

TF 16: High Crimes & Misdemeanors

Harry Litman [00:00:07] Welcome to a very special episode of Talking Feds. We have an amazing show for you today and I feel incredibly fortunate to be hosting it. We're going to be taking a close look at the constitutional concept of high crimes and misdemeanors -- which the Constitution specifies is required to trigger the impeachment and removal of the president and other officials. That concept feels amorphous and arcane to many people, and yet it is the key to determining how the country should respond to a long series of legal and political abuses by the President of the United States. And the task feels all the more exigent in the wake of Special Counsel Robert Mueller's statement, leaving no doubt that the issue of the president's conduct is now firmly in Congress's hands.

Harry Litman [00:00:58] And for our discussion we have brought together three of the hands down most eminent and important thinkers in the country. Just an unbelievably high powered group. They are Laurence Tribe, the Carl M. Loeb University Professor at Harvard Law School, author of the leading treatise "American Constitutional Law", a world famous advocate who's argued before the Supreme Court 36 times, and most recently the author, with Joshua Matz, of a primer on impeachment, "To End A Presidency." Welcome Larry Tribe and thank you so much for joining us.

Laurence Tribe [00:01:35] Thank you, Harry.

Harry Litman [00:01:36] Next Erwin Chemerinsky, Dean of Berkeley Law School at the University of California Berkeley, previous founding dean of the University of California Irvine School of Law from 2008 to 2017, the author of two leading treatises on constitutional law and federal jurisdiction, and one of the most cited legal scholars in the country. Welcome, Erwin Chemerinsky and thank you so much for joining us.

Erwin Chemerinsky [00:02:02] It's terrific to be with you.

Harry Litman [00:02:04] And finally Congressman Jamie Raskin, himself a longtime constitutional scholar and now a member of the House representing Maryland's 8th District, and perhaps more importantly a member of the House Judiciary Committee, which is where impeachment proceedings would begin. Welcome so much, Jamie Raskin and thank you for joining us.

Jamie Raskin [00:02:26] And thank you for having me.

Harry Litman [00:02:27] I'm Harry Litman. I'm a former United States Attorney and Deputy Assistant Attorney General and a current Washington Post columnist. Definitely the junior partner in this gathering but I will do my best to keep up. We could spend the balance of the episode detailing the credentials of our three guests, but I'm loathe to lose even a minute of our discussion, so let me just report that the air is bracing here on Mount Olympus and let's dive right in to the discussion.

Harry Litman [00:02:56] I want to start by hopefully clearing away a couple misconceptions. First, there's this oft cited notion that Congressman Gerald Ford, then the House minority leader, advanced in 1970. Ford provided a blunt answer to an old question, he said, "An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history." But the suggestion that it's all

standardless and open ended can't be right, can it? It's just a meaningless totality there? "High Crimes and Misdemeanors" does have content. Does everyone agree they are right or wrong answers here?

Erwin Chemerinsky [00:03:34] Sure. I think it's important to separate what Congress has the power to do from the constitutional standard. Literally Congress can impeach for "High Crimes and Misdemeanors" meaning whatever a majority the House says, and two thirds of the Senate agrees to, but these words in the Constitution, like all words in the Constitution, should be given meaning and we should talk about what are "High Crimes and Misdemeanors." All members of Congress take an oath to uphold the Constitution and they should be consistent with the meaning of these words, not just the exercise of the power they possess.

Harry Litman [00:04:07] Larry and Jamie agree with that? Yes?

Laurence Tribe [00:04:10] Yes, I agree completely. I mean theoretically Congress could get away with impeaching a pumpkin for being a pumpkin. But that's not what the Constitution means.

Harry Litman [00:04:22] All right. And then second we have in the wake of the Mueller Report an understandable perhaps focus on, did the President commit a crime according to the federal statutory code? But I want to also suggest or ask you, if there's a distinct difference between a high crime and misdemeanor, notwithstanding the use of the word "crime" and a crime in the federal code. And in fact it's clear that conduct doesn't even need to be malign to be impeachable. If the President just decides to watch TV all day and not do his or her job that would be a justifiable Article of Impeachment. Jamie, start with you, does that make sense?

