

Incitement

Roman Mars [00:00:00] All right. Well, it's been quite a month. I think we knew that we weren't really done with Trump when we finished last time, although we did call it the "last days." It was still the last days. It was still the things that we're wrapping up with with Trump. But there is so much more to wrap up. So what did you want to talk about this month?

Elizabeth Joh [00:00:15] Let's talk about three Wednesdays in January. On January 6th, the President Trump supporters stormed the Capitol as Congress was meeting to count the Electoral College votes to certify Biden as the winner.

Newscaster #1 [00:00:29] It is hard to put into words what exactly we witnessed today because we have not seen this before. Thousands storming the Capitol after a rally with President Trump during which he urged them to march on the Capitol.

Elizabeth Joh [00:00:40] Now, as we all watched, thousands of Trump supporters had gathered that day on the Ellipse near the White House or the Save America rally. For weeks, Trump had told his supporters that January 6th was a day to gather in Washington and stop the steal of an election he falsely claimed that he won and kept on saying that. For instance, in December he tweeted, "Big protest in DC on January 6. Be there. Will be wild." And at the rally itself, Trump gave a fiery speech. And so here's some of what he said. He said, "You'll never take back our country with weakness. You have to show strength, and you have to be strong. If you don't fight like hell, you're not going to have a country anymore." Now, Trump tells the crowd he knows they'll be marching to the Capitol. He says, "We're going to walk down Pennsylvania Avenue." That's the street that's the most direct route to the Capitol from where they were. Now, federal officials estimate that something like 800 people left the rally, headed to the Capitol, broke through the barricades, and entered the Capitol. There were some temporary barricades and some Capitol Police officers, but they were completely overwhelmed.

Newscaster #2 [00:01:55] According to the chairman of the Capitol Police Labor Committee, some officers suffered brain injuries, cracked ribs, smashed spinal cord discs. One officer will likely lose an eye.

Elizabeth Joh [00:02:09] Now, inside the Capitol, we've all seen the scenes of violence. Rioters broke the windows, destroyed property--they entered the chambers--took selfies, all kinds of things. Now, remember, Congress had started its joint session already. When the rioters entered the Capitol, both the House and the Senate had gone to their respective chambers to debate an objection to Arizona's votes. But the members of Congress soon realized what was going on, and Vice President Pence and Senator Chuck Grassley both were in line of succession at the time--presidential succession. They were quickly whisked away to a secure location. Lawmakers, staff, and reporters are putting on emergency gas masks. Aides are grabbing the boxes containing the Electoral College certificates. And so for several hours, lawmakers and staff are just hiding, and they don't really know what's going on. And there's chaos inside the Capitol. And, you know, five people eventually died during this mayhem, including one police officer. And the rioters didn't succeed. Congress eventually reconvenes that night at 8:00. And a joint session of Congress, which is presided over by Vice President Pence, certifies the results at 4:00 a.m. the next morning. But even this result isn't the usual one either. Remember, in most elections, certification like this is usually just a formality. Nobody really pays any attention to it. But in 2021, 147 Republican lawmakers objected to electoral results, both in Arizona

and Pennsylvania. Neither objection passed, but it was a very large number of representatives and senators who objected to the Electoral College results even after the violence. That's the remarkable thing--this is after the riot had happened. And two days later, Twitter permanently suspended Trump's account. That was the first Wednesday. On the second Wednesday in January, the House voted to approve an article of impeachment against Trump for incitement of insurrection. Ten Republican House members voted with the Democratic majority. And on the third Wednesday of January, Joe Biden and Kamala Harris were inaugurated as president and Vice President of the United States.

Joe Biden [00:04:24] So help me God.

John Roberts [00:04:26] Congratulations, Mr. President.

