

What Trump Can Teach Us About Con Law Double Dose of Jacobson

Roman Mars [00:00:00] Okay. So, we're talking on July 23rd, on Friday afternoon. And so, what do we have for this one?

Elizabeth Joh [00:00:06] Well, first a Trump update. We haven't talked about him for a while.

Roman Mars [00:00:11] Heaven forbid.

Elizabeth Joh [00:00:14] Well, at the beginning of the month, Donald Trump filed a class action lawsuit against Facebook, Twitter, and Google in federal court for banning or blocking him from being on their sites and posting content. Now, remember, you know, Trump was de-platformed at the beginning of the year, right? You had the January 6th attacks on the Capitol. Twitter and YouTube, which is owned by Google, banned Trump, and then Facebook suspended Trump for two years. So, he kind of disappeared on all of these sites. And Trump responded by setting up a blog. Have you ever taken a look at it?

Roman Mars [00:00:50] I have not.

Elizabeth Joh [00:00:52] Yes. Neither have I. And neither did anyone else, apparently because it quietly died after about a month. Trump's claim in this lawsuit is that his First Amendment rights were being violated by being de-platformed. The problem with the lawsuit is that the First Amendment only applies to what the government does. Now, Trump's claim here is that, well, maybe that's technically true, but Facebook, Twitter, and Google behave just like mini governments--and since they are kind of like mini governments, they should have to follow the same rules that apply to governments. As a part of this, he also asked the Federal Court to declare a Section 230--which gives platforms some immunity with respect to user content--unconstitutional. So, let's get back to the First Amendment problem. Maybe these places--Twitter, Facebook--they feel like the new public square. But, you know, the reality is that the heads of these three tech companies don't work for the government. Not even a little bit.

Roman Mars [00:01:53] No. Even if you perceive them as powerful as a government, they don't have their own First Amendment. If they're a government, then they have their own country and their own constitution, which does not involve, you know, the First Amendment.

Elizabeth Joh [00:02:06] Yeah. Not only that, which is a perfectly sensible argument, it's that this actual legal argument has failed many, many times before, before courts. So, Trump isn't doing anything particularly novel either. And there's also an interesting irony here. Roman, do you remember when Twitter users actually sued Trump?

Roman Mars [00:02:23] I do. Because he's a public official, he was blocking them, and he couldn't remove them from the public square of his own Twitter missives? But that seems like a separate thing than this.

Elizabeth Joh [00:02:36] Well, yeah, that's right. So, you're absolutely right. These Twitter users sued him because he kept blocking his critics. And to say a little bit more about what happened, the federal appeals court in that case said, "You know, when the government opens a physical public space, it's not supposed to pick and choose among different

viewpoints--the ones that it likes, and it doesn't like." And so, in 2019, the federal appeals court ruled in favor of those blocked Twitter users. They said, "Look, when the president tweets--and then normally you can retweet Trump as the president or respond to him. That's kind of like a virtual public forum in terms of First Amendment law." And the court ruled that President Trump--at that time, President Trump--couldn't block people just because they criticized him. So, here's the irony. Now it's 2021. Trump isn't a government actor, but now he's complaining that these private social media sites are violating his First Amendment rights because they're government spaces. But when he was president, he was trying desperately to argue that these places, where he kept tweeting and posting, were not government spaces. Well, it's not a very serious lawsuit. Time for us to turn to something a bit more serious.

Roman Mars [00:03:52] Okay. This is What Trump Can Teach Us About Con Law--an ongoing series due for a rebranding, where we take the current events of a world of government and politics and use them to examine our Constitution like we never had before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow perpetual student and host, Roman Mars.