Jamie Raskin [00:05:07] Well you know in the Venn diagram of it, there are "High Crimes and Misdemeanors" that would be federal or state criminal offenses. Bribery is one of them which is both constitutionally assigned in the impeachment clause, but also is against the law. Obstruction of justice is another but then there are lots of things that a President could do, that would be high crimes and misdemeanors, acting in contempt of Congress, for example, abusing power was one of the articles of impeachment in the Nixon investigation, um, disrespecting the lawful authority of the other branches and so on that are not codified in the federal criminal code. And then there are also things which would be criminal statutory offenses that wouldn't necessarily be high crimes and misdemeanors I think the Clinton impeachment might be a good example of that where perhaps Clinton could have been convicted of perjury but what he lied about was an act of sex and so I view that as a low crime and misdemeanor. It's something that doesn't rise to the level of the constitutional indication from the specification of treason and bribery, which suggests we're talking about offenses against the character of our government, and a fundamental breach of trust and disloyalty to the American people, and the rule of law.

Harry Litman [00:06:24] I really like that way of looking at as a sort of Venn diagram. So one more quick detour, Jamie mentions the actual presence in the text of two denominated crimes treason and bribery. Larry, any particular opinion about the interpretive aid of the phrase "High Crimes and Misdemeanors" that is provided by the contiguity of treason and bribery as a specified justification?

Laurence Tribe [00:06:53] I think so, Harry. The fact that treason and bribery are mentioned before other High Crimes and Misdemeanors suggests that the whole concept of Crimes and Misdemeanors involves betrayal of the country, and betrayal in a way that involves the President's intent. That is you don't commit "High Crimes and Misdemeanors" by accident any more than you take a bribe or commit treason by accident. These are deliberate betrayals and I very much agree with Jamie Raskin that the category of "High Crimes and Misdemeanors" is all about offenses against the nation, not necessarily violations of the federal criminal laws, which after all didn't exist at the time that the "High Crimes and Misdemeanors" standard was put in the Constitution -- there are a lot of things the President could do that would be clearly impeachable like deciding to pardon everybody who is a registered Democrat or a registered Republican, which would be an abuse of power, but not a crime.

Harry Litman [00:07:59] At least, arguably. Let's cut to the chase and situate the discussion in our current situation because President Trump seems to have committed, I think again about the Venn diagram image from Jamie, there sort of, there are multiple kinds of misconduct that the Congress could take up, as potential impeachable offenses and multiple instances of each category. So we're not here to reach the bottom line factual judgment that would be for Congress about whether he's done them. But obviously we have plausible cases of different categories of problematic conduct. So we have criminal conduct perhaps that predates his candidacy as a President, criminal conduct as a candidate to win the election, non-criminal but, objectionable, opprobrious conduct, in exploiting and welcoming Russia's effort to help his candidacy and hurt Clinton's candidacy. And that's all before he takes office. And now in office criminal conduct to obstruct justice. And then importantly a whole bevy of misconduct in office: attacks on the rule of law, on democratic institutions, attempts to corrupt the criminal justice system to bring charges against political enemies. What I think of for shorthand as banana republic behavior. So we have this long possible bill of particulars and we can double back on categories. But let me start with the sort of \$64,000 question for each of you. If, Tribe, Chemerinsky, Raskin, were a one man House Judiciary Committee what would be the most serious, or first article of impeachment, that you would want to be taking up for consideration? So, let's just go in that order Larry, Erwin, and Jamie, if that's OK.

Laurence Tribe [00:09:59] Sure. I think Harry, the most serious impeachable offense would be collaboration with a hostile foreign power to become president in circumstances where one would then owe allegiance to that power, because of their leverage and then covering it up. It's all part of a unitary violation of the fundamental duty of loyalty to the United States loyalty that is exemplified in the President's Oath. And I think segmenting it in greater detail would miss the point that the whole is greater than the sum of its parts.