Elizabeth Joh [00:04:36] Okay. Deep breath. Now, the Justice Department has already criminally charged more than 150 people involved in the Capitol riot. There are likely going to be many more. And the criminal charges against the rioters thus far have largely focused on the violent acts that they did, like entering federal property without authorization, disorderly conduct on Capitol grounds, or impeding official proceedings--charges of that nature. But the top federal prosecutor in Washington has said that his office is considering much more serious charges, too, including holding people responsible for the death of the police officer who died during the attack. And identifying these rioters, as I think everyone online has seen, hasn't been too hard because so many people took selfies and videos of themselves as they participated in this riot. Now, some of the rioters now facing criminal charges have already begun to say something interesting in court filings and in interviews. They say they were just following Trump's orders. I was just doing what the president told me to do. Now, what's interesting about this is not for their own individual cases. I wouldn't think of it in terms of excusing their actions. It won't. Instead, think of it in terms of what it might mean for someone else--and that's Trump. Could now former President Trump be responsible for inciting a riot? Or was it just his free speech? Time to find out.

Roman Mars [00:06:03] Yeah. This is What Trump Can Teach Us About Con Law, an ongoing series where we take the unprecedented and norm breaking actions of the 45th and former President of the United States and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow remote learning student and host, Roman Mars.

Elizabeth Joh [00:06:55] Now Trump has been impeached a second time. He's accused by the house of incitement of insurrection. Now, remember, the Constitution specifically allows for the president to be removed from office for so-called "high crimes and misdemeanors." And the House has the role of impeaching or charging the president. And the Senate has the role of holding the trial. Members of the House who are named House managers serve as sort of like the prosecution. And all of this should be familiar to all of us now because we were just here a year ago, actually, when Trump was impeached for the first time.

Roman Mars [00:07:30] Yeah.

Elizabeth Joh [00:07:31] So there's just one article of impeachment this time, and it charges Trump with inciting violence against the government of the United States at the January 6th rally. Here's what the article alleges--that Trump incited the crowd just as Congress was doing its constitutional duty of counting the votes. It was his speech on the

Ellipse near the White House that prompted his supporters to breach the Capitol and interrupt Congress. That's what the article of impeachment says. And according to the article of impeachment, that speech was part of a larger pattern of conduct to try and interfere with the certification of the presidential election. The article of impeachment doesn't just refer to the rally. It refers to other things Trump said before that. It also refers to a phone call on January 2nd, when Trump urged the Georgia secretary of state to find some other votes so that they could overturn Georgia's Electoral College results.

Roman Mars [00:08:24] Yeah. Lest we forget.

Elizabeth Joh [00:08:25] Lest we forget. Right. Now, according to the House, not only is Trump's conduct a high crime and misdemeanor, but it also cites a different portion of the Constitution--Section 3 of the 14th Amendment.

Roman Mars [00:08:38] Yes, I have heard about this a lot on Twitter, too and haven't gotten the right answer. So what is Article 3 of the 14th Amendment? What is that about?

Elizabeth Joh [00:08:45] All right. So the 14th Amendment is ratified right after the Civil War, and you probably know it best because it guarantees birthright citizenship and equal protection of the laws. But there's a more obscure part of the amendment--or Section 3--and that bars any person who has engaged in insurrection or rebellion against the United States from holding office. It's mostly ignored, but it appears to give Congress the ability to bar someone who's taken part in insurrection from holding office unless Congress allows them to do so by legislation. Now, we know historically that this section is aimed at former members of the Confederacy. This, you know, makes sense. It prevents them from holding office after the Civil War. But even then, historically, Congress then removed that bar for most of the people who were targeted by this provision as part of an attempt at reconciliation. So it's been mostly a dead letter. Now, people did get excited about this over social media because it was mentioned, as I said, in the article of impeachment. But with Trump, it's really uncertain about how Section 3 would work. You know, could Congress just vote that the section worked that way, or will they have to pass a law? And if Congress even could pass a law that Trump had violated this, what would happen then? It doesn't sort of automatically boot him out of anything. He's no longer in office. What if he tried to run later? What if he tried to get on the ballot, and a state said, "Well, wait a minute, there's been a Section 3 determination"? There would inevitably be a lawsuit. It's totally unclear how it would work. And it's a weaker provision for Congress to rely upon than impeachment. So let's get back to impeachment. If you've been paying attention to what's been discussed after the riot at the Capitol happened, we've heard a lot of different terms. So maybe it's useful for us to define what they mean.

