

WHAT ROMAN MARS CAN LEARN ABOUT CON LAW FARFETCHED ARGUMENTS

ROMAN MARS: We are talking on Thursday, July 25th, at about 11:15 AM. And it has been an incredible week in politics and government. What are we going to talk about this week?

ELIZABETH JOH: Well, you're right. I think we just lived through what seems like the longest week of 2024--so far anyway. Shall we recount what happened?

ROMAN MARS: Yes, let's start there.

ELIZABETH JOH: On July 13th, Trump survived an assassination attempt during a rally in Pennsylvania. Then two days later, on the 15th, federal judge Aileen Cannon ordered that criminal charges be dismissed against Trump. Then two days later, President Biden tested positive for COVID and isolated himself.

ROMAN MARS: Yeah, I forgot about that one. Yeah.

ELIZABETH JOH: And then on the next day, the 18th, Trump formally accepted his nomination as the Republican nominee at the convention in Milwaukee, Wisconsin. Then on the 21st, Biden announced that he would drop out of the presidential race with less than four months before election day. Remember, he had faced this relentless pressure to drop out after his dismal performance in his debate in June with Trump. And less than an hour after that announcement, Biden then endorsed Vice President Kamala Harris to be the Democratic Party's nominee. So, in this very, very long week, two of those events have already raised a bunch of legal questions now that Harris is running for president and Trump's criminal case in Florida has disappeared. So, what is happening? And what are the consequences? Time to find out.

ROMAN MARS: Let's do it. This is What Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length and sporadic release, where we look at the farfetched arguments challenging Vice President Harris on the ballot for president and a Florida judge's decision to throw out the classified documents case against former President Donald Trump 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 student and host, Roman Mars.

ELIZABETH JOH: So, now here we are. Kamala Harris is very likely the Democratic nominee in the presidential election. And it looks like she's secured enough informal support from delegates to be the nominee. So, what is she going to face? I think some Republican-led lawsuits, but, Roman, I don't think they should be taken very seriously. Let me address some of the big ones. First, there is talk of running to

court to prevent Harris from getting on the state ballots. And I think the argument here is that it's legally too late for her to be the nominee. This claim--let me be clear--is a loser.

ROMAN MARS: Why is that?

ELIZABETH JOH: Let me explain. So, first--as far as who the nominee is--that's a matter for the political parties. The National Party rules determine how delegates are selected. Now, of course, everybody thinks, "Well, Biden announced he was going to run for reelection earlier, and so delegates were providing their support to him." And unofficially that was true. But Biden, had he not dropped out, would not have become the official Democratic nominee until he was formally nominated at the Democratic National Convention. And that hasn't taken place yet.

So, if we assume that Harris becomes the formal nominee during the convention, then she becomes the party's formal candidate. And there's still plenty of time for her to put her name on the ballot. And so, it's up to the states to decide their own rules about listing candidates on the general election ballot for president. And there's no state now that has a printed paper ballot before the Democratic National Convention in Chicago. So, let's take the example of Iowa, which has an early ballot access deadline. So, Iowa tells the parties--the political parties--to provide the names of their nominees no later than 81 days before election day or August 16th. But Iowa also says that parties with late conventions have another couple of days after they finish. And so since the Democratic National Convention starts on August 19th and ends on August 22nd, that means that the Democratic National Convention can provide the name of their nominee pretty late. And so, Harris isn't even close to being late to have her name on Iowa's ballots. And actually, even before Biden dropped out, some Trump allies threatened to block Biden from withdrawing from the ballot. That's silly, too, for the same reason. He hasn't been the formal nominee yet. It also has a creepy stalker vibe. "You can't quit the race." But anyway, it's pretty ridiculous. So, there's no chance that such a lawsuit's going to go anywhere. Second, there may be some Republican campaign funding lawsuits. And the idea behind this type of lawsuit might be that Republicans would sue to stop Harris from using Biden's campaign funds. But Roman, there's a pretty big problem here. Who was on the Democratic ticket until last week?

ROMAN MARS: Biden and Harris.

