

- Roman Mars: [00:00](#) I should start here with a production note. We recorded parts of this episode about the power of the President to hire and fire people as described in the U.S. Constitution four separate times. Why did we have to do it so many times? Because the President kept firing people. This probably shouldn't be surprising because in addition to being a real estate tycoon, he was most famous for being a reality TV star whose catchphrase was "You're fired." But still each firing had its own implications, and they changed the scope of the discussion about the Appointments Clause of the Constitution and the removal power of the executive just a little bit. So we kept coming back to it and talking more. With Comey on everyone's mind and insiders discussing the possibility of Trump firing special counsel Robert Mueller--that's the person who's leading the Russia investigation--this seemed like a good time to talk about appointments and removals. But we're going to turn back the clock to a more innocent time, when Trump had only fired Sally Yates.
- Elizabeth Joh: [00:56](#) When Trump became President, Sally Yates was the acting or temporary attorney general. That's the head law enforcement official for the federal government.
- Roman Mars: [01:04](#) That's because Jeff Sessions hadn't yet been confirmed as attorney general.
- Elizabeth Joh: [01:08](#) At the end of January, Trump fired then Acting Attorney General Yates shortly after she had ordered the Department of Justice not to defend the first executive order Trump had signed. That's the one that banned citizens from seven majority Muslim countries from entering the United States.
- Roman Mars: [01:23](#) That order, of course, was blocked by district courts who ruled against it.
- Elizabeth Joh: [01:27](#) At the beginning of March, Trump asked 46 United States attorneys--these are the chief regional federal prosecutors around the country--to resign. When Preet Bharara--who was the U.S. attorney for the area, including Manhattan--refused, Trump promptly fired him. And probably most dramatically in May, Trump fired FBI Director James Comey. Of course, the White House isn't like The Apprentice. So the question is, when can a president fire people in the executive branch? The basic answer is one that law professors love to give. It kind of depends.

Roman Mars: [02:01](#) It always depends. You law professors are the worst. Alright, let's do this. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where my favorite law professor, Elizabeth Joh, comes to my house every week to teach us all a lesson about a constitution that is being tested in new and fascinating ways by the 45th President of the United States. I'm your fellow student and host, Roman Mars. We have an appointment with the Appointments Clause right after this. Here's some background.

Elizabeth Joh: [02:33](#) Most people who work in the federal government are part of the civil service. In other words, they're career people who work there no matter who the president is. But a smaller group of people are political appointees, subject to the president's appointment and removal power. Article II, Section 2 of the Constitution specifies that the president can, with the advice and consent of the Senate, make appointments of officers of the United States. That same provision also says that with some so-called "inferior officers," that's a word from the Constitution itself, that Congress can decide to give the power of appointment or hiring to someone else other than the president. But when it comes to the really important executive officials--these are sometimes referred to as "principal officers"--the president is supposed to make the appointment directly. In other words, when it comes to the most important policymaking, executive branch officials, like members of the cabinet, the president gets to make the hiring decisions so long as the Senate approves.

Roman Mars: [03:32](#) Think of all those people called "Secretary of something or other."

Elizabeth Joh: [03:35](#) Secretary of Agriculture, Commerce, Defense Education, so on--these are the positions that are left up to the president to nominate. That's why it was a little strange to see Trump tweet on June 5th--and I'm quoting here--he said, "Dems are taking forever to approve my people, including Ambassadors. They are nothing but OBSTRUCTIONISTS! Want approvals." So that's weird. Mostly because a Senate--now with a Republican majority--can only consent to the appointment of ambassadors once they have been nominated by Trump himself. In other words, for the whole process to begin to be an ambassador, at least for the political appointee ambassadors, Trump has to actually name some people.

Roman Mars: [04:16](#) The Constitution says it's his job to do it.