Roman Mars [00:10:31] Yes, please.

Elizabeth Joh [00:10:32] Yeah. So in criminal law, a "conspiracy" means that a group of people have agreed to do an unlawful act and then they take some step towards it. So what's interesting about the crime of conspiracy is you don't have to be successful in the objective of your conspiracy to be guilty of conspiracy. You can just be guilty of the conspiracy all by itself. Now there's also sedition. Historically, "sedition" has meant you're encouraging, supporting, or being involved in an attempt to overthrow the government. Now, today, there's a group of federal criminal laws that punish stuff around sedition. But one of the laws today that is of interest is seditious conspiracy, so it's a combination of these things. So it's a crime under federal law to conspire, to overthrow, put down, or destroy by force the government of the United States--or even if you agree to use force to

prevent, hinder, or delay the execution of any law of the United States. So in plain English, that just means it's a crime to agree not just to overthrow the government, but it can also be a crime to agree to delay the execution of federal law. So that's what seditious conspiracy is. Proving seditious conspiracy can be tricky under modern law because you need evidence of some sort that the agreement existed, so it's not always easy for prosecutors. So that's why it's no surprise we're seeing the charges already filed don't have that yet. They're mostly about that they enter the Capitol without permission and things like that.

Roman Mars [00:12:01] And so they have to investigate the parlor DMs to get those potentially.

Elizabeth Joh [00:12:07] Presumably, yes. Yeah. Yeah. Sedition has a long history in our system and not a very honorable one. States and federal laws have long been used to punish even just criticizing the government. And so people have actually gone to prison for doing things like writing and distributing pamphlets or just making speeches that criticize the government.

Roman Mars [00:12:30] I remember this big shadow of this in my memory of my history education--that the Sedition Act happened during John Adams. And it was considered, like, this moment where, you know, this democracy that everyone was all, you know, in favor of was behaving the most like a monarchy--that a lot of people had been particularly upset by the Sedition Act.

Elizabeth Joh [00:12:52] Yeah, that's right. So if people are getting sort of excited about the prospect of a sedition prosecution, we have to be kind of careful about it, given what we know and have experienced.

Roman Mars [00:13:01] It has its own flavor of totalitarianism and monarchy.

Elizabeth Joh [00:13:05] Exactly. Exactly. You've heard the phrase "You can't shout 'fire' in a crowded theater"?

Roman Mars [00:13:10] I have. Yeah.

Elizabeth Joh [00:13:11] Yeah. So what do you think when you hear that phrase?

Roman Mars [00:13:13] Well, I think the point is, like, you can have free speech and you can say things based on your feelings and convictions. However, if you express something verbally that is a harm to people--that would cause harm and wreak havoc--that is not protected as part of the normal bounds of free speech.

Elizabeth Joh [00:13:34] Yeah, that's pretty good. I mean, this phrase is used all the time, right? People say it all the time. You can't shout 'fire' in a crowded theater. It's like the one phrase people associate with free speech in the First Amendment.

Roman Mars [00:13:44] And presumably in that axiom, what is being described is a scene in which there is not a fire in a crowded theater. There is no fire, but someone shouts "fire."

