Yes, it is that Big of a Deal: Or . . . This is what happens when you ask a debater to conduct an impeachment trial

Mark Vargo
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In classical rhetoric, you often hear that an argument must change based on the forum, the audience, and the speaker.1 In the world of criminal law, there is actually very little variation in those factors at any given trial. The forum is governed by sets of rules that have been honed over hundreds of years and which vary only marginally from courtroom to courtroom.2 The audience is, at least ideally, a blank slate of jurors who have neither any knowledge nor any opinion about the argument which they will hear. The speakers likely vary the most but are still overlaid with the roles to which they are assigned as prosecutor or defense attorney.

Not so an impeachment trial in front of the South Dakota Senate. The forum had never been invoked in 132 years of statehood.3 The audience was chosen by the voters about eighteen months before the trial,4 and the chances are vanishingly slim that very many voters had in mind the impeachment of the Attorney General when they cast their votes for the members of the Senate. As for the Speaker, my only condition when I was asked to conduct the impeachment was that I be allowed a co-counsel of my own choosing. My first and only call to recruit my co-counsel was to Alexis Tracy, Clay County State’s Attorney, President of the South Dakota State’s Attorneys Association, and a dauntless prosecutor.5

As Alexis and I honed the theme of the trial, we were also mindful of the need to convey our message appropriately given the forum, the audience, and our disparate personalities as speakers. In part, that meant trying to leave behind some

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2. See, e.g., FED. R. EVID. (applying to federal courtrooms and largely replicated by states’ rules of evidence).
of the habits and tropes of a jury trial . . . or morphing them to fit the forum and the audience.

The first and most intractable problem was the audience. The South Dakota Constitution provides that “[n]o person shall be convicted [at a trial of impeachment] without the concurrence of two-thirds of the members elected.”6 Two of the most basic questions that are routinely posed at voir dire are whether the prospective jurors have any knowledge of the case and whether they have any opinions about the guilt or innocence of the defendant.

The assembled senators would have to have been living under rocks not to know the facts of the case. In fact, the rules of the forum laid down by the President of the Senate, Lieutenant Governor Larry Rhoden, and his legal counsel, former Lieutenant Governor Matt Michels, required us to post the evidence that we intended to present in advance of the trial.7 So how do you deal with not having a blank slate?

The answer was, oddly, to provide less information . . . both in advance of trial and at trial. Every single report that was part of the underlying investigation was available online as part of the House Special Committee on Investigation report.8 What we wanted to do was to re-focus the Senate on the things that really mattered. Against the backdrop of the white noise created by the media and the House report, we wanted there to be a focal point of only those things that we thought truly mattered.

Then there is the question of having an opinion before the trial starts. As we were preparing our case, both Alexis and I had to be at the Knudson School of Law for interviews as part of our day jobs. In a frank, but I hope well-intentioned, comment, one of the staff asked me why we were bothering to prepare a case since “all the senators have already made up their minds.” I remember thinking first that I hoped that wasn’t true and second that it made for an even more interesting challenge.

It was certainly true that there were political agendas playing out that we were not part of and about which we had precious little information. We made a conscious decision to neither try and count the votes nor to have any contact with senators other than the ones setting up the rules for the trial. But we were not so naïve as to think that there were no conversations going on. After all, the House committee vote had been along straight party lines, but the House floor vote obviously required significant Republican support.9

Overcoming the presumption of innocence is something that every prosecutor is very used to. Overcoming a personal conviction that the accused is not guilty is a wholly different animal. It was virtually certain that Mr. Ravensborg

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had interacted with most, if not all, of the senators at various times during his three plus years in office. And while we had the impression that he was not well-respected, there is a huge gap between thinking someone is not good at his job and saying that he is unfit even to hold it.