Harry Litman [00:10:43] And yet, but the betrayal that you see is, is more keen and worrisome where it involves a foreign adversary. So, in other words you've you've chosen to give primacy over arguable betrayals of the people, you know, and the people's democratic institutions. You take the most serious offense to be not, not treason, per se, but the kind of joining with Russia as a hostile enemy. Now, and in terms of the fact, let me just stay with you for a second, so we're talking about the parts in Section 1 of the Mueller Report, the collaboration and welcoming, even if it falls short of a criminal conspiracy and a formal agreement an overt act, is that right?

Laurence Tribe [00:11:30] That's exactly right. And it's partly, even though I'm not what one might call an originalist, somebody who tries to read the minds of the Framers and ask

what they originally meant, I do put a lot of emphasis on the fact that in the founding of the Republic there was a deep concern with the fact that other countries, that were not necessarily friendly to the American project, Britain, France, and others, might ultimately call the shots. And the idea of a President who is, if not a Manchurian candidate than a French or Russian or English candidate, the fact that such a person could become the President of the United States, was a central concern and one that I think we need to take seriously today.

Harry Litman [00:12:18] Erwin.

Erwin Chemerinsky [00:12:19] Larry is very persuasive. I don't want to repeat what he said but I'm going to point to two things, which may be cheating in terms of the question you asked. The first is obstruction of justice. One need only read the Mueller Report to see that the evidence of obstruction of justice is overwhelming. And obstruction of justice is a federal crime. It thus fits within that part of Jamie's Venn diagram. The fact that Mueller felt that he couldn't indict a sitting President doesn't deny that it's obstruction of justice. And so I think it's something that if I were on the House Judiciary committee advising it, I would want to focus on. But I also want to point to a second thing that doesn't fit in the way we've talked about "High Crimes and Misdemeanors," but I don't think it lost: unconstitutional behavior by the President even if not illegal, can constitute a "High Crime and Misdemeanor." And the reality is since the day he was sworn into office Donald Trump has been violating both of the emoluments clauses of the Constitution, the one in Article 1, Section 9 that says that, officials of the federal government can't receive presents or emoluments from a foreign government. Now one under Article 2 that says, the President can receive no emoluments other than the salary paid for the office. The fact that there has been this ongoing violation of the Constitution is to me also a "High Crime and Misdemeanor."

Harry Litman [00:13:39] So Jamie, of course you are on the House Judiciary Committee, and I should have added if there is any question that I ask you that you are constrained not to answer, I will happily or you can happily reformulate it, but have I served up an answerable question to you?

Jamie Raskin [00:13:57] Sure and of course I speak only for myself here. But I agree very much with both what Professor Tribe and Professor Chemerinsky said. You know, both of the hypothetical forms of conduct they've described definitely constitute "High Crimes and Misdemeanors" worthy of aggressive impeachment inquiry and efforts, you know, in the event that all of it turns out to be true. I would add to it a couple of things. One is that since the Mueller Report was released even in its redacted form, the President has essentially ordered all of his employees in the Executive Branch and all of his subordinates to stop cooperating with Congress. So they are not complying with lawful demands for information. They are not appearing to testify. They are not complying with congressional subpoenas. They are acting in categorical wholesale Contempt of Congress. That too was one of the articles that was brought against Richard Nixon, for a far more finely tuned and targeted form of disobedience and defiance of congressional will. But they're making it impossible for us to do our jobs. The Supreme Court has emphasized that the investigative fact-finding function is central and essential to having a lawmaking branch. In other words, we can't decide how to make laws and how to proceed as Congress if we can't get the information that we need. So the president compounded the obstruction of justice that we read about, the 11 episodes recited by Special Counsel Mueller in Volume 2. He compounded it with a categorical obstruction of justice in the form of contempt of

