Kate Shaw:

How was your TikTok tutorial?

Leah Litman:

It was good. I still haven't done my TikTok yet, but I'm going to try to do it this weekend.

Kate Shaw:

Not that I know much about TikTok, but your welcome videos suggest to me that you have a natural aptitude for TikTok. I think those are not different from TikTok really.

Leah Litman:

The interface is not that user-friendly or intuitive.

Kate Shaw:

Really?

Leah Litman:

Yeah. There's just like a bunch of different things you can do. My sister gave me an idea for one that she says would be good that I am to try to do, but I don't know. I might try to do it this weekend.

Kate Shaw:

I made an account like a couple months ago, literally following one person, Claudia Conway, because she was breaking all this news about all the COVID outbreaks, but otherwise, I'm not ... I don't even really know how to find people.

Intro:

It's no joke, but when a man argues against two beautiful ladies like this, they're going to have last words.

Intro:

She spoke, not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet of our necks."

Melissa Murray:

Welcome back. This is Strict Scrutiny, your podcast about the Supreme court and the legal culture that surrounds it. I'm Melissa Murray.

Leah Litman:

I'm Leah Litman.

Kate Shaw:

And I'm Kate Shaw.

Melissa Murray:

We have a huge show for you today. As always, we will start off with some breaking news and spoiler alert. There is a lot of breaking news, and then we will do a preview of the January sitting, and then finally, for court culture, we're going to go a little court culture adjacent. Given all of the breaking news, we thought it would be useful for you all if we talked a little bit about the 25th amendment, because it seems slightly relevant. All right. Leah, do you want to kick us off with the news?

Leah Litman:

Sure. What is breaking? Everything.

Melissa Murray:

Everything.

Leah Litman:

Everything almost broke this week, I guess you could say. One thing we wanted to note that happened after we recorded our last episode is the president's call with Georgia's secretary of state in which the president shook him down urging him to find 11,780 votes in order to flip the election to president Trump. It's hard to believe, was this a week ago? Was this two weeks ago?

Kate Shaw:

This is five days ago. It is insane. Yeah, it feels like another lifetime.

Leah Litman:

They're just doing so many crimes on their way out and such serious crimes. It's just hard to keep track of them all, but this was ... One thing, it's the president urging a state official to commit election fraud.

Melissa Murray:

Which sounds familiar Kate, because I believe about a year ago, you and I were hanging out on an ABC set talking about the president allegedly making a call to shake down a foreign official to dig up some dirt for him. That seemed like it was an unusual circumstance, but maybe it wasn't.

Kate Shaw:

Yeah. I mean, this is clearly Ukraine redox, except it's on tape, and it's really it's really-

Melissa Murray:

And it's domestic.

Kate Shaw:

It's domestic and it's really explicit. I don't know if you guys have listened to that. It's an hour. Raffensperger had the presence of mind to record the conversation. It's a full hour, and I don't think the headlines or the little clips that have been played on the radio and the television really do justice to the experience of listening to the president circle around and then just plunge into an explicit request for election fraud. Even if you think you're beyond shock, it's still shocking to witness. One more observation to make, to think about, the place where he basically stops making these ridiculous claims

about voting machines and other obviously debunked and baseless fraud allegations, and basically just goes forward and says, "Look, I just need you to find me 11,780 votes."

Kate Shaw:

It is just such a funny thing to ask for, because say Raffensperger had agreed to do it and said, "Okay, you know what? We redid the calculation, and it turns out Trump, you won by one vote." No one would've thought that was credible. Just ask for 12,000. Right? But no, he asks for 11,780, which is exactly the number he needs to win if Raffensperger decides to somehow claim he has rerun the numbers, which of course, he declined to do and held on to the tape until the president started making more untrue statements about Raffensperger on Twitter, and then decided to release it, and I think that was absolutely the correct call.

Kate Shaw:

I think people are appropriately talking about what state criminal exposure the president may have in the wake of this phone call.

Melissa Murray:

FYI-

Kate Shaw:

And that's not even the 10th most important thing that happened this week.

Leah Litman:

No.

Melissa Murray:

Well, also to note, even if the president does decide to pardon himself, which would give us a whole special emergency episode preview, spoiler alert, if there were state level charges, those would not be pardonable by the president, so that's a completely different animal altogether.

Kate Shaw:

Absolutely. I think it's so interesting that Georgia is one of, I think, the only state of all of these states that were close in the 2020 election that is controlled at the statewide level by basically just Republicans, and I think that's why he felt comfortable running this play in Georgia and not elsewhere, at least not exactly the same play. But I don't think that the fact that they are co-partisans is going to shield the president at this point. I think the Georgia Republicans are all out of patients with the president, and there are local democratic DAs who I think could also potentially have jurisdiction over this investigation.

Kate Shaw:

I think there's a lot of potential criminal exposure, and exactly as Melissa says, the pardon power has nothing to say about it.

Melissa Murray:

Well, it wasn't just that Georgia was on the president's mind in search of 11,780 votes. Georgia was also the site of a special election, and not everything broke in that special election because Stacy Abrams delivered to the democratic party. Raphael Warnock, and Jon Ossoff are going to be the newest senators from the peach tree state. Of course, that will be enormous for us here on the pod because we have been talking all about the composition of the federal courts, and as our faithful listeners know, the composition of the federal courts depends a lot on the composition of the Senate.

Melissa Murray:

With these two new additions, the Senate will be equally divided 50-50 between the GOP and the Democrats, and Vice President-elect, Kamala Harris, will be the tie breaking vote. I think this means we will likely see some movement on the Supreme Court, maybe Justice Breyer at the end of this term deciding to step back from active duties allowing this new democratic majority to usher in a new replacement for him. What do you think?

Kate Shaw:

End of this term? I don't know. I think-

Melissa Murray:

You think earlier?

Kate Shaw:

I do. I think there's a possiblity of February or March-

Melissa Murray:

Really?

Kate Shaw:

Yeah. I do. Things can change-

Melissa Murray:

Why do you think earlier?

Kate Shaw:

Look, I just think that ... I don't see the Biden administration taking a democratic Senator and putting them in the cabinet and opening up a seat that a Republican ... I mean, they're too smart to do that, but things can change quickly, I think, in politics. A 50-50 margin is just so close that I think that you want to move quickly. If you're the White House, of course, that doesn't mean you control Breyer, but I think that February, March announcement is more likely than end of term.

Melissa Murray:

Maybe a February March announcement, but I'm thinking if you're Steve Breyer and you've been in this job for a while and you've never been the senior member of your wing, and now you are, that's going to be hard to give up right away. I think he wants a couple ....

Kate Shaw:

We can do hard things. Steve Breyer can do hard things, I think.

