

Kavanaugh Special Episode

Roman Mars [00:00:00] I'm in the studio with Elizabeth Joh, and we're recording this on Tuesday, October 2nd at 2:13 p.m. Pacific Coast time. And this is a special Trump Con Law about the Kavanaugh confirmation process because it's just the thing that's on the forefront of everyone's mind.

Elizabeth Joh [00:00:14] On our minds, but in a state of confusion, right? So, a little recap. Remember that on September 27th, there was a hearing before the Senate Judiciary Committee. Even though there already had been hearings with Brett Kavanaugh in front of the Senate Judiciary Committee, this was a special one, in part prompted by allegations by Christine Blasey Ford that she had been sexually assaulted by Brett Kavanaugh when they were both high school students in the 1980s. So, this particular day of testimony really focused both on Christine Blasey Ford, who testified alone, and then more testimony from Judge Kavanaugh, responding to these allegations. So, Ford spoke at length about what she recalled from her experience of having been sexually assaulted. And there were many moments--many very emotional moments in her testimony. And one struck me in particular. Senator Klobuchar asked her, "And many people are focused today on what you're not able to remember about that night. I actually think you remember a lot. I'm going to phrase it a little differently. Can you tell us what you don't forget about that night?" And Ford responded, "The stairwell. The living room. The bedroom. The bed on the right side of the room. As you walk into the room, there was a bed to the right. The bathroom in close proximity. The laughter. The uproarious laughter. And the multiple attempts to escape. And the final ability to do so." And then it was Kavanaugh's turn. Judge Kavanaugh had released a statement prior to his testimony, but it was clear that when he came up to the actual day and his turn before the committee, he departed pretty radically from what he had planned to say. And instead, he'd offered this really angry partisan and sometimes tearful response to these allegations by Dr. Ford. The Judiciary Committee, eventually, after hearing from both of them, decided to have a vote, and they did vote on party lines to send his nomination out of committee. So, it's basically a procedural mechanism to get his nomination before the entire Senate because it's the Senate's job to provide advice and consent. Now, the one twist here was that Senator Flake announced that he was providing his critical vote on the condition that there was some understanding that there'd be an additional limited investigation into these sexual assault allegations. So currently the FBI is conducting a further background investigation. On September 29th, President Trump tweeted, "Just started tonight our seventh FBI investigation of Judge Brett Kavanaugh. He will someday be recognized as a truly great Justice of the United States Supreme Court." And over the weekend, after claims, or questions at least, that there were some limits--maybe there wasn't going to be an entirely thorough investigation--Trump then tweeted on September 30th, "Wow. Just starting to hear the Democrats, who are only thinking obstruct and delay, are starting to put out the word that the time and scope of FBI looking into Judge Kavanaugh and witnesses is not enough. Hello. For them, it will never be enough. Stay tuned and watch." So right now, it's not clear what's going to happen. There are some claims that there may be more facts out there that need to be covered. It's not clear what the FBI is looking into. A lot of this is sort of speculation and leaking. Senate Leader Mitch McConnell has announced that there will be a vote very soon--as soon as the end of the week. So that sort of gives us an opportunity to think about, well, what are some issues that we can think about right now?

Roman Mars [00:04:18] And we're going to talk about those issues right after this. The first kind of mundane thing to consider in all this is that the new Supreme Court term has actually started.

Elizabeth Joh [00:04:27] So the Supreme Court's season, if you like, begins on the first Monday of every October, which was yesterday for us. And right now, there are only eight Justices, of course, because Judge Kavanaugh has been nominated to fill that vacant seat. So, there's not a ninth Justice there. There may be one soon. We don't know. But what happens in the meantime? They have to decide their cases, right? Well, if there are five Justices who can come to an agreement on the legal issue, then the Supreme Court can reach a decision, right? But what if they can't? So that sometimes happens. And we've experienced this before. So pretty recently, when Justice Scalia died in 2016, there were eight Justices on the Court then. There's a little bit of a difference, though, because at that time there was one Justice, Justice Kennedy, who's sometimes been referred to as the swing vote on the Court. He would sometimes join with the more liberal members of the Court and sometimes not. So, there was some chance that there might be some variability in the decisions. But if you get a straight kind of ideological vote, you're going to have a 4-4 split on the Court. So, what's the legal effect of that? That means that, you know, all of the cases that are coming from The Supreme Court, or at least the vast majority of them, come from a different court. So that means that the lower court decision just stands; it stays what it was. That's okay sometimes. But there may be really pressing super important issues. And generally, the Supreme Court tends to review things that are very important to the nation in terms of how to resolve a legal problem in the system. And boy, that starts to look tough when you have a bunch of cases where the Supreme Court Justices cannot come to a decision. So that's one sort of practical thing.