Congress. I just wanted to underscore that where Erwin was going in terms of talking about violations of the emoluments clause, that was not part of what the special counsel was looking at. But I think it is going to assume a lot more public prominence in the weeks to come. We have a President who is collected hundreds of thousands or more likely millions of dollars, perhaps even tens of millions of dollars from foreign princes, kings, and governments in violation of the foreign emoluments clause. He's also made it possible for the U.S. government to be putting hundreds of thousands or millions of dollars into various Trump enterprises -- the hotels, the office tower, and so on, because you know, this, these are his weekend and vacation destinations, and so they go and they spend a ton of money there. The President has basically converted the presidency into a money making operation for himself, for his family, and for his friends, and everyone understood, as Michael Cohen told us when he testified before a committee, that the campaign was supposed to be the greatest infomercial of all time, to publicize his name and to get the businesses, and the hotels, and the different products out there. Since becoming president, he has continued to stay in business. He has not divested himself of any of his businesses, he's not put anything into a blind trust, they've continued to operate the businesses, and I think that the various forms of tax fraud, financial fraud, money laundering, all of these things are going to take center stage over the next several weeks because they're not part of the Mueller Report but they are something of intense interest to Congress, and they're, this is all information that we going after not, just in the Judiciary Committee but in the oversight committee, the Ways and Means Committee and other committees in Congress.

Harry Litman [00:17:23] You've given us an indication of what you think is, all three of you as the most sort of grave or the priority article of impeachment. Do you think that the committee as a whole is likely to share that judgment, or will it likely have, have a different focus for...

Jamie Raskin [00:17:42] You know, when Kenneth Starr brought his report in to the Republican controlled judiciary committee, they moved to impeach just based on the report itself. They had no further witnesses or testimony, and they grounded it in that and it has been suggested that we could do the same thing in terms of presidential obstruction of justice based on the numerous episodes that are recounted by Special Counsel Mueller. The, the issue though is that there are multiple other kinds of high crimes and misdemeanors of which we have already substantial evidence brought forward both in Volume One of the Report, as Professor Tribe points out, but also things that we've seen ourselves. The obstruction that we read about in the report came galloping off the pages and right into the halls of Congress, when the President refused to allow any evidentiary discovery to go forward with Congress. And then we have the Emoluments Clause and so on. I think that the in the event that we were to proceed with an impeachment inquiry the Judiciary Committee would have to develop these different categories of offenses and move very quickly to figure out, what is the evidence we need? What are the witnesses we need? And then go after it and pursue them along parallel tracks and then try to bring forward a coherent story about what was taking place within each one of them.

Harry Litman [00:19:11] Erwin any thoughts, it might be outside your bailiwick though, on where Congress is actually gonna be going here?

Erwin Chemerinsky [00:19:18] I can't speak to where Congress will actually going. Jamie has to be the one to speak to that. But I do want to talk about where, if anyone would ask my opinion, I think Congress should be going. I think they should focus on where is the

strongest evidence of an impeachable offense? What is the type of offense, that's most likely to be understood by the public? Because having the public understand is going to be crucial and what's least likely to be regarded as partisan, because inevitably this is going to be something that's very divisive. But if it is a strong indication of an impeachable offense, then perhaps criminal as opposed non-criminal would be strongest in this regard, one that the public could easily comprehend, and one that everybody lib --Republican, Democrat, liberal, conservative could see, that's where I think Congress should be focusing.

Harry Litman [00:20:07] And any thought about your, your number two? What kind of offense do you think is easiest for the public to comprehend?

Erwin Chemerinsky [00:20:14] My sense is either what Larry was talking about in terms of collaboration with a foreign power or obstruction of justice, would be the easiest for the public to comprehend. My concern about some of the others, like the emoluments clause, is it just hasn't either been understood by the public or attracted the kind of public outrage that I wish it had, and I think it should.

Harry Litman [00:20:36] Larry?