Melissa Murray:

Look at you with your Peloton.

Leah Litman:

I know. That was amazing.

Kate Shaw:

It hasn't even arrived yet.

Leah Litman:

And you are already in it.

Kate Shaw:

Do you think Steve Breyer has a Peloton? And if not, should he?

Melissa Murray:

Yes, yes. Of course, he has Peloton,

Leah Litman:

I'll get him one as a retirement gift if he doesn't have one and we can Peloton together in all of his free time. I say this with the greatest respect and affection. I love me some Steve Breyer. He's one of my favorite fellow Cassandra's, but Steve, you deserve some time off.

Kate Shaw:

Speaking of appointments, there is one other piece of good news that we should mention before we really descend into the darkness, which is that this week-

Leah Litman:

Is that the plan to make Joe Manchin my BFF and get him to do all of the good things? No?

Kate Shaw:

Hopes' spring's eternal. You were so charming with that. I wouldn't put it past you. We will see, but-

Melissa Murray:

Are you going to get him a Peloton too?

Leah Litman:

I will, Joe, and I will be sending you high fives.

Kate Shaw:

You get a Peloton and you get a Peloton.

Leah Litman:

Those endorphins, they work magic. Let me tell you.

Kate Shaw:

But other news in magic that has already occurred as opposed to, that we think could be in the offing, is an amazing set of department of justice personnel announcements out of the Biden-Harris transition operation. DC Circuit, Judge Merrick Garland, will be the attorney general.

Melissa Murray:

Have we heard of him before? His name sounds familiar.

Leah Litman:

He's finally going to get that Senate hearing.

Kate Shaw:

Wednesday started with the announcement, both with the fact that, so Warnock, it was pretty clear on Tuesday night had won. Ossoff's victory wasn't really clear until Wednesday morning. The news of likely two pickups in the Senate, and then this DOJ team broke. So, Garland, both Ossoff and Warnock, but also Garland had a couple of hours to really shine, and then obviously the day took a really dark and dystopic turn.

Melissa Murray:

It wasn't just that Merrick Garland was nominated to be the AG. They also named the whole team that would be under him. That team includes my NYU colleague, Lisa Monaco, who'll be the deputy AG, or was nominated to be the deputy AG, as well as NYU law alumni, class of 2001, Vanita Gupta, who is the head of the leadership conference on civil and human rights, who's been nominated to be the associate attorney general. Then there's also Kristen Clarke, who is the head of the Lawyers Committee. She is not an NYU alumni. She is an alumni of Columbia Law School, but close enough, they're in the same city.

Melissa Murray:

I'm really psyched for her too, and she would be the head of the civil rights division. Leah, do you think this is necessary to enforce the Voting Rights Act?

Leah Litman:

I think this is how you actually enforce the Voting Rights Act.

Kate Shaw:

Are we going to have to retire the joke?

Leah Litman:

No, because now we're going to be talking about how you actually enforced the Voting Rights Act, the meme lives.

Kate Shaw:

Yes.

Leah Litman:

Just a wonderful team. The morning this is announced, on Wednesday, someone tweeted, on Wednesday morning, Merrick Garland woke up thinking today is Merrick's time to shine. Alas, that lasted for only a few hours, because on January 6th, 2021, the day that will live in infamy, there were some events.

Melissa Murray:

Do you think Merrick Garland's just at home watching the news. He's like, damn it.

Leah Litman:

These guys won't let me have a Senate hearing, now they won't let me have 24 hour news cycle. Come on, come on. No, I don't think he's doing that, but you know.

Melissa Murray:

He's probably shocked and horrified like everyone .

Kate Shaw:

Like everyone, and I'm sure thinking immediately about what the department of justice is going to do in the very beginning of this administration as soon as the team is in place to respond. But yeah, let's walk through a little bit the arc of the day. January 6th, we all knew would be a big day because that's the day on which Congress opens and counts the electoral votes that come in from the States. It's supposed to be a pretty ceremonial occasion. The election is long over, the electors on December 14th cast their votes in the states.

Kate Shaw:

Nothing of consequence, apart from the opening and the counting of the ballots is supposed to happen in Congress on January 6th. But nevertheless, this was a day that President Trump had been riling his people up for with these vague promises that he could somehow still pull out a victory in the election, and that Mike Pence had some role to play in ensuring that. That morning, gosh, a lot happened that day. That morning, Pence, for the first time in four years, I would say, grew a spine and released a letter explaining that under the constitution, and consistent with his oath of office, no, he could not unilaterally decide which electoral votes to count and which ones to throw out.

Kate Shaw:

And that giving the vice-president that authority, the authority literally to throw out an election would be antithetical to constitutional design. I have to say, it's an amazing testament to how low the bar is that this was viewed as an act of principle and integrity, but there you have it. One thing to flag about that letter is that, basically the main authority on which the vice-president relied in his big constitutional moment was a tweet thread the day before by what may or may not be the actual Twitter account of former appeals court Judge, Michael Luttig.

Kate Shaw:

I think it probably is his account, but it's wild, but that was the authority that, that staffer who put that letter together relied upon, but maybe not entirely how this era ends.

Melissa Murray:

Really, this is a twitter administration. This is a Twitter administration, and you've written about this.

Kate Shaw:

Yeah, no, but a lot of the time the administration is busy disclaiming the sort of legal significance of things the president tweets. It's not even an academic article, it is literally a Twitter thread, but again, I think a former appeals board judge, not even sure is him, it was wild. But that announcement, that seemed to basically put to rest this idea that anything of consequence was going to happen to upend the election didn't stop a number of Republicans led by Josh Hawley and Ted Cruz from mounting an effort to object to electoral college votes.

Leah Litman:

Ted Cruz in the announcement and in the speech stating that he was going to object cited to the 1876 election commission as a model to emulate. If that doesn't sound familiar and/or horrifying, that was the election commission and the election that resulted in the compromise of 1877 that included a compromise whereby the North essentially agreed to withdraw from the South and abandoned reconstruction. It ushered in the period known as redemption in which Southern states were given for your reign to suppress black political participation and black voters, and usher in the era of Jim Crow.

Leah Litman:

Ted Cruz was like, yeah, let's do that. The letter said they were objecting because of a lack of faith and irregularities in the process, but the irregularities, of course were just their allegations of irregularities, not actual irregularities, and it was their own allegations that are faith in the process.

Kate Shaw:

Yeah. I mean, there's amazing circularity to drum up distrust and suspicion and then to point to distrust and suspicion as justification for invalidating these votes is just shockingly cynical. But you had it on the floor of both the Senate and the House in the couple of hours in which this process was ongoing before ... It's hard to even know how to talk about what happened next.

Leah Litman:

Right.

