

Speaker 1:

Mr. Chief Justice and may it please the Court. It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.

Speaker 2:

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

Kate Shaw:

Welcome back to Strict Scrutiny, your podcast about the Supreme Court, and the legal culture that surrounds it. We're your host today. I'm Kate Shaw.

Leah Litman:

And I'm Leah Litman.

Kate Shaw:

And today, we're going to bring you a short episode that is mostly an opportunity for us to debrief, and maybe get a little bit of catharsis on the impeachment trial of former President Donald Trump that just wrapped yesterday. So, we're recording on Sunday morning, and yesterday, the Senate voted 57 to 43 to acquit former President Trump on the single count for which he was impeached in the house, that's incitement of insurrection.

Kate Shaw:

The Constitution requires a two-thirds supermajority to convict in the Senate. So, that'd be 67 votes. And the house impeachment managers who were prosecuting the case against President Trump fell 10 votes short, although still securing seven Republican votes to convict, pretty significant in history. There had only ever been a single vote by a member of the President's own party to convict on any article of impeachment, and that was Mitt Romney who voted to convict on one article the first time President Trump was impeached.

Kate Shaw:

Okay. So, maybe let's start with some big picture stuff, Leah. What do we think this acquittal means knowing that we're just a day out from it, and it's going to take a little while for its full meaning to become clear?

Leah Litman:

So, a part of me was glad that we got those Republican votes in favor of impeachment. I think the evidence was overwhelming, the danger to the Republic clear that I am glad that it wasn't a vote that was entirely along party lines. But I am still left wondering about whether there was enough accountability to prevent this from happening again in the future, and even worse.

Leah Litman:

Just looking back on, for example, white nationalist violence in the aftermath, and even precursor of the Civil War, I think historians have written about how the lack of accountability for early acts of violence

spawned further additional, more egregious violence. And it's hard to see an ultimate acquittal, as real accountability, I think, Eric Trump tweeted out after the vote to nothing as if this is somehow a great victory for the president and his supporters.

Leah Litman:

So, I think that there still remains a lot to be done by way of understanding exactly what happened in the lead up to January 6th, and what enabled it, and also in holding those responsible for the attack accountable. But there was at least something that came of the impeachment trial.

Kate Shaw:

Yeah. I agree with all of that. I think that in addition to looking to US history, I think that scholars who study the rise of authoritarianism or a democratic backsliding globally, do point to the fact that it is often the case that a first attempt at attack on democracy is unsuccessful. But that it can create infrastructure, and momentum for future successful such efforts.

Kate Shaw:

And so, I do think that there's something deeply concerning, if you think of this as a first real attack on democracy in this modern era. And I don't mean just the January 6th attack, but the lead up to it, and January 6th as the culmination. So, I do agree, it's deeply concerning. But I also agree that there is something really significant about the condemnation expressed in the seven Republican votes to convict in an incredibly polarized time in which it has been for four years, very difficult to find a lot of voices in the republican party that would squarely condemn President Trump's conduct and rhetoric.

Kate Shaw:

And in terms of impeachment, we haven't had a lot of presidential impeachments. And each of them comes to stand for a set of ideas or principles. So, Andrew Johnson, the first presidential impeachment in 1868. He comes within one vote of being convicted in the Senate. So, he manages to escape conviction, but just by the skin of his teeth, and there's all kinds of questions about whether there was bribery and corruption afoot in one or more of the votes to acquit, but in any event, he gets acquitted.

Kate Shaw:

So, that's a vindication in some respects. In terms of what it means for Johnson personally, he's very politically wounded by the process, and ends up not even securing his party's nomination to run for president in 1868. So, it does very much adversely impact his own political future. And so, that's, I think, really significant. And I think, helpfully illustrates the point that it's not just a binary conviction or acquittal, and an acquittal is always an incomplete vindication and a victory on the part of the non-convicted president.

Kate Shaw:

If we're just talking about presidential impeachment, of course, impeachment can happen for other officials. But what we're interested in here is presidential impeachment. But in addition to Johnson himself, what the Johnson impeachment came to mean, I think for a lot of years, it was viewed as something of an error, or an overreach on the part of the Radical Republicans in Congress who miss, that they attempted to overreach to assert excessive amounts of congressional power at the expense of inappropriate understanding of presidential power, or that it was about a triviality.

Kate Shaw:

The main thing for which Johnson was impeached was a violation of a statute called the Tenure of Office Act, which required him to get senate consent before removing a cabinet official. Later, in a different case, the Supreme Court essentially sides with Johnson that is unconstitutional to constrain the President's removal power that way. And so, all these things, I think, for a long time, in part led by a racist school of historians who wanted to vindicate Johnson, who really had been seeking to uphold White supremacy in the south, or in the country at large.

Kate Shaw:

So, that was the narrative for many years about the Johnson impeachment. But I think that that has come to change. I think there now is an understanding among at least a lot of people that it actually was totally appropriate to seek to use the mechanism of impeachment and removal for Johnson, who posed an existential threat to the future of a real multiracial democracy, and that maybe they framed it in imperfect ways.

Kate Shaw:

The impeachers, the drafters of the first ever presidential impeachment, but that the purpose was totally proper. Anyway, so although it's a long way of making the point that the meaning of an impeachment can change over time. And also, that sometimes we indulge in these counterfactuals with impeachment. So, Nixon resigned before he could be impeached, but there were articles of impeachment that had been approved in the house judiciary committee at the time that he resigned.