Laurence Tribe [00:20:37] Well my thought is that so much of what is fundamentally corrosive of democracy, and of the rule of law, sounds too abstract to much of the public. Obstruction of justice, people tend to respond by saying, "Well, if there wasn't any underlying offense, who cares about the cover up?" It's a mistake. But it is a mistake that so many people make that we have to take it into account. I think that the most fundamental point is a lot like what you emphasized, Harry, and that is we don't want to be a banana republic. People are in grave danger if we have a President who can go after his enemies by weaponizing the tools of the Justice Department, who can compromise national security by exposing secrets in order to go after the political opponents of the president. I think people recognize instinctively, that for us to have a government in which people are fundamentally at the mercy of a political machine, is dangerous and I think that demonstrating that that's what this presidency has become, though it's not technically a series of criminal offenses, is going to be extremely important, and that can be done through rather dramatic testimony. I do think that the emoluments clause violations were extraordinarily serious and represented violations of the Constitution from the very beginning of this presidency. But, I would also caution that people have, even now, not fully caught up to the idea of why that's important. And I also think there's an analytical point worth making and that is we don't want to say that every constitutional violation by a President is a cause for impeachment. This President has violated the Constitution by my count four 473 times, at least. But we don't want courts to think that they cannot strike down a presidential action, whether about immigration or something else on constitutional grounds, without thereby triggering an effort to remove the president. There are a lot of things that Presidents can do that don't comport with the Constitution that are not themselves the kinds of profound violations of public trust that ought to justify removal of a duly elected president.

Erwin Chemerinsky [00:23:11] I think that's exactly right and I would draw the distinction that you do, between constitutional violations that are a serious violation of public trust, and other constitutional violations, however important they may be. I think the emoluments clause fits into the former for just the reasons Jamie said: this is an instance of a

pPresident who is using his office to profit himself in a way that violates the Constitution. That is an abuse of public trust.

Jamie Raskin [00:23:37] And if I get out of that I think it links to Larry's original point about cooperation with a foreign power in the course of acquiring the Office of the Presidency. The whole purpose of the emoluments clause was to guarantee the absolute, undivided loyalty of the President to the American people, and not to foreign governments who could show up with trinkets or presents or big cash payoffs. Now in in the past, presidents who have gotten something as small as a Persian rug or a set of cufflinks or something like that, would come to Congress and ask the question whether he could keep it, and Congress would either say, "It's OK you can keep it or no you can't keep it. Turn it over to the State Department," and this is relating the things worth like a hundred dollars. Yet, this President despite widespread public protest, despite litigation over the subject has never once come to Congress to ask for our permission to keep the hundreds of thousands of dollars or millions of dollars he's been collecting from foreign governments. He's made one or two almost comical voluntary payments of what he calls "the profits of foreign governments spending in his hotels" to the Treasury. Of course, that's not what the law is; you're not supposed to estimate on your own without any accurate accounting what you received, and what the profits were, and then turn it over without consulting Congress. The Constitution says you must come to Congress. Congress must consent in order for you to keep it. So, I think the fact that he's felt he's had to give hundreds of thousands of dollars to the U.S. Government gives the game away. He's collecting millions of dollars this way we know of lots of countries like Saudi Arabia, United Arab Emirates, the Chinese government, which have been making payments to the Trump Hotel or the Trump Office Tower, to various other businesses, and then the President makes this ludicrous estimate on his own without ever coming to Congress. So I think he's going to be called to account for that and it does go to the question of who is he serving in office? Is he serving the American people? Or is he serving himself? Or his family or business? Or other people that we don't know about?

Laurence Tribe [00:25:54] And you know the whole point, Harry, and I agree very much with Jamie, the whole point of the foreign emoluments clause was that the American people should not have to guess whether a President who is bending policy in the direction of Russia or Saudi Arabia or Turkey, is doing so in order to fatten his own bottom line or doing so out of interest for the American people. You don't have to prove bribery in order to be in that zone where the American people need to be able to trust that the President is acting out of the national interest and not out of his own personal interests.