ELIZABETH JOH: That's right. They were running together. They had one committee. Her name was already on all of the campaign funding paperwork. And so, her committee just needed to have amended or changed it to say, "Well, she's now running for president instead of vice president." So, she's already on the ticket. It's Harris' money to use. So, even if there's some conceivable campaign finance issue, there's another problem in a campaign finance challenge. And that is timing is not on the side of the challenger. A federal court would very likely say, "Look, if you have a problem with Harris's campaign funding, you have to first go to the

Federal Election Commission." And unfortunately, the Federal Election Commission typically takes years to resolve complaints.

ROMAN MARS: Wow.

ELIZABETH JOH: So, any resolution about any problem--real or imagined--about Harris' campaign funding would come long after the 2024 election. And presumably, even if there was a violation, she'd have to pay a fine. So, that's not going to stop her from being the nominee. And then third is the ugliest lawsuit--that somehow Harris is not constitutionally eligible to be president. Now, in 2020, when Harris was running with Biden, Trump said that he heard that Harris doesn't qualify. Why do you think he said that?

ROMAN MARS: Ugh. This is a page out of an older playbook.

ELIZABETH JOH: Right. Just plain old racism, right?

ROMAN MARS: Yeah.

ELIZABETH JOH: So, the Constitution requires that the president and vice president be "natural born citizens." Now, Roman, you know where Harris was born.

ROMAN MARS: Yeah. She was born in Oakland, California.

ELIZABETH JOH: Do you want to say your signature line or no?

ROMAN MARS: I don't know if it's downtown or not, but she was probably born in Alta Bates. I don't know.

ELIZABETH JOH: Anyway, there's no question. She is a natural born citizen of the United States. She was born in California in the United States. Now, it's also true that both of her parents were not born in the United States. They came to the University of California Berkeley as students to study. But where Harris' parents were born or their citizenship is totally irrelevant to whether Harris is a natural born citizen.

ROMAN MARS: Totally. Besides the obvious racism, where does this crazy idea come from--that she's somehow not qualified?

ELIZABETH JOH: Well, you remember our friend John Eastman?

ROMAN MARS: Oh, yes, I do.

ELIZABETH JOH: We had a whole episode on John Eastman. He was the law professor and legal advisor to Trump. And Eastman, of course, concocted this zany theory that Vice President Pence could somehow reject the certified state electors and just decide that Trump had won the 2020 election. It's a crazy idea. And since then, Eastman now faces disbarment and criminal charges. But he has also advanced a

different crazy legal theory that because Harris' parents were in the United States on student visas when Harris was born in Oakland, they were "not subject to the jurisdiction of the United States." That's language from the 14th Amendment's Birthright Citizenship Clause. I just want to say and be very plain that this is a totally fringe, total crackpot legal theory. But it hasn't stopped people from bringing it up--people who are Trump supporters. So, there you have it--three legal challenges that might be raised against Harris. None of them are likely to go anywhere.

ROMAN MARS: Okay. That's good to know.

ELIZABETH JOH: Okay, so now let's turn to the other big legal news of that very long week: Judge Cannon's decision to dismiss the indictment in Trump's criminal case in Florida. Now, I thought we should remind everybody of what that case involves because it's one of the many Trump cases. This is the criminal case involving classified government documents that Trump had taken to his Mar-a-Lago estate after he was no longer president. And remember, Trump was not legally permitted to retain these documents. And you probably remember the FBI search of Mar-a-Lago in 2022. That was a big headline. Now, Trump had announced just two months before that search that he had been indicted by a federal grand jury for retaining the classified documents. And the indictment charged him with something like 37 separate counts of violating federal criminal law. And a later indictment added some additional charges in that case, too. Now, the reason why this became a serious criminal case was because the government charges Trump not just with holding on to documents he shouldn't have but willfully retaining these very sensitive documents. So, this is not just a case of, "Whoops, I'm sorry. I didn't realize I had these documents. You can have 'em back." The reason why this is a criminal case is because allegedly he knew he shouldn't have had them, he claimed not to have any more after he turns them over, and then he hindered or obstructed the government's attempts to try and look for those documents. That's certainly something you're not supposed to do. Now, after Trump announced in November of 2022 that he was going to run for president again, Attorney General Merrick Garland appointed Jack Smith as a special counsel.