Elizabeth Joh [00:13:53] And causes a panic, or something like that. Right, Right. And often it's used to convey this idea that, "Well, you can't just say anything you want." You know, some things are not allowed. But there's no controversy that, you know, every kind

of speech is allowed. There are some kinds of speech that can be restricted or punished. But many of the people who use that phrase either don't know the context or are ignoring the context. The phrase comes from a Supreme Court case that's more than a hundred years old, when the Court reviewed the conviction of a man named Charles Schenck. Schenck was the general secretary of the US Socialist Party, and the Socialists were opposed to the War--World War I. Now, Schenck was part of a group who drafted and distributed a pamphlet that was highly critical of the war and the drafting of men for the war effort. Now, keep in mind the context. It seems like, "Well, it's a pamphlet, right?" But at the time there were some serious doubts. The government was not sure whether they could actually get enough men drafted for the military--for the war effort. So if you had really popular critical speech like Schenck's, that could undermine what the government's doing. Now, if you read the words in Schenck's pamphlet today, they seem not very radical by today's standards.

Roman Mars [00:15:05] Okay.

Elizabeth Joh [00:15:06] The pamphlet cites the Constitution as one of the greatest bulwarks of political liberty. The leaflet goes on to criticize the war and says people should assert their rights. It didn't tell people to riot or anything like that. But for publishing that pamphlet, Schenck was charged and convicted under the Espionage Act of 1917. Well, wasn't his pamphlet protected speech? In 1919, the Supreme Court said, "No." They said Schenck's conviction was constitutional. And in doing so, they said what matters is whether the words that were spoken or published in this case were a so-called "clear and present danger," given the context of the war at the time. It is Oliver Wendell Holmes who writes the opinion. And to sharpen his point again in upholding this conviction, he says, "The most stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theater and causing a panic." So there's two problems here for people who are always talking about you can't shout "fire" in a crowded theater. First, the fire in a crowded theater phrase tells us that some speech isn't protected. Okay, but which speech isn't protected? You know, how far can the government go? And the second thing is, despite the fact that people are citing it even in 2021, that standard that was used in the Schenck case was the standard for judging this kind of speech for decades. But it isn't the law now.

Roman Mars [00:16:32] Okay. So what's the law now?

Elizabeth Joh [00:16:35] So after Schenck, we see a number of cases where the Supreme Court seems to support the government's punishment and censorship just for being critical of the government--of criticizing the government, making speeches, writing things down--especially during wartime. So it's not so great for free speech. But by the 1960s, the Supreme Court is ready to change its mind about this. They want to provide more protections for free speech rights--even when the speech is really awful, or it sounds like it could cause people to be violent. So in 1964, the leader of a KKK group in Ohio holds a rally where there are Klan members. They invite a reporter. And the leader gives a speech. He says, "We are not a revengent organization. But if our president, our Congress, our Supreme Court continues to suppress the white Caucasian race, it's possible that there might have to be some revengeance taken."

Roman Mars [00:17:32] I think the use of the word "revengeance" should be illegal. Can we get a ruling on that?

Elizabeth Joh [00:17:38] Possibly, yeah. Unconstitutionally ungrammatical. All right. So the speaker's name was Clarence Brandenburg. And for that speech, he was convicted

actually for the advocacy of violence to accomplish what was called "industrial" or "political reform." These were so-called "syndicalism laws" that were pretty common back then. The Supreme Court agreed to hear the Klan leader's case. And in 1969, the Supreme Court overturned his conviction. Now, what happened? The Court said that this speech, even awful speech like Brandenburg's, is protected by the First Amendment unless it is directed to inciting or producing imminent, lawless action and is likely to incite or produce such action. So there's two parts to what the Court says here. If the state wants to punish you--put you in prison for your speech--the speech has to be directed at imminent, illegal conduct, and it has to be likely to produce that result. So why doesn't Clarence Brandenburg's awful speech about vengeance qualify? Well, remember, Brandenburg said that some kind of unspecified bad thing--that's the word "revengeance"--might happen at some time in the future if he thought of the suppression of whites continuing--if it might continue. So everything is really conditional and hypothetical. And so the Supreme Court in that case says, "Look, there's a big difference between this kind of advocacy, which is kind of hypothetical and kind of gesturing at the future, and actual incitement. The Klan's speech falls in that first category. And so it's protected by the First Amendment."