Kate Shaw:

And it's broadly understood that he would have been impeached, and removed had he not resigned, and foreclosed that possibility. And so, the fact of the timing of his resignation is understood not to reflect that he's not an impeached president, but that he's a president who would have been impeached and removed had he not left office when he did.

Kate Shaw:

So, I wonder whether there's a way that these events in some way stand for a similar idea, potentially, that had he been impeached, and tried in the senate prior to January 20th, he being former president, Donald Trump, obviously, there's a very decent chance that he would have been convicted. And so, there, I think that both the fact that there were the seven Republican votes, and the fact that so Mitch McConnell, who voted to acquit, but gave a pretty scathing set of remarks after his vote, that made clear he holds President Trump fully responsible for the events of January 6th.

Kate Shaw:

Had McConnell not decided to gerrymander the timing such that the trial happened after January 20th, that it had somehow occurred prior to the 20th. Would there have been McConnell, and could have brought another nine Republican votes with him so there would have been the 67 to convict? It seems like there's a very real possibility that that's the case.

Kate Shaw:

So, one way to understand these events is Donald Trump escaped conviction by virtue of the timing of the trial. It's only one way. And obviously, I don't mean to exculpate Mitch McConnell, unless he made

the choice to delay the trial, and thus use the timing of the trial as cover to vote to acquit. So, none of his conduct was laudatory at all here. I just wonder whether there's a way to understand the events in the way I just described, is that plausible? What do you think?

Leah Litman:

So, I'm not nearly as optimistic as you are, and I would not say even a sliver of the positive things about the Mitch McConnell speech, given that I think the real problem is that many people saw this really building up until January 6th. Mitch McConnell did nothing to stop it, including refusing to acknowledge Joe Biden as the rightful winner of the election, dispelling that narrative, and doing anything to constrain the anti-democracy fervor that was rising.

Leah Litman:

But I think what this impeachment comes to mean is entirely contingent on what happens next, and what happens now. Will there be, again, further investigations into what happened in the lead up to January 6th? Will there be actual accountability on any of the people that enabled this?

Leah Litman:

What is the political future of various people within the Republican Party who participated in some form, or another in propagating this narrative, and allowing January 6th to happen? So, I think that what it means is unclear. I am not particularly optimistic, absent some major refashioning about the electoral structure that also enabled some of this.

Kate Shaw:

Yeah. So, let's stay for a beat on this question of so what happens next in terms of potential accountability. So, there are a few different venues in which that additional accountability, or genuine accountability might come. And I'm not sure, this is more about the historical record than personal accountability for former President Trump.

Kate Shaw:

But one thing that was really clear in this very abbreviated trial was that there's just a ton we don't know about even January 6th itself. So, representative Ted Lieu, one of the house managers at one point said or no, maybe this was Castor said, open his mouth, and said there's a lot we don't know about January 6th. And I found that a little bit of hard because it was like, well, you guys have made the choice to proceed in this expedited fashion that doesn't involve fact finding or witnesses.

Kate Shaw:

We will talk about witnesses in a minute. So, let's put a pin in that. But anyway, the managers themselves can see that there's a lot we don't know, even in the very thorough factual presentation that they gave. And so, it just seems really clear, there needs to be a very rigorous congressional investigation that involves speaking to witnesses, reviewing documents.

Kate Shaw:

There are like many, many knowable facts that I think I still don't totally understand why they were not run to ground prior to this trial. But just little things like that, even if privilege, and other kinds of obstacles might make it difficult to actually get witness testimony from the people who were the senior

White House advisors who were around the president who might speak to what he said and did during the minutes and hours of the siege of the Capitol.

Kate Shaw:

It's worth pursuing all of that, but there may be obstacles to actually forcing people to provide that information. But on the other side of some of these exchanges, the Department of Defense, this Acting Secretary of Defense put out a statement in the middle of the siege indicating that he was calling up the National Guard, and had consulted with Vice President Pence, and congressional leadership.

Kate Shaw:

And of course, everybody noticed the conspicuous absence of President Trump in the list of individuals with whom he had spoken. There are records at DOD about what phone calls, and conversations happened, and who had what, and none of that should be remotely difficult to access. You can subpoena any of that. There are no privilege concern. I suppose you can make the argument, but I'm not really worried about the argument winning.

Kate Shaw:

That, Secret Service also should be a fount of information about what exactly was known to the protective detail around to the President, and the Vice President, and when, and what communication happened between them. I don't see any real privilege objections there either.

Leah Litman:

No. And certainly, no privilege objections about conversations between the President and other members of Congress.

Kate Shaw:

Well, it's interesting, like an inter-branch privilege like that. The presidential communications privilege could in theory, I think, I'm not sure if it's ever come up in court. I don't think it has as between a member of Congress, certainly with senior White House staff that you imagine that they would raise presidential-

Leah Litman:

Yeah, no, I'm not talking about anyone within the executive branch. I just meant, for example, a conversation with a senator or a congressional representative.

Kate Shaw:

Yeah. I think that's absolutely right. And in some ways, could the president try? If those members are willing to speak anyway, I just can't imagine where privilege objection would even be raised. So, there's just a lot of low-hanging fruit in terms of the things they could easily get. I understand they didn't want to litigate some of these difficult witness questions or testimony questions.

Kate Shaw:

But all this to say, some kind of serious congressional commission that is charged with right now, there are four different congressional committees that each has inquiries out to various executive branch

entities, and local law enforcement in DC. And it just feels like it needs to happen in a coordinated way, as opposed to dispersed across a bunch of different committees.