Roman Mars [00:06:16] And will those cases be delayed, or will they just go through with the eight Justices, no matter what?

Elizabeth Joh [00:06:24] They go through with eight, no matter what. And so, you'll get language sometimes that if there is a 4-4 split, there'll just be a decision by the Court that says something like "the judgment is affirmed by an equally divided court." So that's sort of like, "We couldn't decide. So, the lower court decision will stand."

Roman Mars [00:06:42] Wow.

Elizabeth Joh [00:06:43] So, yeah, I mean, it does alter the mechanics of the Court. And if Judge Kavanaugh becomes Justice Kavanaugh, he becomes the ninth. But he can't sort of tack himself on to pieces that were already argued.

Roman Mars [00:06:56] Can a case that was submitted to the Supreme Court where the lower ruling stands because it's a 4-4 tie ever be resubmitted to the Supreme Court?

Elizabeth Joh [00:07:06] So the same case wouldn't be resubmitted, but a similar issue could come up before the Court again. There's another issue, too, right? And that's been kind of popular on social media right now. Well, what about impeaching Judge Kavanaugh? So, if he becomes Justice Kavanaugh, of course, he could be theoretically impeached because the impeachment clause of the Constitution has been interpreted to apply to federal judges. But then there's the practical part, which is, you know, impeaching a federal judge is as hard as impeaching a president. It takes a simple majority of the House to get the process going. But to actually remove a federal judge, you need a two thirds of the Senate vote to remove that person. So that's really difficult. I mean, particularly given the makeup of the Senate right now, it seems highly unlikely. Is it possible that he could be impeached even if he just returns to his current regular job on the D.C. Federal Court of Appeals? He could. But again, it's the same impeachment

problem. You have to have kind of supermajority by the Senate. It seems pretty unlikely that he'd be impeached. There's a lot of misinformation out there right now suggesting that Judge Merrick Garland--who was nominated by President Obama, but whose nomination was never even considered by the Senate--that he could somehow impeach Judge Kavanaugh. That's not the way it works.

Roman Mars [00:08:33] I wouldn't think so. I mean, it seems almost impossible if 50 senators--and then with the vote of Pence making 51--approve of Judge Kavanaugh to become Justice Kavanaugh. Then how do you somehow get two thirds of the Senate to impeach him? The math doesn't work very well. Unless, like, a bunch of new stuff comes out and all of a sudden people are, you know, angry about their choice to vote for him. But I don't get that impression.

Elizabeth Joh [00:09:01] I think that's right. So, there's, like, a symbolic appeal to a lot of people about impeachment, but it's practically highly unlikely. And then there's a third thing that is being raised just by the testimony alone that Judge Kavanaugh gave last week. And so let me return to a little bit of what he said. He addressed specifically the Democratic senators on the Judiciary Committee. Here's what he said. He said, "Your words have meaning. You sowed the wind for decades to come. I fear that the whole country will reap the whirlwind. The behavior of several of the Democratic members of this committee at my hearing a few weeks ago was an embarrassment. But at least it was just a good old-fashioned attempt at Borking. This whole two-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record, revenge on behalf of the Clintons, and millions of dollars in money from outside left-wing opposition groups." So, this is striking for a lot of reasons. One, it's very partisan. It's highly unusual--I just can't emphasize that enough--for a sitting federal judge to say something like this. He was quite angry at that point. But there's a serious issue here, too. So, keep in mind what Kavanaugh said at that hearing. And that was he is attacking members of the Judiciary Committee who happen to be Democratic senators. So, Senator Richard Blumenthal is a member of the committee. It's also the case that he is the named plaintiff in one of the Emoluments Clause cases. So, in a lawsuit called Blumenthal versus Trump--this is a lawsuit brought by a number of members of Congress that says that Trump is violating the foreign Emoluments Clause by continuing to receive profits from his private businesses when foreign governments stay at his hotels or use his golf courses or whatnot. So ultimately, you know, the case is still ongoing, but we don't know the resolution of it. But importantly, the day after the Ford and Kavanaugh hearing, a federal judge ruled that the plaintiffs in that Emoluments Clause case has standing. In other words, they had the kind of legal injury that a court could theoretically redress at the end point of this lawsuit. So that means the case doesn't get dismissed right now, okay? So, imagine this lawsuit eventually making its way up to the Supreme Court. It could be a variety of different issues. Like, you know, does what President Trump's doing actually violate the Emoluments Clause? Or even this kind of actual issue that we heard about last week--does someone like Senator Blumenthal have standing? Or is he the right kind of person to bring a case? Any of these really interesting questions could come up before the Supreme Court. Well, what if Justice Kavanaugh is on the Court? So, one of the important things about federal law is it does address this kind of issue. So federal law says, "A federal judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." And remember, this was a revenge filled statement that Kavanaugh made during the hearing. So, would Justice Kavanaugh recuse himself? And then if he did, what if we had an eight-member Court that couldn't agree on a totally unsettled question involving President Trump?

