

WHAT ROMAN MARS CAN LEARN ABOUT CON LAW

FISHY DEEP STATE

ROMAN MARS: So, it is Thursday, August 22nd, at about 3:00 PM. What are we going to be talking about today?

ELIZABETH JOH: All right, well, let's go to the beginning of this year.

ROMAN MARS: Okay.

ELIZABETH JOH: In the first major rally of his 2024 campaign, former President Trump spoke to his supporters in Waco, Texas. And he told the crowd, "I am your warrior. I am your justice. I am your retribution."

ROMAN MARS: Oh, God. Okay.

ELIZABETH JOH: But then he also told the crowd that either the deep state destroys America or we destroy the deep state. Now, you probably remember the term "witch-hunt," right?

ROMAN MARS: Yeah. No, yeah, I do. Yeah.

ELIZABETH JOH: Yep. And Trump used it for every kind of political or legal trouble he received during his presidency. Special counsel Robert Mueller's 2017 investigation? "Witch-hunt."

ROMAN MARS: Yeah.

ELIZABETH JOH: FBI raid of his former lawyer, Michael Cohen? "Witch-hunt." Criminal indictments? "Witch-hunt." So, like "witch-hunt." the term "deep state" also became a favorite phrase of Trump's to attack all of the investigations and all of the legal troubles Trump has faced. According to Trump, all of these are witch-hunts conducted by the deep state. And so here's an example. On May 23rd, 2018, Trump tweeted about the "Criminal Deep State" going after "Phony Collusion with Russia." And on September 15th, 2019, Trump tweeted, "I am fighting the Fake (Corrupt) News the Deep State the Democrats." So, it's no surprise that in 2024, Trump is still talking about the deep state. And he has got a new running mate, JD Vance. And Vance? He keeps talking about bringing back something called Schedule F from the first Trump administration. And Trump's complaints about the deep state and Vance's calls for Schedule F happen to be related to a dispute about a little silvery fish, the Atlantic herring. They're usually canned as sardines. And that little fish is at the center of a raging, important dispute the Supreme Court decided just a few months ago. What's the fishy connection between Trump, Vance, and the Supreme Court? 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 connection between the so-called "deep state" and a tiny silvery fish and use it to examine a 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. So what is the deep state?

ELIZABETH JOH: Well, if you're a serious scholar, it's a serious term.

ROMAN MARS: Oh, really? I thought it was all just made-up nonsense. But this actually has some kind of grounding in something real?

ELIZABETH JOH: Yeah, it is a serious term. But it's been used to describe authoritarian governments like Turkey or Egypt. And for those countries, the term deep state refers to military or security officials within the government that secretly control the political system. But no serious person thinks the United States has the same secret government conspiracy like you might find in Turkey or Egypt. But Trump began to tweet and talk about the deep state when he became president. Now, at first, he was referring to the scrutiny of his own behavior, like Mueller's investigation of Russian interference into the 2016 election, or when he faced his own criminal investigations that later turned into indictments. But over time, the term deep state has morphed into a more general way to refer to the government, especially the federal administrative state. And that connection happens to be very, very appealing to conservative activists and corporate interests.

ROMAN MARS: So, what's the connection there? Why are they interested in this term?

ELIZABETH JOH: Well, first I think we should talk about what the administrative state is. So, the administrative state sounds like a pretty dry topic, but it's another way to describe how important the federal government is to ordinary people. Do you want to work in a place where death and injury isn't the norm? Do you want to have kids to have as little lead in their bloodstream as possible? Do you want people to receive social security or Medicare payments on time? Do you want to avoid being poisoned by your groceries? Did you ever wonder why the Cuyahoga River in Cleveland used to catch on fire regularly but doesn't anymore? You can thank the administrative state.