Elizabeth Joh [00:04:44] So let's turn to the pandemic. We've been living with it for, what, 18 months? Forever? Take your pick. Vaccines are now widely available. And according to the CDC, there's something like 187 million people in the United States who've had at least one shot, and 162 million people are fully vaccinated. And that means about 48, 49% of the population is fully vaccinated. So, unless you're a kid who's under 12, the reason why you're not vaccinated in the United States is nothing to do with the vaccine supply, the cost, or anything like that. It's largely because you are just choosing not to get the vaccine. Either you're refusing or you're hesitant about vaccination. But even in that scenario, until about a month ago, people were becoming pretty optimistic about the future, right? People were thinking about going back to school, going back to work. People were thinking about this kind of post-pandemic world. And then comes this Delta variant. Delta variant's a variant of COVID 19. The World Health Organization announced that important new strains of the virus would go by the Greek alphabet. Now, it turns out that the Delta variant is a lot more contagious than the version of COVID that the United States has been experiencing so far. And now it's accounting for, I think, the vast majority of new COVID cases in the United States. So here we are. It's July 2021. We have millions of people in United States who could be vaccinated if they wanted to--but they're not vaccinated--millions of school age kids who couldn't get vaccinated if even if they wanted to, this push to reopen everything after living with this pandemic, and the Delta variant. So, all this raises questions about what are you going to do if your workplace or school? So, if you're a private business, what can you do? You can strongly encourage your employees to get vaccinated. You can give them perks, bonuses, or cash incentives--things like that. Or you can just flat out require that your employees can get vaccinated.

Roman Mars [00:06:51] I've actually been wondering this myself. People I know who work with people who are not getting vaccinated--I'm wondering why or if their employer can't just say, "You have to get vaccinated to work here." Is that legal or illegal?

Elizabeth Joh [00:07:06] So probably private employers can do that. Private entities, like a private business, can say to their employees, "You gotta get a vaccine if you want to come back to work." There's no federal law that specifically addresses this. And in fact, the EEOC--that's the agency that's responsible for enforcing federal laws about workplace discrimination--they recently put out the statement that says, "Well, generally employers have the right to make vaccines a requirement for you to come back to the workplace

unless there's some other conflicting state law." But the problem then--you might wonder, "Why doesn't every employer do that?" It doesn't mean that people wouldn't sue anyway. And so, employers--just for that reason alone--might choose incentives over requirements because who wants to be sued right and left over that? And so not only is that kind of an up-in-the-air choice for employers, there are also some states that are now thinking about or have passed laws that would actually ban an employer or a state agency from requiring vaccines. So, this is a version of what we saw earlier in the pandemic with masking. So, remember that some of these so-called blue states had rules that said, "You have to wear a mask in these situations." And then some red states, like Texas, saying, "You know, we're going to prohibit our counties and cities from imposing mask mandates." So, this just feels like a more recent version of these prohibitions on requirements. And it's not just employers. Colleges and universities--and there's something like 500 of them so far--are starting to say, "Look, school is coming pretty soon in August in a lot of places. And we're going to require vaccines for at least some or most of our faculty, staff, and most importantly, students." And that's the idea; you want to have in-person classes, you have to get vaccinated. And if you have a college or university that says you have to have a mandate, there's usually some possibility to apply for an exemption. Let's say you have a religious or a legitimate medical reason that you can't get vaccinated. So, the University of California system, for example, announced in July that they're going to have a vaccine requirement for everybody who comes to campus--faculty, staff, students. So, if you refuse and you don't have an exemption, you can't come--you can't come into the classrooms, you can't come into the dormitories. And if you think about it, in the last school year, there were huge outbreaks in a lot of college campuses because there were a lot of unvaccinated college students doing the things that college students do. And the universities don't want to see that again. So, a big proportion of people who say that they don't want to be vaccinated or at least hesitant about it are young people. And that's the very same group we're talking about here. So as soon as you see these universities and colleges starting to impose vaccine requirements, what do we start to see? Lawsuits with constitutional law claims. So, when we're talking about a public university, the actions that a public university takes can be considered government action. And that just means that when you're a public university, there are constitutional restrictions on you, just like there are on other government actors. It's not true for private colleges and universities. So, what does that mean if you're a public university? Well, then someone might make a claim that their constitutional rights have been violated by whatever new policies or programs you're going to have. So, Roman, maybe you remember that early on in the pandemic--in April, I think, of last year--we saw lawsuits arguing that COVID restrictions were unconstitutional because they violated people's rights.