ROMAN MARS: So, what exactly does a special counsel do in this type of case?

ELIZABETH JOH: Okay, when the Justice Department appoints a special counsel, or sometimes it's called an "independent counsel," that means that the Justice Department senses that there's at least a perceived need to hire a federal prosecutor who isn't within the usual hierarchy of the Justice Department often because there's some politically sensitive or controversial case. So, an independent or special counsel is not directly overseen by the Attorney General. I mean, there is some oversight. But the idea here is that a special counsel enjoys some independence about how to conduct an investigation. And we've had special federal prosecutors appointed for decades. Do you remember the Watergate tapes case from 1974?

ROMAN MARS: I do. Yeah.

ELIZABETH JOH: Yeah. And we've talked about that Supreme Court decision before.

ROMAN MARS: Totally. Yeah.

ELIZABETH JOH: But actually we only focused on one important aspect of it, and that was the Court's recognition of what's called "executive privilege." And that's the idea that presidents can keep some communications secret. But in the very same case, the Supreme Court also had to address Nixon's claim that the Supreme Court didn't have any authority to get involved in the case at all because, in that case, he had refused to turn over the tapes to Leon Jaworski, the special prosecutor who had been appointed by then acting Attorney General Robert Bork. So, this part is important because the Court ultimately rejected Nixon's argument. The Court said, "We can look at this case." And in doing so, the Supreme Court explained that Congress, by passing a series of federal statutes, gave the Attorney General the power to investigate crimes. Not only that, Congress gave the Attorney General the power to appoint what it called "subordinate officers" to help do that. And the Court interprets this as meaning, "That's why there can be a special prosecutor." And so, ever since that time, which is 50 years ago now, this part of the Nixon case--that the Attorney General can appoint special prosecutors--has been widely accepted. And so, we've had a lot of special counsels over the decades, like the special counsel who investigated the Iran-Contra affair during the Reagan administration. And Robert Mueller--remember him?

ROMAN MARS: Yeah, sure.

ELIZABETH JOH: That's right. So, Mueller--of course--was a special counsel appointed by acting Attorney General Rod Rosenstein. And so, since 1999, federal special counsels have been appointed under a set of federal regulations, which are implementing federal statutes. And those regulations say that the Attorney General can supervise a special counsel but the special counsel has a lot of independence. And independence is the entire point of this kind of job. So, all of this put together means that the idea of independent federal special counsels being legitimate and lawful and constitutional has been widely accepted by lawyers, judges, Congress, and literally decades of historical experience--unless you're Aileen Cannon. With that, we can return to Trump and the classified documents case. Trump argued that Jack Smith's appointment as special counsel was not just illegal, but it was unconstitutional. And on July 15th, Judge Cannon agreed with Trump and actually ordered that the charges against Trump be completely dismissed.

ROMAN MARS: So, how did she explain herself in this case, sort of contradicting 50 years of precedent?

ELIZABETH JOH: Well, Cannon decided that Garland's appointment of Smith was unconstitutional because it was a violation of Article II, Section 2, Clause 2 of the Constitution, also known as the Appointments Clause. So, Roman, why don't I have you read the clause?

ROMAN MARS: Okay, here we go. "The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

ELIZABETH JOH: Another one of those perfectly clear parts of the Constitution, right? It's really hard to understand. So, the Supreme Court has discussed this clause a lot. And you can tell it can be pretty confusing. But here's a simple way to think about it. So, if you think of all of the people who work in the federal government, there are a small group of positions that are considered Officers of the United States. And I mean relatively speaking; we're still talking about hundreds of people, but it's not close to the many, many thousands more who work for the federal government. But these are the officers that are referred to in the Appointments Clause. Officers can be principal officers or so-called "inferior officers." And the default rule here is that the President has the power to appoint principal officers who are then confirmed by the Senate. So, if you think about the president's cabinet--that's how they get their jobs. But with inferior officers, Congress has the option to decide to give that appointment power to somebody else. So, in theory, Attorney General Garland could be that someone else--the "Head of Department" that you just referred to in the Appointments Clause. Jack Smith said that he was an inferior officer appointed by Garland--the head of a department. And Smith also pointed to the 1999 federal regulations, the federal statutes cited by the Supreme Court in the Nixon case, the Nixon case itself, and the general idea that--look--everybody has assumed for a long time that special counsels can be constitutionally appointed.