And so the administrative state is just a way to talk about federal agencies. And of course, most people are familiar with those three letter agencies, like the FDA or the EPA or the SEC. And these agencies have a lot of power. They write federal regulations, many of them can conduct investigations, and some agencies can even go after people who violate these regulations and start legal cases against them. And all of this agency power is by design. When Congress passes a federal law on a complicated subject like the regulation of prescription drugs, Congress doesn't really have the expertise or the resources to figure out what those rules

should be for every single kind of drug. And even if Congress could regulate every prescription drug at one time in one year, imagine having to update that federal law each time a new drug came on the market. So, that's an impossible task. Instead, Congress passes some of its powers to federal agencies, and lawyers call this "legislative delegation." All that means is that the federal agencies are primarily in charge of regulating things like the food we eat, the drugs we take, and the air we breathe. That's the administrative state.

And when you think about these agencies, they employ thousands of people. And many of these people have special expertise and training. So the EPA has scientists--they study things like chemical safety or land management or air pollution and climate change. Or the FAA, the Federal Aviation Administration, employs aerospace engineers, civil engineers, electrical engineers--you name it. And these agencies employ thousands of people. And they are all civil servants for the most part. Most of the people working in an agency stay even when there is a new president who's been elected. But business interests do not like these agencies. They complain about the fact that agencies have this power. And they complain about the amount of federal regulation there is. And so these corporate interests have spent millions of dollars fighting new regulations in court. And conservative groups have spent millions trying to come up with new legal strategies to fight the administrative state and also to appoint federal judges who aren't fans of the administrative state either. And one very important moment here is in 1984, when all of these conservative interests scored a victory before the Supreme Court.

ROMAN MARS: Okay, so what was that victory?

ELIZABETH JOH: Well, in 1970, Richard Nixon--famous tree hugger--signed the Clean Air Act and also created the EPA.

ROMAN MARS: I know. He'd be a Democrat today. I mean, like, a real crooked Democrat--but a Democrat in terms of his policies, for sure.

ELIZABETH JOH: Right. Pretty surprising. And the primary job of the EPA is to protect the environment through regulation. But Republicans and corporations hated the Clean Air Act when it was signed, and they hated the creation of the EPA. But they weren't able to overturn the act or get rid of the agency. But conservatives did find a friend in president Ronald Reagan. In his first inaugural address, in 1981, Reagan said, "Government is not the solution to our problem. Government is the problem." And Reagan, like every president, got to pick a new head of the EPA. And the new head of the EPA turned Reagan's ideas into new regulations. Now, these new regulations defined what it meant to be a "polluting source." The word "source" is a term congress left undefined in the Clean Air Act. And because their regulations were changed, it actually meant that it was easier for companies to pollute the air. So, the new regulation was really a form of deregulation. And an environmental group filed a lawsuit to

challenge the new regulations. They argued that the new agency rules conflicted with what Congress wanted in the Clean Air Act. And in 1984, the Supreme Court disagreed with the environmental group. Their decision is a landmark case that most people don't know about. It's called Chevron versus NRDC. And in the Chevron case, the Supreme Court sided with the EPA. And the Court came up with a two-part legal test when there are challenges to federal agency regulations. So, there's two parts. The first part says, "Is Congress clear or unclear about the topic in the lawsuit?" And if Congress is unclear or if they're ambiguous, then there's a second and important step. "If things are unclear, the Court should defer or rely on what the agency has done," meaning that the Court should leave the agency's interpretation alone, even if the Court might disagree.

So, Chevron is an enormously important case. The Supreme Court decided, in 1984, that agencies should get the benefit of the doubt. Why? Because they have the expertise. And when Congress has given an agency this kind of power--well--the agencies are more politically accountable than the courts. That was the thinking at the time.

ROMAN MARS: And it just so happens that in this particular case, the head of the agency in question was trying to allow more environmental damage than was originally interpreted. So, that in itself was a win for conservatives--that you could bring someone else in and then the Court would refer to that agency. If that agency was headed by a person who wanted no regulations, that could be fine.

ELIZABETH JOH: Yeah, that's exactly right. So, the Chevron case at the time--in 1984--is actually a win for conservatives. The EPA allowed more pollution with a less restrictive rule. But politics change and agencies continued to grow and created more regulations. And over time, because of the Chevron case, corporations found that it was really hard to challenge federal regulations in court. They had a much harder time winning these lawsuits. And courts relied on the Chevron case in literally thousands and thousands of cases. And in each time, they were saying, "Look, when Congress isn't clear, we're going to assume that the agency's interpretation of federal law is reasonable. And if it's reasonable, we'll leave it that way." And so, the Chevron case becomes a major target for corporate interests and political conservatives who want to see less regulation.