Roman Mars [00:10:48] Yeah. Yeah.

Elizabeth Joh [00:10:49] So there are two in particular that come to mind. In Texas, in spring of 2020, the governor there imposed a ban on non-essential surgeries. And from a policy perspective, that made a lot of sense. The hospital beds were filling up, and we needed health care workers in the state. But that ban on non-essential surgeries also, according to the state, applied to women seeking legal abortions. And the argument that was raised here was that "Wait a minute. Women have a constitutional right to a legal abortion under Roe versus Wade. And so, they have to be able to have that kind of access." But, you know, back in those early days of the pandemic, a federal appeals court upheld that ban--with some exceptions--because of the emergency of the pandemic. And the federal appeals court in that case said, "Jacobson instructs that all constitutional rights may be reasonably restricted to combat a public health emergency." Now, Jacobson is a case that you and I have talked about. It's a reference to a 1905 Supreme Court decision.

And in that case, the city of Cambridge, Massachusetts, had a smallpox outbreak, and they wanted everyone to be vaccinated. And Henning Jacobson refused. And the Supreme Court rejected his argument that his constitutional rights were violated. You know, they said, "Look, you have rights, but they're not absolutely free from regulation." And sometimes those rights have to be restricted for what the Supreme Court said in the Jacobson case was for the, quote, "common good." So that was one case from that early time in the pandemic. And the other one that comes to mind is a case from Kentucky. There was a church in Louisville, Kentucky, and they filed a lawsuit when it looked like, in Louisville, you couldn't have drive-in worship services, but you could have drive-in liquor sales. So that seemed kind of unfair, and maybe they were being targeted. So, in that case, a federal judge actually granted an emergency order to the church. This was a case where the government seemed to be treating religious groups differently than secular or non-religious groups. And that's something, according to the judge, the constitution doesn't permit. Now, in the church case, that federal district court judge also cited the 1905 Jacobson decision, but this time for a very different proposition. He said, "Even in a pandemic, constitutional rights still exist." Now, since that time, when we talked about those cases, even the Supreme Court has weighed in. You remember in November, December, how bad things were in the United States with the pandemic?

Roman Mars [00:13:22] Yeah, of course. Yeah.

Elizabeth Joh [00:13:23] Yeah, it was just awful. The cases were very high, lots of hospitalizations, and there weren't any vaccines available to the public. So, in light of those circumstances, the governor of New York imposed these restrictions on indoor gatherings, including religious services. So, depending on what kind of zone you were in the state of New York, some of these places only were allowed ten or 25 people maximum inside to gather for worship. So, a Roman Catholic diocese and two Orthodox Jewish synagogues asked the Supreme Court for an emergency order to block the governor's actions. They said, "Look, the state is singling us out for these harsher restrictions because, even in the same general area, if you were considered an essential business, you didn't have to limit yourself in this way." Now, the Supreme Court, right before midnight on the night before Thanksgiving, issued a 5-4 opinion, and they sided with the religious organizations. So just like in the Louisville church case, the majority here was concerned about the government not being neutral when it comes to religious and non-religious organizations. The Court was concerned here, as they said, "Even in a pandemic, the Constitution can't be put away and forgotten."

Roman Mars [00:14:40] So when it comes to the public universities, is there a ruling as to whether or not the Constitution can be put away and forgotten? Or is it there, present as it always is?

Elizabeth Joh [00:14:51] Well, we're starting to look at some of these challenges. And it turns out that these cases might turn out very differently. We don't have a lot of experience thus far, but just this past week, a federal judge issued a decision in the lawsuit that was brought by a group of students at Indiana University. It's a public university with 90,000 students and 40,000 employees; it's kind of the size of a small city. So, they decided that they were going to have a vaccine requirement for the fall. You could apply for a religious or medical exemption. But the basic idea was everybody else has to be vaccinated. So, the gist of the lawsuit here, from the students' perspective, is that the university's vaccine requirement violated their rights under the 14th Amendment of the Constitution. The 14th Amendment says that no state shall deprive any person of life, liberty, or property without due process of law. But not every 14th Amendment claim about liberty--and that's the

claim they're making--is alike. So, in terms of constitutional law, there are two things that matter here. The students in the Indiana case are arguing that the liberty guaranteed them under the Constitution is being violated by this vaccine mandate. But the liberty here that's mentioned in the Constitution's due process clause in the 14th Amendment protects rights that are considered fundamental and also those that are considered non-fundamental.