Melissa Murray:

Well, let me weigh it in. Last but not least, there was an insurrection. I mean, is that a fair way to put it? There was an insurrection.

Leah Litman:

Oh yeah.

Kate Shaw:

Yeah, absolutely.

Melissa Murray:

Okay. Right.

Leah Litman:

I don't know whether to correctly call it an insurrection, violent mob, attempted coup, some combination of all of the above. I don't know what the accurate-

Kate Shaw:

Certainly there was a storming and a siege of the Capitol. I think that those things make clear what physically happened on the grounds of the seat of government on Wednesday.

Melissa Murray:

Following a rally at which president Trump explicitly directed his followers, and they numbered in the thousands, to go to the Capitol. He told them to March down Pennsylvania Avenue and go to the Capitol and demand that Congress confront what he called an egregious assault on our democracy. Actually, should we just play part of his speech here? I feel like I'm not doing it justice.

Kate Shaw:

Yeah. I think that's a good idea.

Melissa Murray:

Let's let the tape roll.

Trump:

We're gonna walk down to the Capitol and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength and you have to be strong.

Melissa Murray:

After this appeal to his many followers, they marched to the Capitol, stormed the Capitol, scaled the walls of the Capitol, entered the building, destroyed property, delayed for many hours the counting of the votes, trashed offices. I think there was one tweet where someone posted a selfie of himself sitting with his feet up on the desk of Nancy Pelosi, a Capitol police officer was killed, and there were four other deaths that morning. It's not clear what is going to happen in the wake of all of this.

Melissa Murray:

There've been significant resignations from the house Sergeant of arms, the chief of the Capitol police force, but this is an ongoing criminal investigation right now. I mean, that's the only way to put it.

Leah Litman:

Yeah. People were also posting pictures of themselves with letters they took from Nancy Pelosi's office. They took things from the Capitol. There were images of people with wrist ties, plastic ties in the Capitol.

We don't know what would have happened had they not actually evacuated and secured members of the house and Senate. It was truly horrifying to watch and watch it play out. Then now, for there to be, thus far, very little done about it.

Kate Shaw:

A police officer, a Capitol Hill police officer was murdered by participants in this mob. We don't know exactly how many people were involved or how this all transpired, but this is an unbelievably serious thing. There were a number of other deaths it seems exclusively of participants in the rioting, but we don't really have all the details there either. I think a couple of other additional facts that I think are really important is that we have real questions about whether the president deliberately slow-walked approval for the National Guard to be able to augment the clearly insufficient numbers of Capitol police who were on the premises.

Kate Shaw:

He released a statement suggesting that he had immediately authorized the National Guard. That seems not to be true, and if it is in fact the case that the facts bear out his having deliberately slow-walked out approval, after having incited this mob, he delayed the sending of aid to members of Congress and materially endangered, I think the lives of congressional leadership, and maybe his own vice-president. That is just unbelievably serious. It is very difficult to think of presidential misconduct that could be more serious than that.

Leah Litman:

Yeah. I mean, governor Hogan of Maryland gave a press conference at which he said, they were trying to get permission to send in National Guard and that was initially rebuffed or declined. It's truly appalling.

Kate Shaw:

Not surprisingly, all of this has set in motion a renewed set of calls for impeachment, possibly the invocation of the 25th amendment. We're going to talk about that at the end of the episode. Events are moving fast. We're recording this on Friday. I think it's possible that articles of impeachment sounds at least ... it sounds actually likely that articles of impeachment may be voted on in the next couple of days. I think probably not before this episode drops, but we will see, and if we need to, as most has suggested, get an emergency episode together if all this is moving quickly in the coming days, we'll do that.

Melissa Murray:

Also, to mention factually, in the wake of this episode at the Capitol, a number of individuals from the administration began issuing their resignations. On Thursday, it seemed that those resignations even went as far up as some of the original Trump cabinet members. So, Elaine Chao, who was also married to Senate majority, I guess now minority leader, Mitch McConnell, resigned from her post as secretary of labor, and Betsy DeVos also resigned as secretary of education. We can talk about what that might mean for the invocation of the 25th amendment at the end of the episode.

Leah Litman:

We should also note that after this violent mob put the Capitol under siege and endangered the lives of many people in the House and Senate, some members of Congress still elected to go through with the

absolutely baseless objections to the election that had been used as part of the incitement for this mob, including Josh Hawley and Ted Cruz, and a significant number of Republicans in the House as well.

Kate Shaw:

Yeah. I mean, Mitt Romney who spoke on the Senate floor after the Senate reconvened in the evening, I thought really explicitly drew the connection between what had just happened with the storming of the Capitol and these objections. They're not two different things. They're two sides of the same coin. The individuals who had been riled up to storm the Capitol we're doing so, in part, based on a lie, which is that the election was illegitimate or fraudulent, and to continue to perpetrate that lie in the context of these objections, that there's no way, in good faith, these members of Congress believed were justified.

Kate Shaw:

I can't credit that. It seems to me really hard to avoid the conclusion that they were absolutely complicit in what had happened, and in some ways, offering their endorsement of it after the fact by continuing to press these baseless objections.

Melissa Murray:

What do you make of the comparisons that are going around between these "protests" and the protests that occurred over the summer with regard to black lives matters? Because one of the things that I've seen, at least from conservative Twitter, is sort of an equation. This is just like that. This was nothing more than the same kind of peaceful protest, but I recall the National Guard being heavily involved in black lives matters protests over the summer, and it just seemed like the treatment of these protesters was wholly different from that experience.

Kate Shaw:

The militarized police response to all of these predominantly peaceful protests in every city in the country was just wildly out of proportion to any public safety threat that any of them posed, and here the response to this, not demonstration, but actual insurrection or mob action was grossly insufficient to meet the actual threat. I think that's distinction one. One point I think we should make is, if I'm not mistaken, the number of active duty police officers who were killed in the George Floyd and black lives matter protest over the summer, which occurred over many months in every American city was the same.

Kate Shaw:

I think it was the same. I think it was the same number as occurred yesterday in two hours. To suggest that somehow the kind of threat to public safety and order was analogous in any way is I think just preposterous, but certainly there's no comparison in terms of ... Five people died on Wednesday, including a police officer.

Leah Litman:

Should we switch to the January case previews?

Melissa Murray:

That's a great segue Leah, very artfully done. Very well done. Very well done.

Leah Litman:

What is there even to say after that? I don't know.

Melissa Murray:

I'll start it off. One of the cases, in the January sitting, is Uzuegbunam versus Preczewski, and this is a really important civil rights case up, even though the issue it presents may seem very technical and dry. The question in the case is whether a claim for nominal or symbolic damages becomes moot when the government subsequently modifies the challenge policy going forward. This is a really important issue for those who do civil rights litigation, because it determines whether a court can reach the merits of a civil rights plaintiff's claim and determine whether the government's challenged policy is unlawful.