This is where Cannon deviated from everyone else. Cannon said, "Well, look, none of the federal statutes or federal regulations specifically say the magic words 'Congress gives the Attorney General the power to appoint a special counsel.'" And technically that's true. There isn't a literal sentence like that. But again, if you read all of the federal law put together--plus what the Supreme Court said in the Nixon case, plus a bunch of lower court cases that have interpreted the Nixon case, and, again, plus decades of historical experience--there's a pretty convincing case that Jack Smith is legal and that his position is lawful. So, then you might think, "Well, wait a minute. How can you ignore what the Supreme Court said? Didn't the Supreme Court say that this kind of appointment is constitutional?" Well, Cannon gets around this in a very strange way. She says, "The Supreme Court was just kind of mentioning that Congress seemed to have given the Attorney General the power to appoint special counsels. They weren't actually deciding that issue. So, I can ignore it." And so, Cannon's reasoning runs like this. Congress could have given Attorney

General Garland the power to appoint Jack Smith, and that would've been constitutional. But because Judge Cannon decides that there is no federal law that says the magic words allowing the Attorney General to appoint a special counsel, Jack Smith's position is not legal because the Appointments Clause that you just read says that Congress must have done this "by law." "And there is no law," she says.

So, in other words, what does her 93-page opinion boil down to? It means that there has to be some federal statute that authorized Attorney General Garland to appoint Smith, but there isn't. So, that means that his appointment violates the Constitution's Appointment Clause. So, Cannon goes in a direction that really nobody else has. But the reason the decision is so significant is that what she decides is the result of her reasoning. Because Jack Smith was not lawfully appointed, she orders the government to drop the charges against Trump in the classified documents case. After all of this time, after the FBI investigation, after the revelation of some pretty damning evidence, and after the grand jury issues an indictment, that's the shocking part.

ROMAN MARS: Wow.

ELIZABETH JOH: She appears to be comfortable with saying, "No more prosecution."

ROMAN MARS: So, where does she get this idea? How could she say this when it's so contrary to actual lived experience and the Constitution and every other way people think about this type of thing?

ELIZABETH JOH: Well--number one--we know in the classified documents case that Judge Cannon has been particularly susceptible to giving Trump every benefit of the doubt, and not just in this issue, but in others. But there's actually an even more specific reason, and that comes from the immunity case that you and I talked about last time. Now, of course, in that case, the Supreme Court recognized this very, very generous immunity for a president of the United States. But Justice Clarence Thomas had a concurring opinion. Not only did he think that that was right about giving any president such broad immunity, he said, "I have something else to say." And his something else was: "By the way, I think special counsels are unconstitutional." Granted, nobody asked him, but this is what he wanted to say. Thomas says in his separate opinion that "if the unprecedented prosecution of Trump," that's his words, "was going to go forward, it must," as he put it, "be conducted by someone duly authorized by the American people." And he didn't think Jack Smith was such a person. So, essentially, Judge Cannon took up that charge and ran with it. She actually cites Thomas' opinion in the immunity case a couple of times in her own opinion. And there you have it. The classified documents case at this moment is dead. Trump continues to be a lucky, lucky, lucky criminal defendant--at least in the federal courts.

ROMAN MARS: Is there anything to be done when she dismisses it? Is that the end of it?

ELIZABETH JOH: It's not the end of it. So, Smith has already decided to appeal the case. He'll be appealing the dismissal of the indictment. And he'll be going up to the Federal Appeals Court in the region--that's the Eleventh Circuit. Now, there's some possibility that things will go in Smith's favor because the Eleventh Circuit has reversed Judge Cannon in the classified documents case before. And the odds are pretty good that they might reverse her, again, because Cannon is going against the weight of a lot of consensus opinion. But if Smith wins, of course, that might not be the end of the case either. And it could go up to the Supreme Court. And Cannon's decision has had another totally unexpected effect. You might be aware that President Biden's son, Hunter, was accused of getting involved in some illegal gun registration or lack of registration and some tax evasion charges. Do you remember what happened to that investigation?