Roman Mars [00:16:16] What are fundamental and non-fundamental rights?

Elizabeth Joh [00:16:19] So most of the rights you see in the Bill of Rights are considered fundamental rights--like free speech or freedom of religion--and also some rights that you can't actually find in the Constitution but ones that the Supreme Court has been very clear in recognizing as fundamental. Like, the right to legal abortion is considered a fundamental right. So that's the first thing. The second thing is how courts then evaluate this. If your right is considered fundamental, the government has a much harder time justifying why they can interfere with your fundamental right. If it's not a fundamental right, then it's much easier for them to justify why they're doing what they're doing. And when it comes to non-fundamental rights, courts then apply a very weak legal test that the government almost always wins.

Roman Mars [00:17:05] So when they claim that their liberty is being violated, what right are they claiming is being violated?

Elizabeth Joh [00:17:10] Yeah, so that's a good question because, well, is it a right to a college education? They don't make that claim because there actually isn't any such right to a college education under the Constitution. The plaintiffs said in their lawsuit that the vaccine mandate interfered with their bodily autonomy and medical privacy. Now, from a pure policy perspective, those are serious and important claims--and ones that people definitely talk about all the time. But in terms of constitutional law, the federal court in the Indiana University case said that these just aren't fundamental rights. No Supreme Court case has ever suggested that there's some fundamental right to refuse a vaccine. And in fact, there's one especially relevant case that the federal judge relies on here. That's the 1906 smallpox vaccine decision--Jacobson. Now, remember, Jacobson lost because the vaccine mandate for smallpox in his case didn't interfere with his liberty in any unconstitutional way. Remember, the Supreme Court said in 1905 that sometimes the collective good takes precedence over any liberties that you have. Now, in this 2021 case, the federal court says something similar about the university's mandate. They say vaccines address a collective enemy. So, because the court finds no fundamental right here, that's the weak legal test that gets applied. So, shall we do it together?

Roman Mars [00:18:38] Yeah, sure. Absolutely. Let's try it.

Elizabeth Joh [00:18:40] So let's try this test. So, does Indiana University meet the low legal standard of having a legitimate state interest? What do you think?

Roman Mars [00:18:47] Of course. Yeah. You're talking about a population that they have control over of 90,000 people. And keeping them safe and healthy seems to be within their purview.

Elizabeth Joh [00:18:58] And during a global pandemic no less, right? Does the vaccine mandate--is that a rational, reasonable way of achieving that interest?

Roman Mars [00:19:07] It strikes me as both rational and reasonable--and I would say easy.

Elizabeth Joh [00:19:12] All right. So now you're ready to be a federal judge, Roman; that's exactly what the judge said in this case. And he concludes that the students lose--they lose in their application to stop the enforcement of the mandate until their lawsuit is completed. So, this particular case, which has just been decided, got a lot of press. There are some important caveats about it, though. This one particular case isn't even over. This was a request to a federal district court, not an appeals court, certainly not the Supreme Court, to grant what's called a preliminary injunction. This is to stop the enforcement of what the university wanted to do until the case was resolved. But it is the first case where a court upheld a university vaccine requirement during COVID-19. And even though the judge ruled against the students who filed the lawsuit, he also expressed his own reservations about what he was doing. As his decision stated, "The court is not declaring the absolute safety and efficacy of the vaccines or for all people." And the judge also made it clear that he felt that his decision made sense at this particular time. He says, "Look, this isn't a foregone conclusion that this is overkill. This pandemic continues to evolve--and medicine and science with it. One such moving target is the Delta variant." There's another update here to talk about this month. Just this month, in July, we saw the first sentencing of a person for a felony connected to the January 6th attack on the Capitol. The person's name was Paul Hodgkins. He pleaded guilty to one count of obstructing a joint session of Congress. Of course, remember, Congress was meeting that day to confirm the results of the 2020 election. Now, the maximum theoretical sentence for that charge is 20 years. And Hodgkins is pretty obvious about his involvement because his picture is all over the internet; he was photographed with a red and white Trump flag in the Senate chambers after everyone who was supposed to be there had been evacuated. Now a federal judge sentenced him to eight months in prison. Hodgkins is the first, but he's certainly not the last person who's going to be sentenced.