Roman Mars [00:19:18] Yeah. So here we go. Are we going to judge these two pieces of criteria to what Trump said?

Elizabeth Joh [00:19:23] Yeah, sure. Let's think about what does this have to do with Trump? Well, a First Amendment defense based on the Brandenburg standard that we just talked about, could come up in a criminal trial. Now, we've talked before about how it's DOJ policy that federal prosecutors will not criminally charge a sitting president. But now Trump is an ex-president, of course. And recently, the top prosecutor for the District of Columbia said that Trump could possibly face criminal charges, in a press conference. And under the law of the District of Columbia, it's illegal to make statements that incite violence. As for the Justice Department, it's theoretically possible that the Justice Department could look at charging ex-President Trump, although at the moment it seems kind of unlikely. So why am I bringing all this Brandenburg stuff up? Because what's much more likely is that Trump's lawyers may try to argue in his upcoming Senate trial that his January 6th speech was protected as a matter of free speech by the First Amendment. So just as an aside here, it's not obvious that this kind of First Amendment defense would formally apply to an impeachment proceeding. Remember, an impeachment isn't like any other kind of normal legal case. It's not like a civil lawsuit. It's not like a criminal case. But, you know, let's just assume that it applies for the moment. That would be the question. Were Trump's words intended to incite the crowd to engage in imminent illegal activity? And was it likely to produce that effect? So let's remember the facts again. You know, there's January 6th. There's the Save America rally. And remember some of the things Trump said. He said the supporters of his should march to the Capitol to stop the steal. He says, "They're not taking this White House. We're going to fight like hell." He says, "If you don't fight like hell, you're not going to have a country anymore." And his supporters need to take back our country.

Roman Mars [00:21:18] It sounds like incitement to me. It is in front of a group of people, telling them to do something. Like, the threshold of, you know, seditious conspiracy isn't just overthrow the government. It's the delay of federal law; counting the electoral votes is, you know, federal law.

Elizabeth Joh [00:21:33] Well, presumably that would be part of the allegation. So how would we evaluate Brandenburg--that test against Trump's conduct? Well, remember, there's two parts. Was it likely that there would be imminent illegal conduct? How probable

was that? So, like, a probability standard. Arguably, it meets that standard, right? He actually said these words at the speech about stopping the steal. And then his supporters go, march down to the Capitol, and they...

Roman Mars [00:21:58] Do what he said. Yeah.

Elizabeth Joh [00:21:59] And do what he said. Exactly right. And they did. I think the much harder question, though, is, was Trump directing illegal acts? That's also from Brandenburg. And I think that's much harder. He didn't specifically tell the crowd, "Go to the Capitol, break windows, vandalize things, steal property, occupy the Senate chamber, engage in acts that will injure people and actually result in the deaths of people." He didn't say, "Break down the doors and take members of Congress hostage," let's say. That would have been a much clearer case. He didn't say any of those things. And to be fair--to be perfectly fair to Trump--he did say during his speech, "I know that everyone will be marching over to the Capitol building to peacefully and patriotically make your voices heard." I'm sure that will come up--that he said, "I told them to do it peacefully." On the other hand, you know, on balance, it was the one thing he said about being peaceful versus all this other kind of violent imagery. So there's definitely a case to be made that Trump might have incited violence in a way that wouldn't have been protected by the First Amendment under the Brandenburg standard that we talked about. But ultimately, whether that's going to go one way or the other would be up to a jury. And in this case, that's the Senate. Remember, when it comes to impeachment, it's always up to the Senate to decide what counts as a high crime and misdemeanor worthy of conviction and removal. They can use judicial standards, like the ones that we're talking about, but ultimately, the determination is up to them. Now, what's very likely is that Trump's defense team is going to be preparing some statement around this--that his speech was fiery, it was passionate, and it wasn't the kind of incitement that would be criminalized in a normal criminal case. Obviously, then the conclusion is it shouldn't be impeachable either. So that's likely one of the big issues in what he's preparing for his upcoming Senate trial.