Melissa Murray:

It might be useful for listeners to think about this case in the context of last term's decision in NYSRPA. That was the second amendment case that challenged New York City's previous gun regulation. The court ended up saying that the case was moot because New York City repealed the challenge regulation, and then New York State passed a law that prohibited the city from reenacting a law like that. And important for our purposes, the plaintiffs in the NYSRPA case had only sought injunctive and declaratory relief, a kind of relief that declares the policy unlawful and prevents the city from enforcing it going forward.

Leah Litman:

If you remember from the briefing in NYSRPA, the city had argued that finding the case moot wouldn't allow governments to evade mirror through links in every case because if the plaintiffs had sought damages, then the case wouldn't be moot. When you seek damages, you're seeking money to rectify harm that was already caused, harm that was caused in the past, and when the government repeals a policy, that doesn't remedy the harm that was already caused by the policy. In NYSRPA, the plaintiffs didn't seek damages, but the solicitor general had nonetheless argued the case was not moot because the plaintiffs in that case could still yet seek damages.

Leah Litman:

You can think of this case as really a follow on to NYSRPA. This case asks what would have happened if the plaintiff in NYSRPA had sought nominal damages in the complaint, in addition to injunctive and declaratory relief, that is if the city repealed the regulation, but the plaintiff's had sought nominal damages, would the case become moot?

Melissa Murray:

With that in mind, it's worth sort of distinguishing nominal damages from regular damages. Nominal damages aren't actually tied to the measure of damages or the harm to the plaintiff like the plaintiff lost X amount of dollars because of someone's action. Monetary damages might be in that X amount. Instead, nominal damages are usually quite small, and in some ways, they're symbolic, but again, they're really important for civil rights litigation because plaintiffs may include them in their claim for relief in order to prevent a case from being mooted if the defendant changes its policies going forward.

Melissa Murray:

The importance to civil rights litigation is really evidenced by the strange cross ideological bedfellow consortium of amici in this case. The case is actually brought by the Alliance Defending Freedom. This is a group that has sought religious exemptions from non-discrimination ordinances protecting LGBTQ individuals, and it's also involved in some anti-trans litigation, but here they're supported by the ACLU as an amicus, along with other civil rights groups, including the federal government as an amicus. Truly strange bedfellows. Again, it really underscores how important this seemingly dry and technical case will be for civil rights litigation going forward.

Kate Shaw:

The actual case involves a college student who wanted to engage in public conversation and public speaking, pamphleting, etc, in support of his religion, but he did those activities in areas that were not designated as free speech areas. So, he was disciplined. He brought this suit along with another plaintiff that challenged the school's policies violations of the first amendment, but then the school changed its policies. The overwhelming consensus in the lower courts is that a claim for nominal damages, which was included in this case as compared to like NYSRPA would mean the case is not moot, but here the 11th Circuit held the case is moot, in part by relying on the difference between nominal damages and actual damages. Again, nominal damage is symbolic, not designed to compensate for actual harm.

Leah Litman:

In some ways, this case kind of reminds me of Tanzin versus Tanvir, in that there are really two cross-cutting principles that might push the justices in different directions. One is, as in Tanzin, the conservative justices real hostility to litigation and to judicial remedies. They often express concern about the possibility that plaintiff's lawyers might abuse the system. But the other principle will be a real felt sympathy for religious liberty plaintiffs and free speech claims, both of which are implicated in this case.

Kate Shaw:

Maybe nominal damages when we're talking about a religious liberty claim.

Leah Litman:

Right. Those don't become moot.

Kate Shaw:

But they can preserve a live dispute in only the subset of cases that the justices are sympathetic to. I'm sure they would love to find that, but I don't think it's possible.

Melissa Murray:

I don't think that's far off the mark. I don't know what kind of reception this case will get before the court, but it is worth noting that in the NYSRPA case, Alito dissented from that decision and noted that if the court were to rule for the challengers, the challengers would be eligible for nominal damages. As he said, in that decision, it's widely recognized that a claim for nominal damages precludes mootness, and both Gorsuch and Thomas joined that part of Alito's descent, so at least it seems that there are three people.

Kate Shaw:

Okay. So, religious liberty and second amendment claims.

Leah Litman:

And some free speech claims. No, but I'm just saying like, when the justices are confronted with these crosscutting principles, as they were in Tanzin, they reconcile them in ways that led them to be more sympathetic to their religious liberty plaintiffs, and so I'm cautiously optimistic that that will happen here. The fact that the court granted cert in this case when it is kind of the lone outlier against the consensus view also suggests that maybe they will see reason.

Melissa Murray:

I think also the facts of this case are really to be important here. The plaintiff is a Christian evangelical, and so it wasn't just a request to pamphlet or to speak, but to speak about particular topics that sound of the register of religious liberty, so that may be important here as well.

Kate Shaw:

Definitely.

Leah Litman:

Also of note, we have been talking about nominal damages as oftentimes about symbolic harm, but sometimes nominal damages are also sought for harms that are difficult to quantify. Here, for example, how would you measure the damages to the plaintiff for not being able to speak? Some statutes actually preclude compensatory damages in certain cases making nominal damages the only kind of damages that are available. There are just many examples of these kinds of cases where again, nominal damages are sought for either minor touchings, assault and battery, or again, free speech, religious liberty claims where you have been temporarily precluded from speaking.

Melissa Murray:

All right. Leah, do you want to go on to the next case?

Leah Litman:

Sure. Next case is FCC and the National Association of Broadcasters versus Prometheus's Radio Project. I'm happy that we have time to go deep on this case because it involves a very important administrative law doctrine, arbitrary and capricious review, two of the big admin law cases involving the Trump administration involved arbitrary and capricious review, the census case, and the DACA case, but those cases involve somewhat different aspects of arbitrary and capricious review than this case does. Recall that in the census case, the most important case of all time, the court ultimately held the addition of the citizenship question to the census was arbitrary and capricious because the commerce department's stated rationale for adding the question that it was necessary to enforce the Voting Rights Act was pretextual.

Leah Litman:

That was contrived and not the actual reason. Then, in the DACA case, the court held that the administration's recession of the DACA program was arbitrary and capricious because the administration had not considered two aspects of the recession, the option of ending some parts of the program like work authorization, but not others, as well as reliance on the DACA program. Now, this case involves a

related, but somewhat distinct strand of arbitrary and capricious review that is more concerned with the facts and evidence rather than the government stated rationale and how it justified its policy.