ROMAN MARS: I mean, he was found guilty.

ELIZABETH JOH: Yeah. And what kind of prosecutor prosecuted his case?

ROMAN MARS: Was it a special prosecutor--independent specialist?

ELIZABETH JOH: Yes, it was. It was a special counsel appointed by Attorney General Garland. Again, why? To avoid the appearance of a conflict since he is, of course, the Attorney General in the Biden administration. But of course, the law doesn't always work just for one kind of person or one kind of party. And so, understandably, Hunter Biden now has filed legal papers saying, "Look, if Jack Smith's position is unlawful, so too are the special prosecutors in my case. Dismiss my pending criminal case, and reverse my conviction."

ROMAN MARS: Wow. What a weird side effect.

ELIZABETH JOH: Yeah.

ROMAN MARS: So, how does this decision affect any of the other cases that are pending against Trump?

ELIZABETH JOH: That's a great question. So, in the state cases--the one where Trump has had a conviction already in New York--and the pending criminal case in Georgia, there's no application at all.

ROMAN MARS: That's irrelevant.

ELIZABETH JOH: Yeah. So, we're talking about federal special prosecutors or independent counsel. So, there won't be any effect. Now, it might seem like, "Look, doesn't this have the same effect in the federal election interference case?" For now, the answer is no because, as I mentioned, there's been a widespread consensus since the Nixon case that special counsels are legitimate and constitutional. And in fact, in the Federal Appeals Court that covers Judge Chutkan's case--that's the judge in the election interference case--that court had already decided before

that it would reject any challenges saying, "Look, a special counsel is unconstitutional." So, in his case, in the District of Columbia, the applicable law means that his special prosecutor is lawful so far because, of course, Judge Aileen Cannon is only a federal trial court judge in the Eleventh Circuit. So, what she says doesn't directly affect what happens in the Court of Appeals in the District of Columbia. Now, that's the case for now. Of course, if we fast forward, if the Supreme Court, for example, were to take up this case--somehow Justice Thomas convinces some of his colleagues to take another look at the lawfulness or the constitutionality of a special prosecutor--that could lead to yet another Supreme Court case, which of course would have national effect. But we're certainly not there yet. And as far as Judge Aileen Cannon's opinion is concerned, it only affects Trump's classified documents case in Mar-a-Lago. And in fact, Cannon made a statement in her opinion, which may or may not have any really important effect for now. She says, "This is only applicable to this case in particular." And we know already that's not true since Hunter Biden says, "Hey, what about me? I'd like my case dismissed, too." And look out for other people in similar situations saying the same thing.

ROMAN MARS: Yeah. So, is there any recourse when it comes to questioning Cannon's judgment here and what could be possibly done?

ELIZABETH JOH: Well, there is some speculation that Jack Smith might ask now that the case be reassigned to a different federal judge if the case survives. There's some risk with that because if his request is denied, then he ends up with a really pissed off Judge Cannon in his case. That would be bad. Now, so far, Jack Smith might be able to point out to different things that have happened in the actual case to say, "Look, her actions seem to be very, very biased in favor of Trump and very biased against the government." So, that would be the best case scenario. Judge Cannon was, in fact, appointed by Trump. But that's probably not a good move by Jack Smith because it's not always the case that, just because a judge has been appointed by a president of a particular party, they always side with issues and decisions that seem to favor one party or one side rather than the other. So, it'd be much more likely that Smith would say, "Look. Look at the actual thing she's decided in this case."

ROMAN MARS: Well, it's fascinating stuff. And there's just so much going on, so I'm glad that we're meeting every two weeks. And let's just hope that maybe, in the next sort of interregnum between the times we talk, a little less news happens just for both of our sake and the country's sake.

ELIZABETH JOH: Yeah, let's hope for some boring times.

ROMAN MARS: Thanks.

ELIZABETH JOH: Thanks, Roman.

ROMAN MARS:

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