Roman Mars [00:23:56] But it doesn't have to be criminal for it to be impeached.

Elizabeth Joh [00:23:59] Exactly. It's whatever two thirds of the Senate decides is impeachable and worth conviction.

Roman Mars [00:24:10] So that's a definition of incitement. Do you think that's going to be central to what happens next?

Elizabeth Joh [00:24:16] Well, unfortunately not. I don't think that it's actually going to be the key part of his upcoming Senate trial. We did spend a lot of time just now talking about, like, "Well, would Brandenburg apply?" But I actually think it's much more likely that the biggest part of Trump's Senate trial in February is going to be consumed not by a debate on the merits of his case--actually whether he incited violence or not--but what I'll call a "procedural objection," and that is you can't impeach a former president.

Roman Mars [00:24:43] Right.

Elizabeth Joh [00:24:43] We already have Republican senators. Remember, these are also the jurors saying that Trump can't be convicted, whether or not he actually incited violence, because the Senate can't constitutionally try an ex-president. So you have Senator Cotton issuing a statement on the day the House voted for its article of impeachment that you can't do that. You have Senator Rubio saying on Fox News recently

he thinks a trial would be, quote, "stupid," and that "the first chance I get to vote to end this trial, I'll do it." And then just on January 26th, right after the Senate has been sworn in to uphold impartial justice in Trump's trial, Senator Paul--Rand Paul--forced to vote on this basis in order to try and dismiss the case because it's unconstitutional to try an ex-president. The motion lost, but it's a pretty good prediction of what's going to happen during the trial.

Roman Mars [00:25:36] Yeah. Yeah, because five Republicans voted for it to go forward, right? And the rest voted against.

Elizabeth Joh [00:25:44] Exactly. So, for betting whether he's going to be convicted, it doesn't look very good right now.

Roman Mars [00:25:50] So what's this basis of the argument that you can't impeach him now that he's out of office?

Elizabeth Joh [00:25:55] So the argument against impeaching someone like Trump is pretty straightforward. It's like, "Well, the Constitution talks about removing a president through impeachment. You can't remove someone who doesn't hold office anymore." Sounds like a genius interpretation, right? But there's another pretty compelling set of arguments. And they come from a lot of different places. So to be clear, I should say that the Constitution says nothing about this, right? They don't say, like, when the Senate trial can or can't take place in terms of timing. So looking at the Constitution's text doesn't tell us anything. There's no guidance there whatsoever.

Roman Mars [00:26:31] Yeah. It seems like using the term "unconstitutional" when there's nothing said is in of itself a logical fallacy.

Elizabeth Joh [00:26:39] The strongest way to argue that it's unconstitutional is to say, "Well, it's about removal, right? And the word removal is there. And you can't remove someone who isn't there anymore." So that's kind of the logic of it.

Roman Mars [00:26:50] But there's more to impeachment than removal.

Elizabeth Joh [00:26:53] That's right. So let's think about a couple of reasons why actually, it's perfectly constitutional to try and have a Senate trial of someone like an ex-president, like Trump and stuff. There's our actual experience. I mean, we've never had a Senate trial of an ex-president before, but the Senate has had impeachment trials for officials after they left office. So probably the best example that people are talking about now is the trial of William Belknap. He was the secretary of war under President Grant. He was pretty corrupt. He was involved in a bribery and corruption scheme. When he finds out that he's literally minutes away from a House vote from impeachment, he resigns, thinking that that's going to end the whole thing. But the House impeaches him anyway, and the Senate also held a trial. Now, Belknap was acquitted. But the point of the Belknap story is that the verdicts rendered with this idea that there's an assumption that you can have a Senate trial of someone who's no longer holding office--that that's perfectly okay. And then there's a larger issue here. There's the purpose of a Senate trial when it comes to impeaching someone like an ex-president. Remember, the Senate has the power both to convict a person, remove them--and the power to take a second vote to disqualify that person from holding an elected office again. If a president could avoid a Senate trial by committing an impeachable offense right at the end of his term, then there's really nothing left of the Senate's disqualification power, right? And then the last part of a president's

term becomes a kind of penalty free zone, where you can do whatever you want. And that doesn't make sense either. Trump has spoken of running for president again in 2024, so the disqualification threat is a real one.