- Elizabeth Joh: [04:18](#) So according to the American Foreign Service Association, there are about 188 ambassador positions, and about a third of those are classified as "political appointments." That means they have to be confirmed by the Senate. But again, to get the process ruling, the president has to actually nominate people. And thus far, President Trump has had five ambassador appointments confirmed by the Senate. Senate confirmation is a part of this process. The Senate is supposed to be an oversight mechanism here. It's a chance for the Senate and the public to see who the president wants to hire in the federal government's most important decisions.
- Roman Mars: [04:51](#) But that's just hiring. What about firing?
- Elizabeth Joh: [04:53](#) Presidential firing turns out to be trickier. The main reason is that the Constitution itself says nothing about it. Get this. It says nothing about how and whether the president can fire people. There's nothing to apply, interpret, or argue about. So it's been up to the Supreme Court to decide a group of cases that have defined or I should say at least said a few things about the boundaries of the so-called "removal or firing power."
- Roman Mars: [05:23](#) It might feel surprising that the Constitution talks about hiring but doesn't mention firing. But the Constitution does this a lot.
- Elizabeth Joh: [05:30](#) The Constitution isn't exactly a detailed instruction manual. It's actually a guideline--a set of broad words about how the federal government should be set up and run. So even when the Constitution does say something, it's very common that the term itself isn't defined--it's not that clear. So it's left up to the courts to decide. And even more frustrating, there are instances like the firing or removal power where there isn't any language at all. So it's totally up to the Supreme Court, and it has to start from scratch. The Supreme Court cases in this area have addressed situations where Congress has tried by federal law to limit the ability of a president to fire an executive official.
- Roman Mars: [06:11](#) So two cases from the early 20th century serve as good examples.
- Elizabeth Joh: [06:14](#) In a 1926 case called Myers versus the United States, President Wilson fired Frank Myers, the postmaster of Portland, Oregon. Now, Wilson had actually initially appointed Myers to the post. Myers was one of many Democratic appointees to postmaster positions around the country. It's not entirely clear to me why he was fired, but the historical records suggest that Myers was a

bit of a jerk. So enough said on that. Now, Myers said in response that a federal law placed limits on whether and how postmasters like him could be fired. But in 1926, the Supreme Court said, "Myers, you're wrong." In very broad sweeping language, the Supreme Court said that just as the president was permitted to hire an executive branch official like Myers without interference, so too did he have the sole power to remove or fire him.

Roman Mars: [07:06](#) But not too long after that, though, the Supreme Court decided another case about presidential firing in a different way.

Elizabeth Joh: [07:11](#) When FDR became president, he summarily fired a man named William Humphrey from the Federal Trade Commission. Roosevelt didn't think Humphrey was a fan of his New Deal policies. So, "You're not my man. You're out." Like Myers, the postmaster, Humphrey pointed to a federal law that limited the reasons why a member of the FTC could be fired. But unlike the Myers case, in the 1935 case of Humphrey's executor, the Supreme Court said that if you look at the nature of the Federal Trade Commission, it wasn't a traditional executive branch job. Agencies like the FTC exercised special responsibilities. So the Court upheld the federal law that said someone like Humphrey--that is, someone who was in the Federal Trade Commission--could only be fired for cause. That's a legalistic way of saying that you can only be fired because you did a bad job and not just because the president didn't like him. There are other cases in this area, too. But the one thing these two cases point out is that the Supreme Court is concerned about the nature of the particular job at issue. When there's some need for independence from the president, the Supreme Court has upheld limits on the president's ability to fire people.

Roman Mars: [08:23](#) So let's go back to Trump.

Elizabeth Joh: [08:24](#) The Acting Attorney General, a United States attorney, and the Director of the FBI probably all fall into the category of jobs where A) they're sort of traditional executive branch jobs that B) the president can treat as at-will fireable positions. In other words, he can just fire them. So, in the abstract, a president can fire a Yates, a Bharara, or a Comey if he wants.

Roman Mars: [08:48](#) And probably even Special Counsel Mueller.

Elizabeth Joh: [08:50](#) But this is no ordinary president. So I'm going to add a caveat here. Even if the president is within his constitutional removal

power in these three firings, there have been concerns raised that all three may have been fired because they were looking into some possible wrongdoing on the part of President Trump. If that is the case--and we don't know that for certain yet--then these firings might themselves become the basis for Trump to find himself in trouble on other grounds. That's the other issue here: whether this could be grounds for impeachment--probably unlikely, but theoretically possible--or even possible criminal liability--theoretically unknown, and a total big question mark.

Roman Mars: [09:35](#) So what you're saying here is that he has the constitutional right to fire this class of worker. But if firing this worker is an act of obstruction of justice, that's a different thing. That's potentially like a criminal act.

Elizabeth Joh: [09:47](#) That's right. But when I say that it's a theoretical unknown, it's because we've actually never tested that out. We've never actually figured out whether it's okay constitutionally to criminally indict a sitting president.

Roman Mars: [10:00](#) We're going to raise that constitutional question as it relates to June 8th, 2017, hereafter known as Comey Day. More Trump Con Law after this. We're back with appointments, removals, and Comey Day.

Elizabeth Joh: [10:12](#) So on June 8th, Comey actually appears before the Senate Intelligence Committee and testifies under oath. Comey says he understood that he could be fired by a president for any reason or no reason at all. That's pretty consistent with what's called the "removal power of the president." That is considered a constitutional power that he has.