And so, it's no surprise that in 2017, you can see Steve Bannon--one of Trump's chief strategists--call for what he's described as the "deconstruction of the administrative state." But--you know--Roman, that phrase, "the deconstruction of the administrative state," is a tough line to sell politically. It's also pretty tough to sell the line, "Let's get rid of Chevron deference." You can't win elections that way. And that's where the deep state comes back in. After all, "the deep state" sounds pretty sinister, it sounds dangerous, and it's conveniently very vague.

ROMAN MARS: I see. Yeah.

ELIZABETH JOH: And then Trump and his supporters start to talk about the deep state to refer to the government in general, even though they started to use the term to talk just about the Justice Department and the Special Council. So over time, the deep state just means the government, and especially the people who work in federal agencies--the people working in the federal bureaucracy, who don't change their jobs when there's a new president. So, do you remember the attacks on Anthony Fauci during the COVID crisis?

ROMAN MARS: Very well, yeah.

ELIZABETH JOH: Right. He was the government's response--he was the face of the government's response--to COVID, he's part of those daily COVID briefings, and he's the director of an agency. He is considered an expert--maybe the expert--on infectious diseases. But the right attacked him over and over. They called Fauci an "agent of the deep state," remember?

ROMAN MARS: Yeah. For sure.

ELIZABETH JOH: Yeah. So, that was part of the Trump agenda. And Trump did more than just allow his supporters to attack Fauci. Trump also appointed 226 federal judges in his one term as President. Obama appointed 320 judges. But of course, he had twice as much time with his two terms in office. And let's not forget the most important of them. Trump appointed three Justices to the United States Supreme Court, Gorsuch, Kavanaugh, and Barrett. And Justice Gorsuch in particular has been especially critical of the Chevron case. And when he was an appeals court judge, he said quite a lot about it. And that's where the Atlantic herring comes in.

So, in 1976, Congress passed the Magnuson–Stevens Act. It's the most important federal law that regulates fisheries in the American waters. And it's a conservation act just like the Clean Air Act. But here, the act is meant to protect the environment in the seas and to protect overfishing. And so, with the act, Congress gave power to regulate and manage fisheries to an agency called the National Marine Fisheries Service. And in 2020, this agency interpreted the 1976 law to require federal monitors on ships that fished for Atlantic herring--that little, silvery fish. And in the agency's interpretation, that was the best way to accomplish Congress's goals. So, this monitor would make sure that the fishermen were following federal law when they fished for Atlantic herring.

But the new regulation in 2020 had one twist. Not only did these fishermen have to have a federal monitor on their ships, they'd have to pay for their own monitors. And two groups of commercial fisheries sued. And the heart of this lawsuit is pretty simple. They just didn't want to pay. They weren't arguing that they didn't want monitors, they just didn't want to pay for those monitors. But that was required under the new regulation. So, these two lawsuits kind of seem like a David and Goliath fight, right? Two little fishermen versus the big federal

government. But that's not really true. The plaintiffs were represented by conservative legal organizations. And these were two different cases that were consolidated together. And each one was represented by a conservative legal organization with financial support from Charles Koch, who's a billionaire. And Koch has supported many other lawsuits attacking federal agencies and government regulations. And in the hearing case, the fishermen convinced the United States Supreme Court to review their case.

Now, let's go back to Chevron, the 1984 case. If you apply the Chevron case--well--Congress didn't actually say for sure whether fisheries could be required to pay for their own monitors. But if the agency's interpretation of the 1976 Act was reasonable, then that should have been the end of the case. But that's not what the Supreme Court decided. And on June 28th, 2024, the Supreme Court decided in the case of Loper Bright versus Raimondo that the herring fisheries were right and that the agency was wrong. And in fact, the Supreme Court didn't just decide that the fishery service was wrong to require industry funded monitors. Chief Justice Roberts concluded for the majority, "Chevron is overruled."