Leah Litman:

Specifically, an administrative action can also be arbitrary and capricious when it is against the weight of evidence or not supported by evidence. Kate, you're the admin law expert. Did I get that right?

Kate Shaw:

Yeah, no, that's all exactly right, and I do think this case is distinct in certain respects from the DACA and census cases, but also shares certain important kind of thematic through lines. In the census case, the plaintiffs had argued, both that the addition of the citizenship question was arbitrary and capricious because it was not supported by the evidence. Remember the plaintiff there said the addition of the citizenship question would depress turnout, it would make the census information less reliable, and therefore, this policy move was not supported by the evidence.

Kate Shaw:

Now, the court in that opinion seemed to reject that argument, although I read the opinion as not being crystal clear on this point, but in any event, it wasn't even necessary to resolve that question to dispose of the case because the court agreed that the pretextual explanation doomed the agency action, the addition of the question. Anyway, the kind of arbitrary and capricious review that is implicated in this case is, as Leah was saying, whether and how the evidence supports the administrative agencies policy decision.

Leah Litman:

We should say that this kind of judicial review of administrative action is, I think some would say this, the kind that strains court's relative competence the most because of agencies are better than courts at anything, you would think it would be at gathering facts, weighing the costs and benefits of particular policies. On this account, it would be hard, I think, for a court to second guess an agency's determination, that a policy decision is supported by the weight of evidence, unless, and again, the census case, the policy decision is so obviously out of whack or insane.

Melissa Murray:

You all mentioned the DACA case and the census case, I actually have been thinking about this in the context of Gundy and just sort of the general assault on the administrative state and this idea that deference to agency expertise is really problematic. I think it falls into that bucket as well.

Kate Shaw:

Like many administrative law doctrines, the kind of valence of these doctrines and how I think that legal political coalitions are going to be enthusiastic about or concerned about is going to very much depend on who is sitting in the administration and sort of what the composition of the court is. I mean, I think that arbitrary and capricious review has not been something that has been in the crosshairs of the conservative legal movement. There has not been an anti State Farm is the big arbitrary and capricious case. There hasn't been an anti State Farm mobilization in the same way that there has been an anti-Chevron mobilization, which I think is interesting.

Kate Shaw:

Maybe because State Farm is such a malleable ... Arbitrary and capricious review has historically been a pretty malleable standard, but that's true about Chevron too, so I don't think it totally explains the difference. I had wondered after we saw this doctrine deployed to invalidate certain Trump administration policies, whether we might see that kind of turn among kind of conservative legal scholars, to suggest that, it's, in some tension, with Chevron, because to say that courts are being too active in policing what agencies are doing is in tangent with an anti administrativist position or strain that is part of the kind of Chevron skepticism.

Kate Shaw:

But this is just, I think, a more under the radar, but hugely important doctrine or set of doctrines that governs how courts substantively review what agencies have decided to do, so where Chevron is about legal interpretations reached by agencies, State Farm is about substantive review, both of the policy decisions made by agencies, the justifications given by agencies, and the basis on which agencies have relied.

Kate Shaw:

I think that all of those things are connected so that it's somewhat difficult to desegregate. Maybe let's walk through the policy issue in this case and that'll help flush it out a little bit. Basically, the agency here is the Federal Communications Commission or the FCC. It has broad authority to allocate and to regulate broadcast licenses in the public interest that's in the statute. In furtherance of that mandate, the commission has limited the number of radio or television stations that a single party may own, both nationally and in local markets, and it has also limited cross ownership of broadcast stations and other media in certain defined markets.

Kate Shaw:

This is in part to avoid over-concentration and it's also to ensure diversity in ownership, including along the lines of race and gender. Okay, so Section 202(h) of the federal communications act says that the FCC shall review its rules adopted pursuant to this section and all of its ownership rules as part of its regulatory reform review under Section 11 of the Communications Act, and shall determine whether any such rules are necessary in the public interest as a result of competition. The commission shall repeal or modify any regulation that determines to be no longer in the public interest.

Kate Shaw:

As part of that process, the FCC reviewed a number of rules over a period spanning a decade and involving a fair number of interim rounds of Third Circuit review. But there are basically four ownership rules at issue here. One, the local television rule, which governs how many stations can be jointly owned in the same local market. The local radio rule, basically the same thing for radio. A newspaper and broadcasting cross ownership rule that limits ownership of a daily newspaper and a broadcast station in the same local market, and radio television cross ownership rule, which caps the number of same market television and radio stations that may be jointly owned.

Melissa Murray:

Two months after the Third Circuit decided Prometheus's three, again, there were many rounds of Third Circuit review, the FCC issued the 2016 order, the first of the three orders that are under review here.

There, the FCC found that the public interest is best served by retaining the existing rules with some minor modifications, and that particularly for local news and public interest programming, traditional media outlets like television and radio continue to serve as the primary sources on which consumers rely.

Melissa Murray:

National non-broadcast video sources, the commission concluded, do not serve as meaningful substitutes for local broadcast television, and local news and information available online usually originates from traditional media outlets. 15 months later, a newly composed FCC issued the reconsideration order, relying upon the same facts used by the commission just over a year ago to reach the exact opposite conclusions. This is one of the dissenting opinions from commissioner Clyburn. The commission eliminated the cross ownership limits entirely and significantly relaxed the local television ownership rules.

Melissa Murray:

Then the Third Circuit unanimously affirmed substantial elements of the agency's decision. But relaxation of the ownership rules was fatally flawed, the court concluded, because the FCC did not adequately consider the effect it's sweeping rule changes will have on ownership of broadcast media by women and racial minorities. The court identified two particular problems. First, the FCC's analysis of changes in ownership by people of color "insubstantial." The agency compared to datasets created using entirely different methodologies, the court said, and exercise and comparing what the court termed apples to oranges, which it did not make any effort to fix.

Melissa Murray:

Further, even if the data were taken at face value, the commission did not actually make any estimate of the impact of past deregulation, and then second, any ostensible conclusion as to female ownership was not based on any record evidence at all.

Leah Litman:

There's a bunch of arguments in the case. One of the arguments is actually whether the statutory provision that Kate read regarding the FCC's regulatory review actually requires, or even permit the SEC to consider diversity in ownership rather than just competition. The government and the Broadcasters Association are arguing that the Third Circuit was wrong to focus only on diversity of ownership, or whether it could focus on diversity of ownership at all. There's also a lot of discussion about the kind of empirical certainty that is required in order for the FCC to visit its rules given that there has been concerns about the integrity of the data throughout this process and previous data that the FCC has relied upon.