Kate Shaw:

And it needs to be done with seriousness, and funds attached to it. And on a timeline that is aggressive enough that memories won't fade. They need to start talking to people now while everyone's memory is fresh. So, anyway, so that seems like something really important. And I think that it's important that congressional leadership actually make it clear that that is something that they're going to pursue now.

Kate Shaw:

And then, of course, there's the question of criminal accountability. What do you think the prospects of criminal charges, state or federal against former President Trump would look like right now?

Leah Litman:

I don't think there will be federal criminal charges against former President Trump. There are currently right now, reportedly, state-level investigations into the President's attempt to strong arm... we talked about the Georgia Secretary of State into finding additional votes. I don't ultimately think that that is going to happen, either. And those events, as we said, are not really about January 6th, in particular, but instead about the larger narrative.

Leah Litman:

And so, I think part of what I would like to see is more digging, and a comprehensive report, or narrative emerge about how the "big lie" about the election being stolen, or the existence of voter fraud, or that entire spiel influenced the organization of the rally, the behavior at the rally, the funding of the rally, and so on, because I think that that is really important to understand, like, who bears fault, and responsibility for what happened on January 6th.

Leah Litman:

And so, we can again try to ensure that this doesn't happen again. Because you can say, "Look, last time you were feeding this lie about the election being wrongfully stolen, and encouraging people to do X, Y, or Z, this is what happened. And here are the people that did it." I think that that would be really important. And so, that would be something that I hope happens.

Kate Shaw:

Yeah. I agree with all that. Maybe one thing that we should have mentioned, we were talking about further proceedings in Congress is something that has been out there, has been discussed, it's actually cited in the article of impeachment is the third section of the 14th Amendment, which would allow the disqualification for someone who participated in or aided in insurrection from holding future federal office.

Kate Shaw:

And it seems maybe one of the purposes of this commission is to consider the factual predicate for actually, I think you'd probably need to pass a statute, specifically identifying President Trump for disqualification in order to invoke this provision of the 14th Amendment. So, that might be one purpose that the Commission could set out, at least to explore, I think that is something that I would like to see

14th Amendment conversation not just fall away, because we are through with this impeachment process.

Kate Shaw:

And in terms of federal inquiry is, I wonder whether... I think you're right, federal criminal charges don't seem likely. But I wonder whether given how much really deeply disturbing new information about the specific events of January 6th did emerge, but whether Biden Justice Department would at least consider a special counsel to investigate any senior governmental involvement in the events leading up to January 6th.

Kate Shaw:

I wonder, you wouldn't want to do it through ordinary Justice Department channels. I think it seems like the thing that would be appropriate for the appointment of some kind of special counsel, but I would hope that they at least consider doing something along those lines. There's been a suggestion of extraordinarily serious, high-level misconduct by government officials.

Kate Shaw:

And specifically, the highest government official. And it seems like not to even consider the possibility that the criminal law is implicated, but would be a mistake, even at the end of the day if it feels as though criminal charges are just not going to be brought, which I do think is probably the result. But it just feels like some serious consideration should be brought to bear on the question.

Leah Litman:

So, maybe we can switch now to talking about some of the particular substantive arguments that came up during the impeachment trial. So, one persistent argument that, at least superficially, Senators insisted, motivated their votes to acquit was this argument about jurisdiction and specifically, whether the Senate had the authority to conduct an impeachment trial over someone who was no longer a federal official.

Leah Litman:

That was, as you noted, Senator Mitch McConnell stated basis for casting a vote to acquit. The Senate as a body took an initial vote on whether they had the authority to try someone who was no longer in federal office, and concluded that they did. That is the same outcome that the Senate reached more than a century ago when they decided the question about whether they had the authority to conduct a trial of a former Secretary of War, William Belknap, who was no longer a federal official when the senate conducted the trial.

Leah Litman:

And I think Steve Vladeck has had the New York Times op-ed, Brian Kalt who has studied impeachment comprehensively, and others have concluded that text history, and particularly historical practice, and all the structural reasons why we have the impeachment power would allow the Senate to conduct a trial for someone who's no longer in federal office. But though, the one point that I wanted to make on this jurisdiction argument, and you were alluding to it earlier, when you talked about Senator Mitch McConnell's gerrymandering, is just that this didn't have to be the case that is the senate didn't necessarily have to try the impeachment proceeding after Donald Trump left office.

Leah Litman:

After the House voted to impeach Speaker of the House, Nancy Pelosi wanted to transmit the articles to the Senate, and have the trial conducted before Joe Biden became President. Senator Mitch McConnell refused that. And so, he created the circumstances under which this argument that the Senate didn't have jurisdiction could exist, and there was no real reason to do that.

Leah Litman:

It's not like the Senate was passing patriot legislation in the final few weeks that he helped gavel. And so, that was just the only thing that I want you to note about the jurisdictional argument.

Kate Shaw:

Totally. And no, I agree, and not only were they not passing major legislation, they weren't even in session. They recessed and they refused to return until January 19th, the day before inauguration, and that was a choice, and a hugely consequential one. And I also think there was... I don't remember exactly how many days, but a number of days lapsed even in the House before they voted on this article.

Kate Shaw:

And I do wonder that they took a brief recess of just a few days, but a recess after starting, I think on the 7th, maybe they came back the night of the 6th after the capital had been secured, they returned. They finish the counting of the ballots. And then, I think they were all exhausted and traumatized. And so, they left for a few days. And I remember the time being like, what, they cannot leave, they have to respond to this.