Jamie Raskin [00:26:36] President Trump made his first foreign visit to Saudi Arabia. Not to Mexico or Canada and not to our neighbors in this hemisphere, but to Saudi Arabia. He never once uttered a peep of protest about what has been the subject of American protest for a long time, which is the human rights violations taking place against women, against religious minorities, against political dissenters there and of course the President, charitably speaking turned the other cheek, when the homicidal crown prince of Saudi Arabia was implicated in the killing of the Washington Post journalist, Mr. Khashoggi. So, he certainly, if it has nothing to do with the various financial entanglements with Saudi Arabia, he has some other mysterious reason for showing them extreme favor, the kind of favor that he has shown to Vladimir Putin, as well.

Harry Litman [00:27:29] I wish we could continue this for a semester. I would definitely take the course again and again. But, here's a question I want to be sure we cover. So,

what went or is going wrong? I mean clearly the framers left us this remedy, and this remedy only, for the circumstances of rank abuse of office, and criminal conduct that we find ourselves in. So is, is there some fundamental flaw in the constitutional scheme? You know, what would Madison and Hamilton say about the spot we're in? If they could be here and recognize that the one "break glass tool" they gave us doesn't seem to be in the offing?

Jamie Raskin [00:28:15] Well, Lincoln wondered whether, you know, "government of the people by the people, for the people" would perish from the earth. And, he knew that it took the sustained, passionate engagement of the people to make all of our institutions work. I think the good news is that a lot of our institutions are working pretty well right now, we certainly have an aroused civil society. The press is out there on top of it and Congress is waking up to say that, "We are the pre-eminent branch of government. There is a reason why the framers said that we have the power to impeach the President for high crimes and misdemeanors. He doesn't have the power to impeach us. His job is to take care that the laws are faithfully executed. If he doesn't do it we have the power to remove him." It's not our only remedy, however. Elections are a built in quadrennial remedy and that's clearly on everybody's mind, wherever they are on the issue of an impeachment inquiry, and launching one, and I am strongly in favor of doing that and we have other remedies as well. We have, we have other levels of government which have been standing up to try to protect democracy and the courts have been packed a lot by Donald Trump, but they haven't been completely packed, and we have judges like Judge Sullivan and Judge Messitte in the emoluments cases, who are doing a very fine job articulating what the rule of law is and insisting upon justice as well as due process, at the same time. So I think that, don't count American democracy out. Don't count an impeachment inquiry out. Everybody needs to speak up forcefully about where we are. And I'm not saying the Constitution is perfect, it's always an unfolding, unfinished project and there are things we can do to improve it. But, I do think that the pathway forward for us, in America today is through the Constitution as the administration grows more corrupt, and more lawless, and more defiant of Congress. We have to rely ever more heavily on the rule of law in the Constitution to get us through this tough period.

Harry Litman [00:30:20] Erwin, are we seeing a constitutional flaw?

Erwin Chemerinsky [00:30:23] Yes, I think the Constitution requires and assumes the good faith of those who govern us. And when people act in bad faith the Constitution often doesn't provide us a remedy. So, when Merrick Garland was nominated for the Supreme Court and the Senate said, "No hearings, no vote." That was they're not acting in good faith and violating long traditions. When Donald Trump says to Congress I'm not allowing anybody in the executive branch to go testify and I'm not going to provide documents. That's not acting in the good faith and following the traditions. And the problem is when those who are governing us aren't acting in the good faith the Constitution assumes, it's very difficult for there to be a remedy. It is very hard for the impeachment or removal remedy to work, when at least one house of Congress is controlled by the President's party, and that party isn't willing to stand up to the President. And so I agree with everything that Jamie just said. And yet there is also a feeling as we look at the Constitution, that it doesn't have very good solutions in a situation like this a president who is clearly breaking the law, abusing the trust of the office and yet a Congress that ultimately seems unwilling to impeach and remove him.

Harry Litman [00:31:36] OK. So, so indictment of in part the constitutional scheme. Larry, what's your thought.