Leah Litman:

There could be some new administrative law principles emerging from this case about how closely courts are to scrutinize the empirical findings of agencies and making their decisions. As Kate was suggesting earlier, when we were discussing kind of like the political valence of these doctrines, I think this is something that could prove to be quite important during the Biden administration given that the Biden administration will likely be pursuing many of its policies through administrative agencies. And now the federal courts, and particularly the courts of appeals are much more conservative than the

administration will be, and therefore could come down differently on where they think the weight of the evidence and the relevant facts push.

Kate Shaw:

Yeah, and I'll say, I think that's a good caution. I'm actually less worried about this, I think, than you Leah, in part, because I think that the reason that these Trump policies have fared so badly under this pretty robust State Farm arbitrary and capricious review is because a lot of these agencies have been pretty dismissive of facts and evidence in pursuit of their policy goals and have been pretty disingenuous in giving their reasons. I just don't really see the Biden administration engaging in regulatory activity in the same spirit.

Kate Shaw:

Now, that's not to say that aggressive courts might not decide to really second guess agency policy judgements, but I don't think they're going to be able to plausibly do it on the basis that facts and evidence weren't considered. In terms of kind of disingenuousness I mentioned earlier, that even though this case is somewhat different than census and DACA, I actually do think that there's kind of a through line, which is that the agency basically said it was continuing to prioritize diversity because it always had, and it didn't, I think want to make a big policy announcement that it had decided to deprioritize diversity.

Kate Shaw:

But instead of just saying that forthrightly, look, we actually, we don't think this is either a policy objective we want to pursue, or we're concerned that there might be constitutional problems with even pursuing racial or gender diversity in ownership. Instead, they went through this decision-making process in which they basically said, that's not going to have any adverse impact. But there's both a candor issue that I think was of course front and center in the census case, but also this public participation issue, which is to say that if the FCC basically said, look, we actually don't think diversity is an important goal and we're not going to pursue it anymore, then public participation could respond to that.

Kate Shaw:

The public would know and they could weigh in. But if they're going to do it in this sort of sub-silentio way, and just sort of do shoddy decision-making that purports to rely on evidence that actually doesn't justify the action that they are taking, that removes the ability of an informed public to really be heard by the agency. I do think that ... That's why I think this case actually is really closely connected to the first two cases that we started by talking about.

Leah Litman:

I think it's exactly right that the Biden administration will certainly be more thorough than the Trump administration and won't dismiss facts. I know, shocking. Low bar, banality of low expectations. But I look back on the Obama administration, and there, we did see, particularly on climate regulation, conservative courts saying, while the administration didn't adequately consider costs, it's not that the administration didn't mention costs, it's just that the courts happened to think that the costs to addressing climate change were bigger than the administration did and weigh it against the policy. In particular, Michigan versus EPA is one of those cases that I'm thinking of. That is really kind of case that I am concerned about.

Kate Shaw:

I think you're right. Cost is probably in its own category. If courts want to say, and it's so hard for me to see how, with a straight face, a court could say, when that's so clearly a policy judgment, that that cost is the most important consideration when we're talking about climate regulation or economic impact is the most important consideration when we're talking about climate regulation. But you're certainly right, it's not difficult to imagine conservative lower courts and the Supreme Court potentially invalidating climate initiatives that happen at the agency level on that basis.

Kate Shaw:

But as a broader principle, I think I'm not that worried about agency action being vulnerable, at least on this theory.

Melissa Murray:

I think I would Leah on this one. Leah, are we going to join our own Cassandra club on this?

Leah Litman:

It's always good to have a resident optimist. But again, it's not just Michigan versus EPA. It's a stay of the clean power plan. There were just so many climate initiatives where I think lower federal courts and the Supreme Court just went over the agency's work product with an unfair lens and said, at the end of the day, we just don't think you adequately considered costs, when what they really meant is you came to a conclusion about the cost that is different from the ones that we would reach.

Melissa Murray:

But I love your Pollyanna optimism though. It's like, Cassandra's versus Pollyanna's, and I'm here for it.

Kate Shaw:

This is the tension that we bring. We should say, obviously a democratically controlled Senate makes all the difference in all of this. We should also say there's still a legislative filibuster, so it's not as though anything you can dream you can do with the democratic Congress, because again, as to legislation, 50 votes is not going to be enough on a lot of issues.

Leah Litman:

That's until me and my BFF, Joe Manchin, work this out.

Kate Shaw:

Oh, to abolish the filibuster rights. Yeah. Until that happens, that's ... Some of this can happen. I think we are just in a different world prior to Tuesday, then after Tuesday, because prior to Tuesday, it could well have been only agency action that was possible on a lot of these issues, and now legislation becomes at least a live possibility.

Leah Litman:

On that optimistic note ...

Kate Shaw:

Thank you.

Melissa Murray:

Wait, wait, can I go back to be a pessimist?

Leah Litman:

Yeah, no, of course.

Melissa Murray:

Can't legislation be struck down by this court?

Kate Shaw:

Absolutely.

Melissa Murray:

Okay. All right. Leah, put that out there. Okay.

Leah Litman:

Also, Joe Manchin is not abolishing the filibuster for environmental reforms as charming as I might try to be, and as many Peloton high-fives as I might send him.

Melissa Murray:

Cody Rigsby on the case.

Leah Litman:

Yes, Cody could pull it off.

Melissa Murray:

Hey, boo. Kate has no idea what we're talking about.

Kate Shaw:

I've heard the name. I've heard the name.

Leah Litman:

Find your light, fix your wig, Joe. Now, on that truly optimistic note, we will go ahead and briefly to the third case we wanted to preview, which is Pham versus Guzman Chavez. The question in this case is whether a certain categories of immigration detentions are governed by either Section 1226, or 1231 of the Immigration and Nationality Act. Section 1226 governs detentions when the decision, whether the alien is to be removed from the United States remains pending.

Leah Litman:

Alien is the language used in the statute. That's not the language that I would choose to use. Section 1231 provides for mandatory detention, but only during the brief 90 day removal period, which

Congress defined as the time during which the government shall remove the alien from the United States. 1231 is mandatory detentions and 1226 is not. So, it's important to know which provision governance, because if detentions are mandatory, then an individual cannot be released while immigration proceedings remain pending.

Leah Litman:

Of course, immigration proceedings can remain pending for a long time. The specific question in this case is whether 1231 or 1226 applies when there is a reinstated order of removal, but a withholding of removal claim remains active. Withholding of removal is available for several reasons, including for individuals who fear persecution or torture upon removal, and reinstated orders of removal occur when a person who was previously removed then unlawfully reenters the United States. Following an unlawful re-entry, the INA provides that the prior order of removal is reinstated.

Leah Litman:

While most defenses to removal are not available for re-instated orders, an individual can still apply for withholding of removal. The government argues that withholding is about where to remove an individual, not whether to remove them, and so therefore, the order of removal is final and these detentions are governed by 1231. The difficulty with that argument is, while technically withholding of removal is about where a person is to be removed, in actuality, when withholding of removal cases are successful, they preclude removal in 98% of the cases.