Kate Shaw:

And I think that might have been a really consequential choice. Now, it still would have been a tough timeline to get it done, and hold a trial all prior to the 20th. But A, you could have at least started the trial prior to the 20th. And that might have been meaningful. But B, I think it could have been done, and it certainly would have if they had tried, it would have removed this really central argument that McConnell and a lot of other Republicans who voted to acquit rested on that it was simply a jurisdictional objection that they were not even reaching the merits of the impeachability of the conduct.

Kate Shaw:

Because at the threshold, they didn't believe they had the authority to do it. And I'm saying they didn't believe, this was the stated basis, as you said. I don't actually think in their heart of hearts, anybody in the Senate was really moved by the jurisdictional argument. Who knows? But I think it's pretty clear that everybody who's really studied the issue has reached, as you said, the Vladeck called et cetera conclusion.

Kate Shaw:

And I do think that very early on, we talked about this before, Mike Luttig, a former appeals court judge from the Fourth Circuit, put penned an op-ed saying, no, it's unconstitutional to try an ex-official, and it got a ton of press, a ton of pick up. And I don't think we've talked about this. I listened to him on a podcast debating Keith Whittington, who's also a real scholar of impeachment, and Whittington was taking the position.

Kate Shaw:

Again, that's very well settled that it's okay to try late impeachments, or that it's permissible to do it. And Luttig was arguing the opposite position. And in the first couple minutes of the debate, Luttig conceded sheepishly that he first started thinking about the question of impeachment a week earlier, one week. He had been setting the question for one week.

Kate Shaw:

And Whittington, again, taking the opposite position, has been studying this for 30 years. And again, everyone who spent any appreciable amount of time on this question has concluded that the Senate has authority here. And so, it just did not feel like there was any real support for this position. And yet, it really was the basis of... it was central to the defense the president mounted, and it was central to the articulated reasons for acquittal that a lot of Republican members gave.

Kate Shaw:

Okay. So, there was the jurisdictional argument. There was a big first amendment argument that the president's lawyers made. So, the argument that because at the heart of the impeachment charge was presidential speech, in particular, the speech that he made on the ellipse just before the actual storming of the Capitol, when he urged his followers to fight like hell, or they wouldn't have a country when he used the term fight 20 times that he said you're never going to take your country back if you don't show strength.

Kate Shaw:

And because that speech, it's protected by the 1st Amendment. And it is thus improper to mete out the punishment as it was repeatedly referred to, of impeachment for speech and speech alone. And it's hard to know where to start with why this argument is wrong. I have to say, I actually think. So, there are people who think that the 1st Amendment has no place at all in an impeachment proceeding, and I actually don't.

Kate Shaw:

And that this scholar's letter, which is a terrific letter by a bunch of 1st Amendment scholars basically takes this position. And I actually think the constitution and probably all of its provisions, or many of them, not all of them. In some fashion, its general protections do apply. So, due process, for example, you can argue that due process doesn't really have any place in impeachment.

Kate Shaw:

And I think that due process principles in some fashion apply. But it is critical to remember that the Senate isn't in any way bound by judicial doctrine on the 1st Amendment or anything else when it decides what the Constitution requires in impeachment. So, is it permissible for the Senate to say we think that it would be improper to impeach someone because of unpopular political speech?

Kate Shaw:

Because we think the 1st Amendment principles protect unpopular political speech. I don't think that's categorically improper for them to think about speech principles in impeachment proceedings. But it's a huge leap to suggest that the Brandenburg test for incitement, which requires intent to cause, and likelihood of causing imminent lawless action.

Leah Litman:

And just to be clear, that's the test that applies when you're talking about what speech can be criminalized-

Kate Shaw:

Criminalized, right.

Leah Litman:

... and subjects to criminal prosecution consistent with the 1st Amendment.

Kate Shaw:

Right. So, when we're asking about whether government can take your liberty for the things you say, the bar is very, very high. And to suggest that that's the standard that has to be satisfied before you can vote to convict an impeachment is just facially preposterous. No one's liberty is at stake when they're facing impeachment. It's literally about a job loss, most of the time, potential disqualification from holding a future set of jobs.

Kate Shaw:

That's it, and that's a hugely important piece of the way we incorporated impeachment into our constitutional scheme. It actually was like a bloody business in England and France. People face serious punishment, including capital punishment following impeachment. And it was very clear when the framers put impeachment in our constitution that they domesticated it.

Kate Shaw:

They said, "Look, all that's at stake if you're convicted is, again, removal and potential disqualification from future office holding." So, these criminal law standards are completely inappropriate if we're talking about the impeachment context. So, that's argument, one, I think, really important. Another really important argument rejoinder to the suggestion that the 1st Amendment shields this speech is that even if we were talking about the Brandenburg thing, I think there's actually a very good argument that this satisfies it.

Kate Shaw:

That actually, clearly, in context, and context matters hugely in 1st Amendment analysis. In context, it was clear that this speech was intended to cause and likely to cause this imminent lawless action is marching on this storming of the Capitol. Was it intended to cause every lawless act that followed? No, but I don't think that would be required in a judicial proceeding, either. So, that's another set of responses that I think is just really critical.

Leah Litman:

Look, the president's lawyers are just really concerned, Kate, about constitutional cancel culture, and canceling the president for trying to cancel the election. Can you blame them? This is cancel culture just gone awry. It's gone too far, finally, when-

Kate Shaw:

They did use the term constitutional cancel culture multiple times. Yeah. And another set of responses to the 1st Amendment argument is just like look, public officials face consequences for the statements they make all the time. So, even if we-

Leah Litman:

Like, does it violate their 1st Amendment rights to consider their statements in court as to whether they have discriminatory intent? No one would say that. That's bonkers. The entire equal protection doctrine and 1st Amendment doctrine is premise and are being able to consider government official statements in figuring out what they were intending to do.