Roman Mars [00:12:44] But the recusal is kind of self-policing anyway, right? So, he maybe just wouldn't.

Elizabeth Joh [00:12:51] Oh, sure. He could just not recuse himself.

Roman Mars [00:12:53] Yeah, that's right. That's what I think he would do.

Elizabeth Joh [00:12:56] I mean, there could be, like, you know, motions on the part of the parties. But I mean, I think the short answer is it would be a mess. It would be a mess because the number of people brought into that sort of gambit of Kavanaugh's targets during that speech. Anybody who's democratic, anybody who's a left-wing opposition group--and there's a lot of people who could potentially fall within that definition--are they all now no longer guaranteed a fair and impartial hearing by a judge or a Justice Kavanaugh? And that's true, even potentially if he remains on the lower of the federal appeals court, too. And that's really what was so unusual about his speech. Everyone expected that he would deny the allegations--that he would say there wasn't enough evidence here--that there's nothing here that has been proven or can be. But it was really just the departure from the norms of being an open-minded, rational, levelheaded, federal judge that to many people--even if they had supported Kavanaugh before or understood that he had sort of the pedigree of someone who was a well-respected jurist--that was the shocking part.

Roman Mars [00:14:09] I think we've seen so much in shifting of the behavior of politicians that maybe how unusual it was didn't exactly land with everybody. But you noticed it.

Elizabeth Joh [00:14:20] Oh, absolutely. I think anybody who has watched, you know, any judge give a public speech... They are almost measured and calm to the point of being ridiculous. They don't say anything controversial ever. But this was a political speech. And that seems totally at odds with the kind of position we'd want on the Court, no matter what your political leanings are. I don't want to engage in this too much, but one can only imagine a Democratic nominee to the Supreme Court, you know, tearful, talking about vengeance, all of these things--it's remarkable. It's a remarkable speech. And that alone, I think, should be some cause for concern. This is totally standing apart from the allegations against him.

Roman Mars [00:15:07] Right. It seemed like his testimony opened up a whole new avenue of attack that really could give people a reason to question anything the Supreme Court decides, which is not a good thing for us in our system.

Elizabeth Joh [00:15:23] That's right. I mean, one of the things about the Supreme Court is, as we've talked about before, that it stands only on its legitimacy. It's got nothing else to go on except our belief that the Court is neutral and impartial. And that's why they have the final word. They don't have the final word on the Constitution because they have some great army behind them or anything like that. We sort of believe in their sort of neutral interpretation of law. And of course, this isn't the first time that kind of question has been raised. But his testimony was so stark. It was so dramatic. It seemed to be kind of a real question in the public's face: "Do you care at all whether this kind of question is raised when it comes to a Supreme Court Justice?"

Roman Mars [00:16:08] More Trump Con Law after this. If it is possible to hypothetically divorce the allegations from him in the process of nominating him, do you think that his presentation of Partisanship is enough to disqualify him from being on the Supreme Court?

Elizabeth Joh [00:16:25] It certainly ought to raise the question for anyone serious about this nomination process. I mean, we have gone from thinking about nominees providing testimony that said almost nothing about them to this example, which goes in the complete opposite direction, which raised alarm bells about can this person actually be an open-minded jurist looking at the claims from all kinds of people?

Roman Mars [00:16:51] If the way that Kavanaugh testified isn't disqualifying, what in the world could be disqualifying in a Senate hearing for confirmation of the Supreme Court? Like, if that person came in for a job and talked about the injustice done to them--regardless of whether I felt about it--I would just be like, "I need to steer clear of this guy."

Elizabeth Joh [00:17:09] I think that's right. I mean, it's true. I mean, we think a lot about the kind of image we have of what a jurist is and the American legal system. But if you expand the window a little bit more, I think we've changed our norms about who gets to be appointed in all areas of public life, including the presidency. So, things have changed pretty dramatically, I think.

Roman Mars [00:17:32] It seems funny to me that we've lost sight of the idea that this really is a job interview--and that's really all it is. And it's not about convicting him in court

Elizabeth Joh [00:17:42] Not at all. That's right. The worst thing that happens to him is that he just stays in his regular job.

Roman Mars [00:17:47] Yeah. For life.

Elizabeth Joh [00:17:48] For life.

Roman Mars [00:17:50] Thanks.

Elizabeth Joh [00:17:50] Sure.

Roman Mars [00:18:02] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com and on Facebook and Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. This new song that you're hearing is an instrumental mix of a track off the Arteria Verite album featuring our pal Sims plus Air Credits and ICETEP. Sims described the album to me as "John Carpenter inspired music from this week's dystopia." That seemed appropriate. You can find out all about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.