Leah Litman:

The reason for that is because the INA restricts the countries to which an individual can be removed. Generally, a person can be removed only to an individual's country of citizenship, or last prior residents, or birth, but then there is this catchall that allows the government to remove individuals to another country whose government will accept the person. But if you successfully pursue a withholding of removal claim, because you demonstrate you're likely to be persecuted or tortured in your home country, country of citizenship, last prior residence or birth, then again, in 98% of cases, you are not going to be removed at all.

Leah Litman:

This is just the exact kind of argument that I worry the court is going to overlook because it concerns, not the precise meaning of the text, but actually how these provisions play out in operation and reality, which I think is quite significant, but before this court, I'm just worried that that statistic is not going to have a significance that I think it should.

Kate Shaw:

Okay, so let's move on to court culture. Melissa, do you want to get us started on that?

Melissa Murray:

Well, yes. Today's court culture segment isn't really about the court at all, but rather about a vagary of constitutional law, the 25th amendment. Traditionally, it is kind of a wallflower at the constitutional cotillion, but now it is having a moment, you guys. It has been mentioned so much over the last four years, but it has been particularly mentioned a lot in the last few days. People are talking about it.

Melissa Murray:

Just to put this in context, for those of you who have Netflix, if the constitution were Bridgerton, the 25th amendment would be the Duke of Hastings. If you don't know what I'm talking about, you need to get on this right away. This is not a drill. All right.

Kate Shaw:

I still haven't. have you, Leah?

Leah Litman:

Yes.

Kate Shaw:

You have? You've watched the whole thing?

Melissa Murray:

And you agree with me?

Leah Litman:

Not the whole thing. Oh yeah, yeah, yeah.

Melissa Murray:

Yeah, Duke of Hastings. Most con law classes don't really talk about the 25th amendment, so we thought this would be a great opportunity to offer a kind of quick and dirty primmer on the amendment, its history, its terms, and what it mean over the next two weeks. Let's start at the beginning. Article 2 Section 1 Clause 6 of the constitution provides that, in case of the removal of the president from office or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president.

Melissa Murray:

This constitutional language is a little ambiguous as to some important details. For example, it doesn't make clear whether the vice-president becomes the actual president upon the removal, death, or resignation of the precedent. It also doesn't really clarify whether the VP becomes an acting president in circumstances where the president is temporarily incapacitated, or rather-

Kate Shaw:

Wait, can I say one thing about ... Partly, that's just the language. It's so strange to say, if he's unable to discharge the powers and duties of the said office, the same. Is the same the office, or is the same the powers and duties? And it's just never been clear.

Melissa Murray:

They could have used an editor. In any event, so this has really been an issue actually over the course of constitutional history, because while it's obvious that a president can be removed, resigned, or may die, there are cases where we don't really know where a president has actually been incapacitated. Edith Wilson famously kept the country in the dark when her husband, President Woodrow Wilson, suffered a

debilitating stroke, and no one informed the vice-president when President Grover Cleveland chartered a yacht complete with physicians and an anesthesiologist to undergo an operation to remove a cancerous tumor.

Melissa Murray:

These questions about what would happen in the case the president was temporarily incapacitated had been percolating for a while and they became really pressing in the 1950s and 1960s. During that period, President Eisenhower suffered a heart attack in September, 1955, and later underwent emergency surgery for intestinal issues in July of 1956. In both of those instances, he tried to clarify the succession procedures by drafting a signed agreement that he executed with his vice president, Richard Nixon.

Melissa Murray:

The agreement which was drafted by the AG didn't actually have legal authority though, but nevertheless, when Eisenhower was temporarily incapacitated in both circumstances, Nixon presided over cabinet meetings, and along with Eisenhower aides, kept the executive branch functioning and assured that the public understood that the situation was under control and that Eisenhower would, when he recovered, resume his duties. But during that period, Nixon never claimed to be the president or an acting president during those brief stints.

Melissa Murray:

All of this reaches a fever pitch after 1963, which is of course when John F. Kennedy is assassinated. Recognizing that medical advances make it increasingly likely that an injured or ill president might live for a long time while being incapacitated, policymakers began to push for a clear procedure for determining presidential disability, especially in the context of the cold war, where continued leadership would be necessary. With that in mind, Indiana Senator, Birch Bayh, who's the chairman of the subcommittee on constitutional amendments, goes about advocating for a more detailed amendment dealing with presidential disability.

Melissa Murray:

The result is the 25th amendment, which is ratified on February 10th, 1967. Ironically, 180 days after Lyndon Johnson is admitted to the hospital for a planned surgery and where there is actually no plan for presidential succession.

Leah Litman:

Anyway, the amendment itself, the amendment has four sections. Section 1 provide that, in case of the removal of the precedent from office, or of his death, or resignation, the vice-president shall become president. This is like the Selina Meyer clause of the 25th amendment. Section 2 provides that whenever there is a vacancy in the office of the vice-president, the president shall nominate a vice-president who shall take office upon confirmation by a majority vote of both Houses of Congress.

Melissa Murray:

That basically just clarifies the whole question of what happens when there's a vice presidential vacancy. This has actually happened during various points in our history. Kate, do you want to talk a little bit about ...

Kate Shaw:

Well, yeah, just it's an odd thing, before the 25th amendment, the vice presidency just sat vacant in the case of a vice-presidential vacancy until a new vice president took office. So, post 25th amendment, this is actually how Gerald Ford became president through the 25th amendment Section 2 mechanisms. So, Spiro Agnew, who is Nixon's corrupt vice-president, maybe the most corrupt person in the White House until the last four years. Spiro Agnew resigns in the fall of 1973, as part of this deal, in which he pleads guilty to tax evasion and avoids more serious charges for the literal bribery scheme he was running out of the White House.

Kate Shaw:

Nixon needed someone uncontroversial and who could be confirmed by both houses. It is just so strange, in the constitution, we were so accustomed to the Senate being the confirming body, but the 25th amendment Section 2 has both the House and the Senate confirming the vice-president. Nixon chose Congressman Gerald Ford of Michigan who fit the bill, and indeed he was easily confirmed by both houses of Congress. When Nixon resigned in 1974, Ford became the president. He then actually used that Section 2 mechanism to nominate his own vice-president, but we should say that, while he was president, Gerald Ford nominated Justice Stevens to the Supreme court.

Kate Shaw:

Probably the most consequential thing that present Ford did during his brief term in office. I, for one, will always have a deep attachment to the 25th amendment, at least a Section 2.