This largely informed our decision not to pull any punches in opening. Alexis and I talked at length in our preparation about when we believed that Mr. Ravnsborg became aware that what he had struck and killed that night was a human being. We certainly did not believe, as he always maintained, that he “discovered” Joe Boever the next morning.10 The stories that he told and the details of the physical evidence made that implausible, to say the least. We were convinced early on that he knew he had killed a man before he left the scene. But it was only after reviewing all of the GPS data from Ravnsborg’s phone that we agreed that he had known that a man died even before he came to a stop by the side of the road.

We also created summary exhibits that crystallized the evidence that Ravnsborg had lied about a wide variety of facts in the course of the investigation. Of all of the evidence that we had, the clearest physical proof showed that he lied about (1) his speed; (2) whether he was in the lane of travel or on the shoulder of the road; and (3) his phone use both on the night of Joe Boever’s death and in general.

Those lies, combined with his misuse of his title and office, formed the backbone of our presentation on Count II of the articles of impeachment.11 But they also created a wedge between Ravnsborg and, at least, his casual supporters and allies. By making them part of our case right up front, we were getting back to an audience that would have more of an open mind. We wanted to ensure that the senators would have to endorse Ravnsborg’s actions, not just pooh-poh them. And we decided the best way to do that was the direct approach. We hoped that by creating the summary exhibits, we would make the lies very clear and show that the misuse of office was not an accident.

The second side of the rhetorical triangle is the forum. The South Dakota Senate is a true citizen legislature. It is part-time. And, to the extent that party affiliation mattered, it is overwhelmingly composed of members of Mr. Ravnsborg’s own party.12 Thus, we had to be ready to speak in real language (not that dissimilar to addressing a jury) to Republicans about one of their own. And we needed to be ready to present not just the facts, but a constitutional argument about impeachment under those conditions.

Ross Garber, a seasoned impeachment attorney, was part of Mr. Ravnsborg’s legal team. We were aware of Mr. Garber’s history. Up until the morning of the impeachment trial, we assumed that Mr. Garber would appear through the letter that he sent to the House committee or as a witness. But whatever his role, he has a clear track record of arguing against impeachment not so much based upon the conduct of the disgraced official, but on theoretical grounds related to the sanctity of elections and the bogeyan of impeachment.

What we decided to do was to reframe impeachment in terms that might have been used when the constitution was being framed, to have a debate not about the language of the constitution, but about its purpose. Mr. Garber has quoted noted historian James Bryce, saying that impeachment “is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.”

We countered that with what I submit is a very common-sense, South Dakota approach: that the Senate, if it acquitted Mr. Ravnsborg, would “reinforce the idea that our elected officials are separate from and above the laws that you pass and that they are sworn to enforce.” We could have debated all day what the words of the constitution mean:

The Governor and other state and judicial officers, except county judges, justices of the peace and police magistrates, shall be liable to impeachment for drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under the state.

Instead, we focused in on what they would have likely been thinking when they wrote the words; a subtle distinction, but one that I think resonated with the citizen legislature in front of whom we were arguing. And it also fit in with the efforts that we were making to require the Senate to either side with or against Ravnsborg. Mr. Garber, during the closing arguments, talked about going back to the class he teaches at Tulane and that “if there is an acquittal in this case, I can explain that to everyone. I can explain the Senate of South Dakota acted as a

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15. “As an impeachment defense lawyer, I often warn about the perils of initiating impeachment proceedings. I emphasize that they should be undertaken only where there is credible information of egregious misconduct that would affect an official’s ability to continue in office, and in full recognition of the incredibly high standard for impeachment, the rigorous process involved, the inevitable disruption in governing and the potential political costs.” Ross Garber, Nancy Pelosi’s Weird (and Wrong) Views About Impeachment, CNN (June 4, 2019, 4:22 AM), https://perma.cc/7CNS-P7GC.
19. S.D. CONST. art. XVI, § 3.
bullwork [sic]\textsuperscript{20}, as the system designed. I will tell you, it would be very different to explain a conviction.”\textsuperscript{21} The tantalizing allure of that argument was that the Senate could write the whole thing off as “no big deal.” After all, as Mr. Garber further noted, politicians lie all the time without being impeached.\textsuperscript{22} Mr. Mike Butler, co-counsel for Mr. Ravnsborg, doubled down on that line of reasoning when he said “we literally would have to back up the school bus” if identifying himself as the Attorney General constituted a misuse of Ravnsborg’s office.\textsuperscript{23}

