months before being discharged. Because of this crowding, there have been concerns voiced about staff and patient safety.

The reason that this is happening is because in North Carolina, approximately 90 percent of inpatient psychiatric beds have been cut from state facilities since 1970 when they were first built. Patients who are reliant on the mental health system to take care of them are either living on the streets or living in Mission's ER. Mission is hoping to create more inpatient psychiatric beds but that takes both time and money.

Broughton Hospital, the inpatient state run psychiatric facility in the region is undergoing renovation with the promise of relieving some of the congestion in the area, but between environmental violations and issues with contractors, healthcare professionals aren't hopeful for an impact any time soon.

In 2017, Cannon Hospital in Linville was awarded a \$6.5 million grant to expand their 10 bed behavioral health unit to almost 30 beds. 20 extra beds is truly a drop in the ocean for the amount of need in the area, however. In 2016, Cannon had received over 5,000 psychiatric referrals and admitted about 560. The grant is certainly a start in regard to fixing the problem, but definitely not a final solution.

"There are just not enough options for crisis care in our communities," said Larry Thompson, a board member for Western Carolina chapter of National Alliance on Mental Illness. "There's just more need than there are beds available."

Mental health needs to be back on the docket as being a priority in Western North Carolina. Patients need more places willing to treat them, and more support from community resources. Western North Carolina isn't able to do that without funds. We need to reinvest in the most vulnerable within our community so that they stand a chance at recovery.

Bridget Seelinger is a registered nurse in the Emergency Department at Mission Hospital in Asheville. She is pursuing her Masters of Public Health at East Tennessee State University.

Mission board made a complex - but right - call

Your Turn
John R. Ball, MD and John W. Garrett, MD
Guest columnists

We understand that healthcare is complex and that Mission Health's decision to align with HCA Healthcare (HCA) is even more nuanced. For those who haven't been directly involved or taken the time to carefully review the wealth of information available on our website (www.MissionHealthForward.org), it is easy to become confused. So we wanted to take some time to explain to everyone how the Mission Board came to its deliberate decision to align with HCA.

Across America, healthcare systems are consolidating. So the Mission Health board has evaluated potential partnership options repeatedly over many years. Our recent decision to align with HCA was made after intensive deliberations lasting months that drew upon those years of prior conversation. The Board asked and management prepared scenarios that reflected both a path of independence and a path of aligning with another health system.

The Board received and deliberated in depth about which path was most beneficial for our community. Ultimately, the Board decided that it could no longer remain both independent and true to its mission: to improve the health of the people of western North Carolina. With that larger decision made, we then considered numerous partnership options, including several proposals from non-profit health systems. Only after careful review and discussion did the board unanimously decide that joining HCA would best continue the quality, accessibility, and affordability of care that our people and communities have come to know and expect.

The board's primary duty is to ensure that the institution's mission -- in this case, improving the health of the people of Western North Carolina -- is met. That is not a responsibility that can be delegated to any other body, including but not limited to local government or even management. The Mission Health board comes from and represents the people of our region, and it is the board's ultimate responsibility to decide how best to meet that mission.

Each decision along our path was deliberate and unanimous. The board had at our disposal multiple independent, world-class consultants, including McKinsey & Company, Cain Brothers and legal counsel. As a best practice



One of the two final beams is hoisted to the top of the Mission Hospital for Advanced Medicine in a topping off ceremony on June 28. The beam had the traditional symbolic pine tree and American flag attached to it as it was secured at the top of the building. Construction began on the new hospital building two years ago and Mission expects to occupy the space by Fall 2018.
ANGELI WRIGHT/CITIZEN TIMES

standard, the Board also routinely deliberated without any management present, including without Dr. Paulus.

The board made its decision in order to preserve health care in Western North Carolina, and because a very substantial, independent foundation completely separate from HCA and Mission Health would be created to serve our community in ways never before possible. It is anticipated that this foundation will invest many tens of millions annually directed toward the social determinants of health: to dramatically improve the health and wellbeing of all people and communities in western North Carolina.

Many misunderstand or are confused by how HCA is able to pay taxes, garner a return for its shareholders and yet maintain quality and access. But the reason is simple: HCA has significant economies of scale and concomitant expertise unavailable to Mission Health that will result in very significant cost savings and care enhancements. Mission Health is a very small health system on a national scale. HCA, at \$44 billion in annual revenue, is the nation's largest. HCA buys volumes of products, equipment and services at prices far below what Mission alone (or any similar system) ever could. While its clinical staffing is very similar to Mission's, it has significant, demonstrated efficiencies in finance, information technology and other "back-office" functions. Beyond that, the Board has negotiated numerous protections for our system members that do not

exist today, including continuation of services and charity care.

Finally, some have suggested incorrectly that management or the Board somehow stands to benefit improperly from the proposed acquisition. To be clear, acquisition discussions began without any sense that present management would even be retained, and it would not be uncommon for current management to lose their jobs in such an acquisition. Even now, management doesn't know whether they will be retained or, if so, what their compensation would be. That will be the decision of HCA and the individuals themselves. From a Board perspective, no member of the Mission Health board receives or will receive any form of compensation or will receive any financial benefit from the contemplated transaction.

Healthcare is among the most personal, complex and frequently misunderstood aspects of our lives. We greatly appreciate the interest in our proposed transaction with HCA Healthcare and encourage everyone to review the wealth of materials available on www.MissionHealthForward.org, where you can also ask any question that you have. Already more than 100,000 people have reviewed materials there; we hope that you will join them.

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