Roman Mars [00:21:27] When I hear that he could have gotten 20 years and he got eight months, I kind of don't know how I feel. Like, is there going to be a lot more prosecutions? Are they going to be all kind of small? Is this a big deal? I just don't even know how to parse it, honestly.

Elizabeth Joh [00:21:41] Yeah. I mean, this is certainly an unusual set of cases because nobody's ever seen anything like this before. Just because there's a maximum theoretical sentence, a lot of it depends on the individual case. And the basic idea in criminal sentencing is that number one, punishments are supposed to be individualized to the defendant, and number two, similarly situated defendants have to be given or should be given similar sentences. So, the government actually wanted Hodgkins to receive 18 months in prison. And that was, you know, based on the circumstances of his particular case. You know, they noted in his case that he pled guilty, like, right away. He didn't take part in any violent acts. The judge in Hodgkins' case noted that Hodgkins didn't take part in any kind of inflammatory, semi violent speech online about the attack either. He didn't really have a criminal history, so it was kind of, you know, not much background there. He didn't try to coordinate with other people in January 6th. But it does tell us something about what's to come because there's actually more than 100 people facing the exact same charge that Hodgkins faced. So, the judge who was sentencing Hodgkins was certainly aware that a lot of people were watching what was going to happen in this very first case. So, the federal judge here in the sentencing hearing--he's made a lot of what was in favor of Hodgkins receiving this light sentence, like the factors I just mentioned, you know, he pled guilty, he didn't take part in any violent acts. So, in a way, you could say, "Well, maybe

that gives judges some, you know, leeway to give other defendants a similarly relatively light sentence." On the other hand, because he's made these factors so explicit, other federal judges are also going to be free to impose much harsher sentences on other defendants as long as they have these other distinguishing characteristics, like, you know, they did take part in violence, whether it was property destruction or worse. And the judge in Hodgkins' case was really explicit about what he thought the role of sentencing was. And remember, in any criminal sentence, it's always about not just punishing that individual person but kind of sending out this larger message and to try and deter people from doing anything similar in the future. So, in Hodgkins' case, the judge said in the public sentencing hearing, "People have to know that assaulting the Capitol and impeding the democratic process, even if you're not bearing arms, will have consequences." And the judge was especially concerned that he wanted to deter others from ever again attempting anything like the events of January 6th.

Roman Mars [00:24:23] Yeah. That's really interesting. So instead of thinking of it as light or minimal, the judge is basically setting a baseline for, like, if somebody is not inflammatory online, wasn't involved in a specific assault, didn't brandish a weapon--you still get eight months in prison. And if there is supposed to be consistency across the sentencing of people--even though it's individualized based on their actions--we might have just sort of guaranteed 100+ eight-month sentences in this case.

Elizabeth Joh [00:24:57] Yeah, that's pretty unlikely. But yeah, sure, theoretically, that's right. And that's why it just shows you that, you know, the criminal justice system--it's really a system in that sense. Like, judges have to be aware that it's not just about one individual case. But, you know, in the future, people will be referring to this one case, at least for a while, until the outcome of these other decisions are made clear.

Roman Mars [00:25:18] Well, that's fascinating. Well, cool. Thank you so much for that update.

Elizabeth Joh [00:25:21] Thanks.

Roman Mars [00:25:30] The show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. 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 part of the Stitcher and SiriusXM Podcast Family.