ROMAN MARS: Wow. What did he cite in his opinion as the reason why Chevron is overruled?

ELIZABETH JOH: So, in this case, Loper Bright isn't really a constitutional law case. It's about interpreting another statute. So, the Supreme Court interpreted a 1936 law called the Administrative Procedures Act. And when Congress passed this act in the '30s, it gave both courts and agencies the power to interpret federal law. And the 1984 Chevron case gave an important part of this power to agencies--let them make the regulations and let those regulations stand. But in Loper Bright, the conservative majority decided, "Well, that was a mistake." And in fact, when we take another look at that 1936 law--the Administrative Procedures Act--what it really means is that courts should decide, not agencies. So Loper Bright, of course, is not just a case about fish because you can tell just by looking at who was interested in the case. Groups that filed briefs in the Supreme Court in support of the fisheries included gun rights groups, trade groups for home builders, paper mills, meat processors, and e-cigarette companies--all groups that want less regulation--a whole lot less regulation.

[AD BREAK]

ROMAN MARS: And I heard this reported. I mean, surprisingly, the phrase "Chevron deference" percolated up into actual news items. You know what I mean? And so, what does it mean to have the end of Chevron deference?

ELIZABETH JOH: Well, for the past 40 years, when a federal agency issues new regulations, the companies affected almost always object. They try to do something about it to fight the new regulation. But the Chevron case has meant, until this year, that if it seems like Congress has written the federal law in a way where it's kind of

nonspecific or ambiguous, then the agency gets to interpret it. And no matter what you say in court, the court's going to probably conclude, "Yes, the agency's interpretation of the law is reasonable." So, let's say Congress authorizes the Federal Aviation Administration to specify how many bolts there should be on an airplane wing for a safer plane. But what if the FAA decides that planes should have more bolts on the wings because their agency engineers think that that would be safer? Or let's say we look at the 2022 Inflation Reduction Act that was signed into law by President Biden, and that gave a federal agency the power to negotiate Medicare prices for drugs. And in fact, the Biden administration just announced that they had negotiated new prices for 10 very popular prescription drugs. And when we think about who should make this final decision, when we talk about the number of bolts that you need to make an airplane safe or whether a drug price is appropriate under federal law, who decides--the agency or a judge? Well, the Loper Bright case now means that the Supreme Court has decided that the final say should go to courts, not agency staff--people who might be trained in scientific data analysis or epidemiology or engineering or public health or climate science. In fact, it should be judges instead of them. And of course, isn't that kind of backward? Because Justice Kagan says in her dissent in the Loper Bright decision, "Expertise is good. We don't necessarily have, as courts, the ability to figure out how to make these determinations."

And so this kind of Chevron deference or relying on the judgments of experts and agencies--it kind of seems like, at first, an obscure, unimportant doctrine that nobody should care about. But in fact, it's one of the biggest wins in this really longrunning conservative attack on the federal government. And so administrative law might not seem like a terribly important topic in your ordinary day-to-day life, but it actually does have a very profound effect. And that's why the lawyer for the federal government said to the Justices in oral argument that overturning Chevron would be what Elizabeth Prelogar called a "convulsive shock to the legal system." And she's probably right. And that's also why Jay Sekulow tweeted after the Loper Bright case was decided that "the U.S. Supreme Court just delivered a massive blow to the deep state's unchecked power." And the "unchecked power"? You mean the decisions keeping us safe and healthy? That's what he means. And Sekulow, of course, is not just a Trump supporter. He was one of Trump's chief lawyers in Trump's first impeachment.

ROMAN MARS: So, while I adjust to the horror that that person is happy about this, tell me what does this have to do with Vance and Schedule F--the thing you mentioned earlier?

ELIZABETH JOH: Well, it's kind of related because Schedule F is another Trump tool in the war against federal agencies. So, at the very end of his term, Trump issued an executive order known as Schedule F. And so, when you think about what happens when a new president takes office, the president of the United States has the ability to make a lot of political appointments, putting people in federal positions that are really loyal to the president. And it's actually a large number

of positions--about 4,000--but that is dwarfed by the tens of thousands of people who work in the federal government who are civil service employees, meaning they have job protections no matter who is president of the United States. So, Schedule F would politicize a much larger part of the federal government. And that order would've reclassified something like 50,000 federal employees who are now civil servants as political appointees.

