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Why Trump's Lawyers Should Talk Like Lawyers

Their rhetorical choices have grave implications for the meaning of the acquittal the president is likely to receive.

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By Kate Shaw

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The Constitution says that what's happening in the Senate right now is a trial. But it's no ordinary trial: As we're all now well aware, a Senate trial is a hybrid affair, part law and part politics.

That's true about the enterprise as a whole, and it's been especially true about the rhetoric each side has deployed. As the president's team has moved into the heart of its substantive defense, the rhetorical choices its members make are significant not only for what they say about impeachment (and legal constraint more broadly) in the age of Trump but also for the meaning of the acquittal the president is likely to receive.

For their part, the House managers prosecuting the case have made their arguments in mostly legal terms — beginning with constitutional language, history and antecedents; drawing on impeachment precedent; marching through the evidence of the president's conduct, in sometimes excruciating detail. In short, they've explained and defended their position that in light of the prevailing understanding of what the Constitution means, requires and prohibits, the president's actions constituted “high crimes and misdemeanors” warranting conviction and removal.

When they *have* invoked politics, it's mostly been to highlight the improper intrusion of politics into the Senate decision-making process — as in Adam Schiff's Friday-night invocation of a CBS report suggesting that Republican senators were being told that if they voted against the president, their heads would be “on a pike.”

The president's team, meanwhile, has regularly toggled between the rhetoric of law and that of pure politics. There's been plenty of President Trump's brand of political rhetoric, replete with hyperbole, untruths and personal attacks. The White House's opening trial brief at times read like a speech written for a political rally, making the decidedly nonlegal point that the Democrats “desperately need an illegitimate boost for their candidate in the 2020 election” and insisting several times that the president's phone call with President Volodymyr Zelensky of Ukraine was “perfectly appropriate” (though they didn't seem quite able to bring themselves to echo the president's claim that the call was “perfect”).

On the first day of the Senate trial, White House lawyers called the charges against the president “ridiculous” by my count at least seven times and the White House counsel Pat Cipollone falsely claimed that during House proceedings, “not even Schiff's Republican colleagues were allowed into the S.C.I.F.” (the Sensitive Compartmented Information Facility, a basement room in the Capitol where closed-door House committee sessions were held to get testimony in an earlier phase of the impeachment process).

But the president's team has simultaneously invoked legal standards: a requirement that articles of impeachment charge an indictable crime; a criminal-law standard of proof beyond a reasonable doubt; a limitation to evidence considered in the House proceedings. All of these arguments are subject to debate, and in some cases have vanishingly little support; but as important, they all sound in law, not politics. This was the tenor of most of the first two days of the president's team's opening arguments, as White House lawyers focused on both disputing the House managers' characterization of the evidence against the president and making a litany of specific legal arguments — that the House's subpoenas were invalid, for example, and that the House proceedings failed to afford the president sufficient due process protections.

What is gained and what is lost in having this fight in the language of the law? There's certainly an argument that here the veneer of law serves mostly to obscure what is really an exercise in raw political power. On that logic, perhaps it would be better to acknowledge that this is at base a political affair; that in our age of hyperpolarization, no president whose party controls the Senate can be subject to a meaningful impeachment check, so that the Constitution's impeachment process is no longer (if it ever was) up to the task of checking a lawless president.

But there may also be real value in the remainder of this fight occurring on the terrain of law and in its language. The Trump administration has shown little interest in adhering to settled norms and practices of governance; indeed, it has frequently evinced contempt for institutions that might serve as rivals or act as genuine checks on the president. But to the extent that the president's

lawyers choose to make their arguments for the rest of the trial in mostly legal terms, they will be acceding to the requirements of the institutional setting in which they are operating. And in doing so they will be implicitly acknowledging that the rules *do* apply to the president and his surrogates, and that law continues to matter.

This would have important symbolic value, but it would also have implications for the kind of acquittal the president is likely to receive. To the extent his lawyers proceed in the president's style — making false representations; engaging in ad hominem attacks against the House managers, witnesses or the whistle-blower, as the president continues to do via Twitter — the likely Senate acquittal will clearly be a crass political victory, and its legitimacy accordingly reduced.

Based on what has already transpired, that will be true to a point either way. But the lawyers have significant space to shape the remainder of this trial — and to do their part to ensure that it does not serve to further erode Americans' trust in their institutions of government

Of course, the president's legal team is in a nearly impossible position: Mr. Trump, in his obvious interest in fireworks and ratings, seems to want his team to turn the Senate trial into a political rally. But his lawyers can instead proceed as officers of *some* sort of court, subject to duties of candor, good faith and fair representation — and for the good of the Constitution and the country, that's the path they should choose.

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