Kate Shaw:

Absolutely. So, right, when we're talking about holding them accountable in court, or just that there's a million other venues in which this stuff happens routinely. So, the Senate is perfectly justified in considering the statements of nominees before it when it is deciding whether to confirm them. And it doesn't violate their 1st Amendment rights-

Leah Litman:

Except for statements on podcast and Twitter, just hypothetically, or TikTok.

Kate Shaw:

Category, off limits. But no, we're accountable for what you say, and that's okay. Public officials just have to be comfortable with that. When former President Trump fired his cybersecurity official, Chris Krebs. Remember this for saying, for acknowledging that this was the most free and fair election in our history.

Kate Shaw:

So, of course, he said that that was true. Trump fired him for it. People were really upset about that rightly, but nobody believed that Krebs' 1st Amendment rights were violated by it. He'd lost his job because of things he said and his boss doesn't agree with him. I think that it's actually quite analogous to what an impeachment proceeding is.

Kate Shaw:

And yet not only did Trump's defense team pressed these specious 1st Amendment arguments again, and again, they also sought to demonstrate that some of the rhetoric that was an issue from this speech at the ellipse was roughly similar in totally different context to words or sentences that prominent democratic officials, most of them women, had uttered on other kinds of occasions.

Leah Litman:

I loved this because just like their accusations of cancel culture were epitomizing a meme beyond how it could be memed in parody, this was just so peak bothsidesism. I can find an internet video where a democratic woman of color has said the word bite, and therefore, that would be unfair to impeach the president for encouraging an insurrectionist mob to go bite people in Congress and take over the capital. It was everything.

Kate Shaw:

It just sounds too bizarre to be believed and literally, that's the argument that they made in this heavily-edited video, that if I'm not mistaken, they played twice start to finish, or maybe it was two different videos. And I was just like, "I can't tell if I've completely lost my mind, or if I'm seeing the same video again." And at one point, one of the lawyers said, I could play it again, but I'm not going to, and I was just like, "Oh, thank God." Yeah. Yes, primarily, women of color in Congress and public office. There was a lot of Elizabeth Warren in there.

Leah Litman:

Yes. That nasty woman. Another nasty woman.

Kate Shaw:

Yeah, yeah. And yeah, they didn't even develop the argument. They just threw up a video, and seem to suggest what you are saying which is that it's everyone. Basically, it's just like, pick bothsidesism people sometimes use the word fight-

Leah Litman:

Everyone incites insurrectionist mobs to storm the Capitol, okay, everybody does it.

Kate Shaw:

And also, it's not fair. And you're going to basically put... you're going to be essentially punishing, or exposing to punishment every future insider of insurrectionist mobs, if you can fit here or who would want that? What exactly-

Leah Litman:

Do we want to go down that path? Do we want to open up the possibility of also impeaching other people who might incite insurrectionist mobs?

Kate Shaw:

Future well intended. Inciters of mobs, yeah, no.

Leah Litman:

Also, just one final note. If this was your defense in criminal court, it would be insane. I murdered someone, but also other people murdered someone, and therefore, you can't hold me accountable. No one thinks that's true.

Kate Shaw:

Right, right. No, right. It's important to adhere to the letter of the law in a criminal sense when we're talking about the 1st Amendment test. But we can do something that would just be facially preposterous in a criminal court, which is to show, though, let's be clear, those videos do not show-

Leah Litman:

Yeah, no, no.

Kate Shaw:

... anyone is ever engaged in rhetoric that's in any way analogous to the rhetoric that was at the heart of this impeachment charge. But even if they had, it wouldn't matter in a criminal proceeding. But the consistency was not a virtue of the defense team. A couple of other arguments that they made, they suggested that the president wasn't given, or the former president wasn't given due process.

Leah Litman:

This is a variation of dude process, where boys get to do whatever they would like, including inciting insurrectionist mobs to take over the Capitol. And you can't do anything about it, because that would be canceling them. No, but it's so bizarre, because obviously, he has notice. You are watching a hearing playing out in front of you, at which his attorneys are arguing for him. Notice hearing assistance of counsel.

Kate Shaw:

Opportunity to be heard is-

Leah Litman:

Exactly. Yeah.

Kate Shaw:

... definitely being heard. Yeah, no, that is-

Leah Litman:

That's pretty much it. Right.

Kate Shaw:

Yeah. This is the process. So, it just felt like they're words that were constitutional sounding words due process, and so they were thrown, and it wasn't even really a developed argument. Similarly, the words bill of attainder appear in the Constitution. And so, those words appeared in the defense, what was the argument that this is a bill of attainder, could you follow it?

Leah Litman:

I think, honestly, when they were making their jurisdictional argument, they kept using additional words to make the jurisdictional argument sound legitimate, including due process and bill of attainder legislative trials to impose criminal punishment on one individual generally, not permitted. But what is permitted are impeachment proceedings of particular federal officials.

Kate Shaw:

Yeah. It was like, so impeachment is a constitutional process so that's in there. And it just felt like there was all these moments in the opening argument that's already feels like it was a lifetime ago, but it was Tuesday. In which, it seemed as though to the Senate, could make sense of Bruce Castor's arguments. He was the Trump lawyer who was very prominently featured on day one, and then was essentially ferreted away, and we didn't really see or hear from him again.