So, that means that if all of these people now became political appointees, a new president could come in, fire them for any reason or really no reason at all, and put in people who are simply loyal to the new president--not because of your experience or your expertise. You'd be hired just because of your political leanings. And so for Trump, Schedule F would mean that Trump would take office and fire tens of thousands of people working in federal agencies and replace them with people who are simply politically loyal to him. Now, in the first Trump administration, he issued Schedule F too late. Before it could go into effect, Biden won the election. And President Biden promptly took that executive order away. But Trump has already announced that he intends to "reissue Schedule F on day one"--those are the words that he's used--if he wins the 2024 election. And this is part of Trump's general campaign platform called Agenda 47. And in that, he plans to "dismantle the deep state." And Schedule F has been a big talking point for Trump's running mate, JD Vance, even before he was on the ticket. Vance said in 2021 that if he could give just one piece of advice to Trump, that would be to "fire every single mid-level bureaucrat--every civil servant--in the administrative state."

ROMAN MARS: Wow. I mean, just to put people in that don't know what they're doing? Doesn't that cause problems, too? Or I guess these people--the problem with them is that they're such nihilists that a government that doesn't function plays into their ideology.

ELIZABETH JOH: Yeah. A government that doesn't function very well--a government that just simply does whatever the person at the top of the pyramid does. But of course, that sounds awfully like authoritarianism more than a democracy.

ROMAN MARS: Totally. And so, on another sort of part of the 99PI umbrella, we're talking about The Power Broker. And the whole part of the early 20th century politics is all about undoing patronage, which is the sort of awarding of political jobs, and the creation of the civil service. It was considered that the seed of political corruption was the awarding of jobs to your political cronies. You know what I mean? That was the whole point. All of the 20th century was all trying to get to the point where you had to have some kind of merit-based system for getting a job inside of the government. And it's amazing that the big idea is to just undo all that.

ELIZABETH JOH: Yeah, I mean, I think the idea here is pretty much a scary one, in which you have a vision of the federal government where you have fewer experts--fewer people

with decades of experience--making decisions about how we live our ordinary lives. I mean, that is really the sort of scary thing. What kinds of drugs are safe for us to take, whether or not meat should be inspected more regularly or less regularly, whether or not rivers can have chemicals dumped into them--these are things that we sort of would like scientists to make decisions about, not just partisan loyalists.

ROMAN MARS: For sure because the alternative is what? You create laws that are clear and therefore very specific and therefore have tons of loopholes and they're sort of fought over by people who are distinctly not experts. They're barely experts in being in Congress! I mean, they're not the best and brightest. Then you'd throw it to the courts rather than to the agency. And those people--again--we talked about Cannon last week or two weeks ago. This is a person that barely understands the law that they're adjudicating. It's just a ridiculous idea. It just doesn't make any sense at all.

ELIZABETH JOH: Yeah, I mean, it's definitely the case that, after the end of Chevron, what we're going to see are many, many more lawsuits over federal regulations. But even from a business, you can sort of understand why, in one sense, it's harder for businesses now.

ROMAN MARS: Right! It's more confusing.

ELIZABETH JOH: Because an agency makes a regulation, you're not sure how long that regulation's going to last. Is someone going to successfully have those regulations rescinded because a court says that's not the right interpretation? Or is it going to stay? But of course, if you're a big corporation, you've got millions of dollars at stake, and you've got to make some kind of long-term plan. And the Loper Bright case does not make that easy at all.

ROMAN MARS: If the notion of the Court is that you want to do as much as possible to make a set of heuristics and guidelines such that people are not doing things with such great uncertainty that things don't happen at all, how does this fit into that sort of notion of what the Supreme Court is for? Because my sense over the years of us talking is that that sense of uncertainty is what the Court--independent of it being more conservative or more liberal--really hates that.