Leah Litman:

Section 3 of the 25th amendment provides that whenever the president transmits to the president of the Senate and the speaker of the House of representatives his written declaration that he's unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the vice-president as acting president.

Melissa Murray:

This is basically just the voluntary transfer. If you know you're going to the hospital to have an appendectomy, you're going to send this letter to the speaker and the president pro tem to let them know, and they'll transmit your duties to the VP until you're able to resume them again.

Kate Shaw:

This has happened a number of times, it's usually for a couple of hours or maybe a day, but it's never a particularly big deal. It's routine, and it is viewed as actually a really good constitutional innovation, that there is a settled practice. So, everyone knows at every second who is in charge of the executive branch of government.

Melissa Murray:

But it's Section 4 that's really the important section. It's the section that everyone is talking about these days. This is the Duke of Hastings section, if you will. Section 4 provides that, whenever the vice president and a majority of either the principle officers of the executive departments, or of such other body as Congress, may by law provide, transmit to the president pro tempore of the Senate and the

speaker of the House of representatives their written declaration that the president is unable to discharge the powers and duties of his office.

Melissa Murray:

The vice president shall immediately assume the powers and duties of the office as acting president. Then there's another clause. Thereafter, when the president transmits to the president pro tempore of the Senate and the speaker of the House his written declaration that no inability exists, he shall resume the powers and duties of his office unless the vice-president and a majority of either the principle officers of the executive department, or of such other body as Congress, may by law provide, transmit within four days to the president pro tempore of the Senate and the speaker of the House their written declaration that the president is unable to discharge the powers and duties of his office.

Melissa Murray:

There upon, Congress shall decide the issue, assembling within 48 hours for that purpose if not in session. If the Congress, within 21 days after receipt of the latter written declaration, or if Congress is not in session within 21 days after Congress is required to assemble, determines by a two-thirds vote of both houses, the president is unable to discharge the powers and duties of his office. The vice-president shall continue to discharge the same as acting president, otherwise the president resumes the powers and duties of his office.

Melissa Murray:

This is like contemplating the possibility of involuntary relinquishment of authority, and there's this sort of mechanism for the vice-president to sort of state the president is unable to perform his duties with the assent of some majority, either the cabinet or some other body that Congress might determine, and then it goes to the Congress and they transmit his powers to the vice president, but then the president can say, "Oh, that's not true. I'm actually fine." Then there's this sort of back and forth with the vice president and then ultimately it goes to Congress. All of this will happen in like 21 days or so.

Leah Litman:

A part of me doesn't really get the enthusiasm for the 25th amendment versus impeachment, given the specter of concern about what this president is going to do during the waning days of the office, given what we saw during the insurrection. Because this requires the assent of actually two-thirds of both houses of Congress in order to remove the president and the likelihood of getting two-thirds of the house in particular, given that you had a majority of the Republican caucus voting to overthrow the results of the election is, I think, just very minimal.

Leah Litman:

Also, there's considerable uncertainty about who the quorum of principal officers is that could vote with Pence, given that you have a lot of acting secretaries, in part because of the resignations, in part because this administration hasn't confirmed anyone to some cabinet positions. I understand why people would like to remove the president now particularly, but the 25th amendment versus impeachment, I don't completely understand.

Kate Shaw:

Yeah, I have agreed. On your first point, I have agreed, whenever I've heard the 25th invoked over the course of the last four years, I've said it makes no sense to pursue that rather than impeachment, because two-thirds in both houses is much harder than two-thirds in the Senate, which is all that's required majority in the house in two-thirds in the Senate in order to impeach and remove. But actually, I think given the 21 day window that Melissa mentioned in Section 4, now the 25th amendment actually makes a lot more sense, because it's true, it requires this two-thirds vote to oust the president if he tries to hang on.

Kate Shaw:

But it's also true that Congress has 21 days to act. As I read the amendment during the pendency of that 21 day period, if the vice-president has transmitted his initial declaration and then his second declaration after the president tries to take the power back. The power remains with the vice-president while Congress considers, whether deliberates and votes. I actually think the default rests with the vice-president, so given that we are only two weeks out from January 20th, I actually think here, if you could just get to a majority of the cabinet, obviously with the vice-president, then that would be sufficient, and Congress could just run out the clock.

Melissa Murray:

That interpretation would be litigated.

Kate Shaw:

I don't think it could in time. I don't know that a court would decide it. I don't think so. But I do think, on the acting issue, which also, I think probably wouldn't be litigated and would just ... The executive branch would sort of make its best determination, I think people disagree about whether acting officials should count, but I also don't think it totally matters because I think that it's just a majority in the constitution. I think that if the actings are out of the count, they're out of the denominator too.

Kate Shaw:

I think right now you have ... The statutory cabinet has 15 members, three are acting. Well, I guess, after Monday, two more will be acting, presumably Chao and DeVos are out. But I think that means you either need eight of the 15, if they all count, or if it's after Monday, there's only 10 actually confirmed cabinet members, and you just need six, I think. I think it would be possible either way. Maybe a court would have to find the word, but it just couldn't happen fast enough to matter.

Melissa Murray:

Wouldn't impeachment, couldn't that happen faster than this, and be cleaner?

Kate Shaw:

It could in theory. Certainly, historically, hasn't happened this quickly, but could they do it? Could the House do it in a day, and could the Senate? I think there's a real question about whether the Senate has to have a trial at all. Under its own rules, it does, but could it suspend those rules? The constitution gives the Senate the power to trial impeachments, but does that make a duty to try, or can it just vote? I think you have to have something you call a trial, but it could be a day or half a day long.

Melissa Murray:

The other thing that impeachment brings to the table that the 25th amendment does not is that you could have conviction and then subsequently disqualification.

Kate Shaw:

That I think is a huge advantage of impeachment, right? Because it could permit his disqualification from future office holding. Interestingly, under the Senate rules right now, it requires only a simple majority vote to disqualify. Now, you would still first need the two-thirds to convict, but the disqualification requires only a simple majority.

Melissa Murray:

Is only a simple majority.

Kate Shaw:

I don't know, maybe there are constitutional problems with that interpretation, but that at least is how the Senate currently reads the requirements.

Leah Litman:

That is probably all we have time for today. Stay safe and stay tuned for our new venture, a Rational Basis Review show aimed at those looking to gain more of an entry into constitutional law just in time for the winter or spring semester. We will be breaking down some of the basic concepts and cases in constitutional law, and we hope it is useful to students and law professors alike. So, many thanks to our producer, Melody Rowell and to Eddie Cooper, who does our music, and many thanks and happy new year to our Glow subscribers. If you'd like to support the pod, please feel free to subscribe at glow.fm/strictscrutiny.

Kate Shaw:

Right. Thanks everyone.