Kate Shaw:

It was a truly disastrous opening statement. But he kept seeming to suggest that perhaps the constitution violated other parts of the constitution. And so, I think that the impeachment clauses violate the bill of attainder prohibition, maybe what he was trying to argue here, but it was hard to follow exactly what the argument was. Okay. So, that's the universe of arguments that the President's team made.

Kate Shaw:

It looked like this was all going to be that the house managers, the prosecutors presented both legal and factual arguments. We'll talk about that team in a minute, but it didn't look as though we were going to hear from anyone during the impeachment trial. And there was a set of developments on Saturday that looked for a minute as though they were going to change the direction of the proceedings.

Kate Shaw:

So, this was all basically headed for a very quick resolution and vote on Saturday. And then, Saturday morning, unexpectedly, the Senate took a vote to consider calling witnesses. And this was brought about largely because a Congresswoman from Washington State, Congresswoman Herrera Beutler put out a statement that was consistent with things that she had actually previously said, but that had a little bit flown under the radar.

Kate Shaw:

She said them to a paper in her hometown and in constituent town hall. But provided some new information about Kevin McCarthy's phone call with Donald Trump, in which it seemed as though that they were really pretty damning statements from President Trump, Kevin McCarthy, essentially pleading with him as individuals like banged on, and at one point, I think broke office windows. McCarthy asking Trump to call off the mob.

Kate Shaw:

Trump initially saying they're not my people. McCarthy saying, no, that they're wearing your hats and your flag, that these are your people, you need to call them off. And Trump responding along the lines of well, maybe Kevin, they're just a little bit more upset about the election than you are, maybe about election fraud than you are. Essentially, seeming to say like, "Good, I'm glad they are." And so, that's really serious evidence.

Leah Litman:

You know what I hear? Senator Elizabeth Warren has used the word upset before, Kate. So, is that a big deal? I'm not sure.

Kate Shaw:

Well, think of the highlight reels that you could make other people saying upset in totally different context. So, they got the vote to actually debate. It was a little bit unclear. At one point, I remember the Senate said, "Wait, hang on, what did we just vote on?" And I was glad I was not the only one who was confused because it was a confusing vote.

Kate Shaw:

I don't think Pat Leahy, who was presiding was perfectly clear on some of these procedural points, either. But anyway, they took the vote to consider calling witnesses, recess for a few hours. And I don't think anybody really knows what exactly transpired during those few hours. But when they returned, there was a stipulation to enter into evidence, Herrera Beutler's statement, but essentially an agreement to move on to closing arguments and not call witnesses. And that did feel-

Leah Litman:

Yeah. During the period of uncertainty, it was very unclear whether they would be calling witnesses, and you had some Republican commentators suggesting they were going to call Nancy Pelosi, Vice President Harris, and so on. And there was real, some combination of excitement, fear, and just no one knew what was going to happen if they were going to be calling witnesses.

Kate Shaw:

And then, it all came crashing down. And I don't know, I don't know the answer to why this extremely talented team of impeachment managers, we'll talk about them in just a minute, made the judgment that they made not to press the issue of calling witnesses. I have to imagine that they had been given reason to believe that they would jeopardize some of the Republican votes.

Kate Shaw:

And not that there would be I don't think a principal basis if you're a Republican who thinks that conviction is appropriate to threaten to withhold that vote on the basis of witness testimonies you haven't even heard yet. It's hard for me to construct a principled exchange between an impeachment manager and a senator leaning convict that follows that script. But I just don't otherwise know.

Kate Shaw:

I think it was really important knowing how hard it was going to be to get to 67, knowing how long the witness fights would likely drag out in terms of at least some of the witnesses, and with the possibility of actually losing as opposed to gaining some votes. I can well understand reaching the decision that it was better to just press ahead with the closing arguments, but it did feel like maybe there was a lot of important information that the public could get.

Kate Shaw:

We talked about this commission, and one thing that is, I think, we have to acknowledge is, there is just an unusually public dimension of an impeachment trial. And so, presenting evidence in this setting, when you actually have networks doing wall-to-wall coverage, and people following it so closely, it's just going to land really differently with the public than even a really rigorous and careful congressional investigation that results in some 500-page report two years from now.

Leah Litman:

Right, exactly. Two audiences. One possible audience is the jury, the Senate, but another very important audience is the American people. Witnesses might have been helpful to one audience, even if not the other. But we will never know. And it's also been reported, I think, the New York Times suggested that Senator Joni Ernst, or at least other Republican senators were saying, "Well, if you go ahead with witnesses, we are basically going to stonewall, and prevent you from enacting any legislation, or move your nominees forward."

Leah Litman:

There were also concerns floated that maybe this is a way to help Joe Biden get his agenda move forward, stop the senate trial. I think that honestly, one hard question that emerges from this trial, and that reporting is, well, what should the Senate and administration be pushing for with a view toward the filibuster, and their ideas about governing.

Leah Litman:

Given that this trial only resulted in 57 votes, which is not a filibuster proof majority to get legislation passed. And we've talked about the extent of evidence, and the existential threat to democracy, what do you do now, knowing that, and especially knowing that they were holding the stretch to attempt to block nominees and block off legislation?

Kate Shaw:

Yeah. That's a great point. The difference between 57 and 60 is actually, it's not that you could even necessarily get a lot of these votes on policy issues anyway. But yes, I would hope that, if anything, this is further... it raises the urgency of the of considering filibuster reform. I totally agree. Okay. So, let's talk for just a couple of minutes about the impeachment managers.

Kate Shaw:

So, those are the House members who serve basically as prosecutors in the senate trial. And it was a team led by Maryland congressman and former law professor Jamie Raskin. I thought that he was absolutely superb in this trial. He was conducting it, leading this team under unimaginably difficult circumstances. So, he, on New Year's Eve, lost a child to suicide.