The Senate appears to have heard what was, I believe, the real point—that there were also consequences of inaction. That a verdict of acquittal would effectively endorse the idea that there comes a point where you are too powerful to fail, too powerful to be held accountable, and that there are two standards of law in this great state, one for patrol deputies and another for the chief law enforcement officer. And, oh, the one for the chief law enforcement officer is lower.\textsuperscript{24}

The third side of the rhetorical triangle is the speaker. As I mentioned at the outset, it is the hardest to control and, in this trial, it was a merging of two very different styles. But her integrity and plain speaking are the very reasons that I asked Alexis Tracy to join me in this endeavor. We are two very different people. Anyone who watched the opening and closing statements back-to-back would be struck by her surgical precision and what I hope might be termed my passion.\textsuperscript{25} We each took those parts of the trial to which we are best suited—Ms. Tracy gave the opening statement; I gave the closing.\textsuperscript{26} She presented the Bureau of Criminal Investigation agent who interviewed Ravnsborg; I presented the traffic reconstructionist.\textsuperscript{27} We respected each other’s strengths and opinions. And we were united in a common message, which Ms. Tracy has very eloquently laid out in her article about this experience. But I would be remiss if I did not add one thought to her essay, which is the answer to the question: “Why was this a big deal?”

I do not pretend to know the motivations and considerations of the individual senators who sat in judgment of Attorney General Jason Ravnsborg. The political landscape of the process was not one that we were privy to nor one that we tried to understand. Accordingly, the creation of the case presented to the Senate arose organically and had its origins in our shared perceptions of the nature of the duty

\textsuperscript{20} I assume that Mr. Garber said “bulwark,” not “bullwork.”
\textsuperscript{21} Transcript of Proceedings, supra note 14, at 231.
\textsuperscript{22} Id. at 232.
\textsuperscript{23} Id. at 238.
\textsuperscript{24} Id. at 230.
\textsuperscript{25} Mr. Butler was likely referring to me, not her, when he mentioned that there had been no finding of criminal liability in the tragic death of Mr. Boever and that “[n]o amount of fire and brimstone changes that as a given fact.” Id. at 236.
\textsuperscript{26} Transcript of Proceedings, supra note 14, at 12, 209. One of the questions that I have received most frequently after the impeachment trial was about the note cards that I used during closing arguments. They are a throw-back to my days as a high school and college debater that have survived into my present job. They are color-coded by theme (main case, defense arguments, expert opinions) and are very useful for taking notes throughout a trial and then being able to reorganize on the fly.
\textsuperscript{27} Transcript of Proceedings, supra note 14, at 50, 73.
owed by the Attorney General to the citizens of the state of South Dakota and the fundamental ways in which Jason Ravnsborg violated those duties and, by deed and by word, forfeited his right to hold office.

I cannot ignore the ethical and emotional response that it evoked in me to have the person charged with this misconduct to have been the chief prosecutor of this state. Robert H. Jackson was the Attorney General of the United States. In 1940, he was addressing a group of United States attorneys and suggested to them that “[i]t would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country.” He went on to note that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.” I believe that is still true. And, truth be told, attorneys general and state’s attorneys (by whatever title) wield that great power far more often than do our federal counterparts.

I do not know whether I would have been as drawn to offer up two months of my life to prepare and present an impeachment if the same transgressions had been committed by a different constitutional officer. But my motivation to participate was never about whether I thought that the Attorney General was good at his job. It was about what Jason Ravnsborg did and that what he did rendered him unfit to serve as a prosecutor, someone who is—and must be—“in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”

30. Id.