Roman Mars [00:28:38] Yeah.

Elizabeth Joh [00:28:39] And remember, it's not just disqualification either. One of the things that we don't really pay enough attention to is that there's a distinct purpose in having a Senate trial apart from the person himself or the person herself. It's for everyone to see. It's setting down an historical record of what happened, what the person accused has to say in his defense, and what every senator is willing to say on the public record about it. This is really about defining norms for the future when it comes to constitutional conduct. And that's another really important feature of impeachment. And so that means, you know, there's this question floating around by a number of Republican senators--"Well, does that mean that we can impeach any former president?" Well, I think the responses, "Well, if you're talking about can we impeach any former president who's accused of inciting a violent attack on the Capitol while Congress was trying to certify the Electoral College votes? I think, sure, that's probably an acceptable precedent for lots and lots of people."

Roman Mars [00:29:43] When you put it that way...

Elizabeth Joh [00:29:44] Exactly.

Roman Mars [00:29:48] I mean, other than mounting some kind of defense, can he just sue to stop this from happening? Like, does he have recourse like that now that he's a private citizen?

Elizabeth Joh [00:29:57] So I would not put it past Trump and his team to try and sue. But I don't think that any court, including the Supreme Court, would want to get involved. And that's because sometimes if a federal court considers an issue falling under what's called the "political question doctrine," it dismisses the case. So very briefly, what that means is the political question doctrine doesn't mean the courts don't get involved in politically controversial issues. It just means that they don't get involved in matters that they think are best suited for the political branches--for the legislature and the executive branch. So if they say, "You know, this is a political question," that means it's not something courts are supposed to get involved in. And in fact, in a case from the 1990s, the Supreme Court actually relied on this very idea--the political question doctrine--to avoid getting involved in a dispute about an impeachment of a federal judge. His name was Walter Nixon. And Nixon's basic argument was he objected to the procedures that the Senate was using to convict him. He said, "Those are unconstitutional." And the Supreme Court said, basically, "We're not going to touch this at all. This is not an issue for courts to get involved in. The Constitution specifically gives the trying power to the Senate. It's not for us to get involved at all." And that's pretty much very likely what would happen if Trump tried to file a lawsuit.

Roman Mars [00:31:16] I mean, all this reminds me of a tweet that you did that I retweeted and was thinking about a lot--every time NPR or somebody would say that this is a symbolic impeachment, it would set me on edge because it's not symbolic. There's consequence and actions. And it means something. And it's not symbolism.

Elizabeth Joh [00:31:38] Exactly. I mean, it's kind of a really disturbing framing of what's going on here. It's not symbolic because, number one, the practical consequence that, in

theory, they could disqualify Trump from ever holding office again. And then just the broader prospect of you want to call it symbolism--defining what it means to behave constitutionally--when you have the most powerful job in the country? That's not symbolic at all. That's pretty important and enduring an issue that will last forever. And, you know, if we are going to have a Senate trial where the Senate determines ultimately this is okay, I think the public needs to know that as well.

Roman Mars [00:32:16] Cool. This is great. So much happened.

Elizabeth Joh [00:32:20] I know. Too much. Too much happened.

Roman Mars [00:32:22] Too much. We'll be back next month. That's the idea. We're going to keep on going and keep on learning. And then maybe there'll be, instead of one of them, a hundred voices to talk about. There might be one to five things to talk about in the news that has happened. And it'll be fun to catch up then. So I'll see you then.

Elizabeth Joh [00:32:41] Sounds good. Thanks.

Roman Mars [00:32:57] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are a proud member of Radio Topia from bureaus supported by listeners just like you.