Kate Shaw:

He had buried him, that child the day before the January 6th attack. He was with one of his other children in the Capitol. Feared their lives while this happened, and then undertook this role of leading this team of managers to put together, and then present this trial before the Senate, and he was just superb. He's a law professor, taught constitutional law for something like 30 years.

Kate Shaw:

And so, his command of the Constitution and the law was really masterful, but he was also not professorial at all. He was, I think, only professorial in the best way, he wasn't pedantic at all, he was very accessible. He talked about the constitution and case law. And there were a couple of really good flexes like so, the President's team a few times suggests he was misrepresenting Bond versus Floyd.

Kate Shaw:

A case in which Julian Bond who had been elected to the Georgia legislature was initially denied the ability to take his seat based on criticisms that he and SNCC of which he was a member who had made it to Vietnam War. And he won a 1st Amendment challenge and was able to take a seat in the legislature. And it was just like, not only does Raskin know the case, inside and out, he bond very well.

Kate Shaw:

And it was just like, he was a little bit like, "No, no, you're not going to school me on the meaning of Bond versus Floyd." And there were a few other moments like that. But mostly, it was just like I thought,

I don't know what would the American public thought, but I just thought he did law professors incredibly proud. He just was a credit to our profession. And also, not all law professors, I think, are good trial lawyers. I don't think I'd do a good job of anything along these lines. But he was like, an incredibly effective trial lawyer. That's what he was prosecuting, a trial, and he did a terrific job.

Leah Litman:

Yeah, no. I think he did a service to the profession. He did a service to the country. I cannot imagine conducting the impeachment trial under those circumstances. But he was spectacular.

Kate Shaw:

He was. And then, America got to really get to know a bunch of other members of Congress, some of whom are new to the body, or low profile, and people probably hadn't been exposed to before. And it was just like an incredibly talented, brilliant bunch. So, representative Joe Neguse from Colorado, I thought was really special. He is 36 years old. He's a lawyer, of course, and an incredibly smart guy.

Kate Shaw:

So, there's this moment when he reached back into the mid-80s. So, he talked about a lot of things that the Senate as a body had accomplished. And he talked about the Voting Rights Act. He talked about passage of the 13th Amendment. But then, he pulled a moment from senate history from 1986 out, and he said in 1986, the Senate voted to override President Reagan's veto of sanctions legislation against apartheid South Africa.

Kate Shaw:

And he said, there were two members still in the Senate, who voted to override the veto, voted in favor of the sanctions that Reagan had vetoed. And in one case, against his party, and potentially a great political cost, and he didn't name the senators, and he just let it out there. He said I know this body can do great things. And it was a young or youngish, Mitch McConnell who had cast that vote.

Kate Shaw:

And it was just such a deft reminder that maybe somewhere in Mitch McConnell is a kernel of principle. And he seemed to be like reaching for it in a way that this young Congressman, it was just such a masterful display. Actually, this whole eight minutes, the second half of his closing remarks yesterday, I would say are so worth watching.

Kate Shaw:

But I'm just like, I have no idea what he's talking about. Then, I got on the internet, and I was like, "Oh yeah, right, this whole thing was an... it's a very smart pitch to Mitch McConnell unsuccessful ultimately, but just, I think, a demonstration of just what a special mind this young congressman has." So, he really blew me away.

Leah Litman:

We also got to know better and see representative Stacey Plaskett, who, as a former prosecutor, really brought a lot of trial skills to the impeachment proceedings. And she had put together or was in charge of narrating and explaining to the body, footage of the offense of January 6th, and constructing the narrative. And I think she just did a superb job on that, and many other things as well.

Kate Shaw:

She's really, really talented. Yeah. I loved getting to watch her. The rest of the team was really impressive, as well. So, I do think that to the extent that for a lot of people, it felt like a week that was really disheartening from the perspective of our institutions and of Congress in particular. It's like there are actually a lot of extremely smart, and principled, and thoughtful people in that body.

Kate Shaw:

And some of them you just have never been exposed to before. So, I actually thought that was one really silver lining of the week, actually. So, did we feel the same way about Trump's defense team?

Leah Litman:

So, we had the lawyer who referred to Philly-delphia, but on top of all the references to due process, and bills of attainder, no, did not so much feel the same about Trump's lawyers, Bruce Castor, David Schoen, James van der Veen, not maybe the best people who are in George blue seniors' words, I have the worst fucking attorneys.

Kate Shaw:

I feel like that meme got appropriately a lot of play left.

Leah Litman:

Yeah, it did.

Kate Shaw:

Yeah. It was a struggle, clearly, for the former president to find lawyers willing to defend him in these proceedings. These are the three who agreed to do it. Castor's rambling opening, we talked about, made very little sense. Van der Veen mostly fielded the questions during the question-and-answer session, and he was actually deeply offensive at a number of points.

Leah Litman:

Yes, yes.

Kate Shaw:

He was rude. He was dismissive. There was one, I think, really important question from Susan Collins and Lisa Murkowski about really pressing the defense team, and when the president knew the vice president was in danger, and what he did to stop it, and van der Veen's dismissive contemptuous answer was to cite it with a tweet, one tweet, and then to attack the house managers for having failed to get that information from their own client.

Kate Shaw:

And there was just a number of moments like this in which they were the, van der Veen in particular, was rude and dismissive. And that the closing that Raskin gave yesterday, Saturday was just like it seemed to speak to the ages. He spoke again about his family. He appealed to the Senate, the senators' love for the constitution. He ended Godspeed to the Senate, and then just sat down, and said history is going to speak.