Laurence Tribe [00:31:43] Well, I guess I would say that first of all, like Jamie I'm not ready to give up on the system. Judges like Judge Mehta and others have shown that an independent judiciary can make a difference. I also very much agree with Erwin that the system as designed depended very much on people of goodwill and good faith. We don't have that now. And the question is, whether in a world where political divisions are as deep as they now are, where social media are as capable as they now are of isolating people in their own silos, where things like partisan gerrymandering, and the Electoral College, and the malapportionment of the Senate, provide structural defects -- whether in that world we are fated to become yet another democracy that didn't quite make it. I think only a combination of the extraordinary energy of the rising young people of this country, and the commitment and political devotion of people like Jamie Raskin and others in Congress, only that combination can give us a real hope of becoming a government of the people, by the people, and for the people, that does not perish from the earth.

Harry Litman [00:33:10] Let me, with great hesitation push back, Larry, on both what you and Erwin said, because I think it's arguable. You know in my less detailed study than yours, that the framers did contemplate the lack of good faith in leaders. And that in fact, their, you know the possibility of a rascals being elected was in their purview. And this was exactly one of the reasons that the impeachment was there as an ultimate remedy. And yet confronted with it it doesn't seem to work. Is there something about the current political impasse or just the state of society and technology that we're in now, that in fact makes the Constitution not up to that, to the task? Because I would say that constitution does contemplate that this kind of malfeasance and left a remedy, that seems difficult now to actually be put into practice.

Laurence Tribe [00:34:18] You know, I think we have an almost irresistible desire to imagine that the framers of the Constitution were demigods and that the scheme they put in place was a scheme for all seasons. They didn't imagine that there would be political parties. They imagined that the Electoral College would filter out absolutely unfit leaders like Trump. They imagined that there would be marginal cases in which we would have to pull the impeachment trigger and it would work. I think the fact is that the design, though brilliant, was flawed and though I don't have a suggestion for a way to improve it globally, I think we have to recognize the possibility that it is not exactly what we hoped for and that we are going to go through a very difficult period in which it's not clear where we will come out in the end.

Harry Litman [00:35:19] Yeah in particular I think this political parties point is huge. They envisioned that there would be four or five factions fighting it out. And when it's come down to that to a two party system, you have the possibility for this sort of stalemate, that we are now experiencing, where if you think about a system where there are three or four or five parties and it's not the one party rule, then we wouldn't be in the fix in exactly this way anyway.

Harry Litman [00:35:49] Erwin, thoughts about my pushback saying, you know Madison, Hamilton, the others, contemplated bad faith on the part of rulers or did they not?

Erwin Chemerinsky [00:35:59] Of course they did. They knew from studying world history that often rascals came to power. Or often those who came to power abused that

authority, but they also knew that any system of government depends on the good faith of those who govern us. That isn't something that's new today. There's always been the danger that presidents could ignore court orders, that presidents could use the power of their office to profit themselves. Unfortunately, the Constitution that was created doesn't have that many built in checks. Impeachment is one but impeachment is made it very difficult by the structure of the constitution. It's made more difficult by our partisan, deeply divided times, made more difficult by political parties. In the end though, I've got to agree with what Larry and Jamie both said: I have faith in the structure of the Constitution and I believe that if people are attentive, if they work hard, the Constitution will survive even Donald Trump. But I also agree it's not going to be easy to get there.

Harry Litman [00:37:04] A million thanks to Professor Laurence Tribe, Dean Erwin Chemerinsky and Congressman Jamie Raskin. I'm a little stunned at my own good fortune for being part of this high level conversation, the likes of which I don't think I've heard before. This was really one for the books. Thank you very much listeners for tuning in to this special episode of Talking Feds.

[00:37:33] Talking Feds is produced by Jennie Josephson. Dave Moldavon, Anthony Lemos and Rebecca Lopatin. David Lieberman is our contributing writer. Production assistants by Sarah Phillipoom. Adeline Sire, Ashley Westerman, Joel Olicker, Xavier Vasquez, Corey Fujikawa, and Natalie Jones recorded this episode. And Cassandra Sundt provided the transcription.

Harry Litman [00:38:03] Thanks as always to the incredible Philip Glass who graciously lets us use his music. Talking Feds is a production of Dalito LLC.

Harry Litman [00:38:14] I'm Harry Litman. See you next time.