Roman Mars: [10:30](#) Between the seven page memo that Comey wrote and his testimony, there were all kinds of awkward moments and suspicious revelations. And honestly, I don't want to get into them here. There are great political podcasts for that. You should check them out. We're just going to talk about the Constitution.

Elizabeth Joh: [10:47](#) So a couple of big con law questions come up. I want to talk about one in particular. One is called "obstruction of justice" and how that relates to a constitutional issue. So obstruction refers to a kind of crime that's punished under a state and federal law. There's no single federal crime of obstruction. There are lots and lots of them. Some of them punish really specific things that kind of are intuitive, like it's a bad idea to kill someone when

you're trying to stop an investigation. Others are broader. One punishes conduct that amounts to some kind of interference with an investigation. The basic idea behind obstruction offenses is that it's a crime to obstruct, impede, or influence a proceeding. It's really kind of a crime about a crime since it involves trying to hinder an investigation about a different or distinct crime. So in that way, obstruction of justice is related to crimes like perjury, which makes it a crime to lie under oath.

Roman Mars: [11:40](#)

Because it's an ordinary criminal law, obstruction of justice is not just something for presidents or officials.

Elizabeth Joh: [11:45](#)

So how does that apply here? Well, obstruction might theoretically apply because Comey's new testimony, added to everything else we know, strongly suggests that Trump might've actually had his whole purpose in firing Comey of just trying to quash the investigation regarding his campaign and Russia. So on the one hand, even though a president can say to a person like an FBI director, "You're fired," that's true so long as the reason behind it itself isn't unlawful. So you can think about it this way. We understand that the President has the authority and the right to sign off on bills or veto them. So presidents do that all the time. But if it were to turn out that the President signed off on a bill in exchange for a multimillion dollar bribe--well, the power would've been used lawfully, but the reason for it would point to some criminal activity. So lots of people are starting to raise this question about Trump. Did he get involved in obstructing justice? That's an interesting question. It certainly involves parsing the criminal statutes. But there's a much bigger constitutional law issue here. And that is, well, it's no problem if Trump were a regular civilian. He'd be prosecuted. But from a constitutional law standpoint, it's actually unclear whether it would be constitutional to indict a sitting president. The Supreme Court has made it clear that sitting presidents are absolutely immune from civil lawsuits for their official acts. So the plain English of that is you can't sue a president in civil court because you're unhappy with what the president did. The Supreme Court said, "Not allowed."

Roman Mars: [13:26](#)

And this is considered really quite reasonable because presidents really couldn't do anything if people could sue them for everything.

Elizabeth Joh: [13:32](#)

But what about something that goes even farther? Would it be okay to prosecute a sitting president? No one knows. It's never happened.

Roman Mars: [13:40](#) We know you can impeach them, and that has a lot of the appearance of a criminal trial. But the successful result of impeachment is just the removal from office. The closest we probably come to the indictment of a sitting president was with Nixon.

Elizabeth Joh: [13:54](#) There was some question during Nixon's presidency as to whether he could be criminally indicted. So on June 7th, 1974, the New York Times reported that President Nixon was named as an unindicted co-conspirator in the Watergate scandal. Being a co-conspirator means that prosecutors think you've entered into an agreement with one other person or a group of people to break the law. But if you're unindicted, that just means you yourself haven't been charged with a crime. Now, in the ordinary case, you might be an unindicted co-conspirator because there's not enough evidence against you. Or it might also be because you happen to be the president of the United States and nobody really knows whether it's constitutional to actually prosecute you. So in Nixon's case, it was probably the case that the grand jury was unsure whether it was okay to go ahead and prosecute Nixon or hand out an indictment in his case. Nixon was never charged criminally. But even after he resigned from office, President Ford--if you'll recall--gave him a full pardon for any wrongdoing Nixon might've participated in. He gave him a clean slate. So the courts haven't addressed whether it would be okay for a sitting president to be prosecuted, and these facts are certainly raising that question. But again, this is one of these instances where this very unusual presidency is asking us the question of, well, what if? It's the hypothetical turned real.

Roman Mars: [15:23](#) The Washington Post reported on Wednesday, June 14th, that Special Counsel Mueller, who is overseeing the investigation into Russia's role in the 2016 election, has now expanded the scope of the investigation to include whether President Trump himself attempted to obstruct justice. That's according to unnamed officials. So could Trump fire Mueller now? The legal answer is he could probably find a way. But what happens after that is unknown constitutional territory, and that's why this show exists. This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumconplaw.com, on Facebook, on and Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop collective. This show is your weekly appointment to add more constitution and Doomtree to your life. This week, we had tracks from Sims and Lazerbeak. We are a proud member of Radiotopia from PRX, a

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