Kate Shaw:

And then, van der Veen got up, and it was just like this incredibly classless response in the way he said basically, I need to first start by cleaning up the mess of the managers closing. It was just so disrespectful. And then, started to take issue with some of the factual representations, and then went on to make tons of factual claims. I think, again, raising the possibility that there were writers from the left and the right in the January 6th attack in the closing.

Kate Shaw:

And the managers, I think, just showed remarkable restraint, and not getting up to object to these baseless claims that were not in the record. Although, part of me wish they had done. So, anyway, and then Raskin did get up and give one final short rebuttal. But again, it was very restrained, and did not take much time doing it.

Kate Shaw:

So, yeah, I wonder whether, it made me think a little bit about previous strict scrutiny guest, and one of our legal idols, Sherrilyn Eiffel, had a terrific piece, I thought in the times about the role of lawyers in the Trump administration last week. And I wonder whether, I think, it's a complicated story, the story of how our profession has performed, and I think maybe we just touch on it today.

Kate Shaw:

Maybe we come back to it, because I think we want to wrap soon. But she's arguing that lawyers enabled Trump's worst abuses, and the piece ran last week. So, before the trial was done, but many of her points were very much on display in this trial. And I think that when we think about the story of the last few months, or putting aside the four years of the Trump administration for a minute.

Kate Shaw:

It's in some ways, part of the story is that the law served as a bulwark, and the court served as a bulwark against these attempted anti-democratic moves that the courts were pretty uniform in smacking down the former president's efforts to press baseless fraud claims, or frivolous legal arguments. And so, this idea that the courts actually did hold. And so, our institutions are strong. And that's one big takeaway. I think, the courts actually performed quite well on that.

Kate Shaw:

I don't want to discount the importance of that. But I also think that they were only in a position of even answering these questions, because lawyers were willing to take these arguments to court. And so, it's important to focus on that, too. And it seems to me that that's what Sherrilyn is focusing on. And these lawyers were making the arguments that were then ultimately successful. And I think that it's true that our profession has to reckon with that as well.

Leah Litman:

Yeah. And it's not just the lawyers who are making these arguments that courts rejected, but also it was lawyers. And Sherrilyn talks about this in her piece, who made the arguments that fed into the big lie, namely, the extent and problem of voter fraud. And now, that's animating a bunch of proposed restrictions on voting, but that was also partially behind the big lie narrative as well. And so, that's part of the accounting that she's calling for.

Kate Shaw:

Yeah. I think that maybe this is the topic we should... she seemed open to coming back and doing a return visit to strict scrutiny. So, maybe we should try to get her to come in and talk about this.

Leah Litman:

Yes, about that.

Kate Shaw:

Sherilyn, if you're listening, just let us know when, any time.

Leah Litman:

So, someone else who we're hoping to have on the podcast because they might have some extra time on their hands.

Kate Shaw:

Oh, you're so good at segues, Leah. Who is that?

Leah Litman:

Maybe you should ask this question, Kate.

Kate Shaw:

Will Steve Breyer soon have a lot of time on his calendar? It seems like-

Leah Litman:

And if not, why?

Kate Shaw:

... this is a moment, if not, why not? So, this, I just feel mid-February is a good time to make this announcement.

Leah Litman:

Happy Valentine's Day America. I love you. I love democracy.

Kate Shaw:

Look, I think that our listeners know this. We love and respect our fellow Cassandra, Steve Breyer. None of this has anything to do with wanting him out of the court in any way. But it is, as we've said many times, it is a very precarious Democratic majority in the Senate, things can change or happen fast. There's still a raging pandemic. I think all the senators have hopefully now had their second shot, but I'm not sure.

Kate Shaw:

And it just feels like waiting until the end of the term, which I understand the instinct to do is just too long. I think that he should at least start talking to the White House, and maybe he has, I don't know.

But I think that he should send a letter to the White House this week, and then maybe announce it publicly a couple weeks from now, so that hearings can happen. And he can make his announcement as Sandra Day O'Connor did-

Leah Litman:

Contingent, right.

Kate Shaw:

... contingent on the confirmation of his successor. I think he should do that. But I truly think that yes, this is the Valentine's Day, a gift America needs, and Steve Breyer don't let us down.

Leah Litman:

Yeah. The one thing I would just add to that is we have seen two, I think cases in recent times, where his vote was actually necessary to the outcome. One in Salinas versus Railroad Retirement Board about the reviewability of past denials of employee benefits. And then, also, more recently, the stay on execution that the court gave to Willie Smith on Religious Liberty grounds.

Leah Litman:

And it is possible that there are other such cases where his vote is necessary to the outcome. One honestly, might be the Affordable Care Act case on severability. Another might be Fulton versus city of Philadelphia, although I think that's going the other way. But I don't think that that prevents him from saying I announced my retirement upon the confirmation of a successor, given the leg time that is built in with meetings with senators, as well as confirmation hearings.

Kate Shaw:

Yeah. Totally agree. All right. So, let's leave it there.

Leah Litman:

Okay. So, thanks, everyone, to listening to our snap episode on the impeachment proceedings. Thanks so much to Catherine Fink for substitute producing this episode. If you'd like to support the show, you can become a Glow subscriber at glow.fm/strictscrutiny. And if for some reason you're on TikTok, we are also recently on TikTok [@strictscrutinypodcast](#). So, join us for some prior memes, some impeachment shticks, and other things too.