ELIZABETH JOH: Well, in theory, that's right. I mean, we should have a system in which there are a set of expectations that shouldn't easily be overturned. And in fact, a big portion of the back and forth between the majority and the dissenters in Loper Bright is about the idea of stare decisis. Justice Kagan says in her dissent, "Um, explain to me again why we just decided to discard this opinion?" And the majority's best explanation is: "Eh, we didn't like it." And of course, that is a pretty terrible set of reasons to say that this doctrine should be overturned.

ROMAN MARS: And is there something in Gorsuch's early writings about the administrative state and his fear of it or distrust of it that indicates where this is coming from--why these aren't the people that make these decisions?

ELIZABETH JOH: Well, certainly he's made a lot of critical commentary, even as a judge, that this is about unaccountable power. Really, if we're going to have this what he refers to as a "separation of powers"-- That's how he sees the key issue--that the executive does some things but that the courts have a role in keeping a check on executive power. And that check on executive power means that you can't just let the agency make its own determinations in a way that it's hard for courts to say, "Well, that seems wrong to us."

ROMAN MARS: Yeah. And there's a part of that that does make sense to me. The balance of powers makes some sense to me, but it seems like that doesn't work in the real world as the real world gets more and more complicated and expertise is needed when it comes to lead levels and pollutants and whatever. How can it just be expected to be an expert of any of those things?

ELIZABETH JOH: Yeah, I mean, we lived through this, right? With the pandemic, who's going to make the decisions about vaccinations versus not being vaccinated? Who's going to allow a safe workplace or, in fact, require a safe workplace by saying workplaces should have vaccination policies? We kind of ended up leaving it to the judges, not all of whom were in agreement about whether that was a good scientific policy or not.

ROMAN MARS: Well, it sounds like a mess.

ELIZABETH JOH: Yep.

ROMAN MARS: Okay. So now, given this... I mean, obviously a future court could rule in a different direction when it comes to these things. How do you see this unfolding from here?

ELIZABETH JOH: Well, to be honest, Chevron of course has never been something that's been embraced by everybody. And of course, the conservatives have always hated Chevron. And there's an argument to be made that maybe the death of Chevron was coming anyway because it had been criticized heavily by the right. But for now, I think most people who are thinking about corporate interests and what businesses should do and the state of federal regulation--I think there's just a lot of uncertainty right now. I think one thing is clear: there are going to be many, many more lawsuits. Some people have said the courts are going to be flooded with new Loper Bright type of lawsuits--and that seems very likely. And the question is: what are courts going to do to try and harmonize these things because you really can't have so many different courts giving so many interpretations of different regulations, right? That really does make life difficult.

ROMAN MARS: For sure. Yeah.

ELIZABETH JOH: Roman, I've got one final note about Loper Bright.

ROMAN MARS: Okay.

ELIZABETH JOH: Justice Gorsuch wrote a separate opinion in which he agrees with the majority. And Gorsuch wrote a lengthy discussion--very lengthy--of why the Chevron case was wrong or, in his words, "why it was a grave anomaly from historical judicial practice." The funny thing is that he has a very deep connection to the Chevron decision itself. Reagan's EPA administrator--the person who created those new regulations, making it easier for polluters to pollute? Anne Gorsuch--his mother.

ROMAN MARS: Oh my. That's so weird! That's so weird and random. And this is probably a thing that was like a Pandora's Box for her because she was trying to deregulate, allow more pollutants, and allow more freedom from the business interests. And in the end, it ended up being this thing that could stop all those things. That's amazing.

ELIZABETH JOH: Of course, he never acknowledges that in his opinion.

ROMAN MARS: Oh, yeah. Well, I'm glad we're here. I had never heard that before. That's amazing. Wow. Well, again, fascinating stuff. I'm so happy to talk to you. Thanks.

ELIZABETH JOH: Thanks, Roman.

ROMAN MARS: This show is produced by Elizabeth Joh, Isabel Angell, and me, Roman Mars. It's mixed by Haziq bin Ahmad Farid. Our executive producer is Kathy Tu. You can find us online at learnconlaw.com. All the music in What Roman Mars Can Learn About Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get mech, and learn about who's on tour at doomtree.net. We are part of the Stitcher and SiriusXM podcast family.