

The Final Days

Roman Mars [00:00:00] For context, this was recorded on Monday, December 21st, 2020. On this episode, we talk a bit about Trump's pardon power and how he might use it. On the following Tuesday and Wednesday of the same week, he issued 41 pardons, including ones for Roger Stone, Paul Manafort, George Papadopoulos, his son in law's father, Charles Kushner, and four pretend soldiers who work for Blackwater who were convicted of killing 14 innocent people without provocation in Baghdad. We obviously didn't know about them at the time of the recording, but we talk about anticipating these kinds of disgusting pardons. There will be more to come, I'm sure. Okay. On with the show.

Elizabeth Joh [00:00:40] So on December 11th, the United States Supreme Court considered some extraordinary claims about the 2020 election. And it turns out they didn't want to hear them at all. So, this is the case of Texas versus Pennsylvania. Now, if you remember, and there's a lot that's been happening in December, but in the first week of December, the state of Texas filed a lawsuit directly at the United States Supreme Court. They challenged the election procedures in four swing states that Biden won--Georgia, Michigan, Pennsylvania, and Wisconsin. Now, Texas was asking the Supreme Court to stop these four states from casting their electoral votes for Biden. Instead, they wanted to have the state legislatures decide. Now understand what Texas is asking the Supreme Court to do in this case--to have the Supreme Court throw out millions of lawfully cast votes. You might remember what Trump said right after the death of Justice Ruth Bader Ginsburg: "I think this will end up in the Supreme Court, and I think it's very important we have nine Justices." And, of course, he got his wish. Justice Amy Coney Barrett was nominated and confirmed just before Election Day. Now, in the case of Texas versus Pennsylvania, the Supreme Court received more than a dozen amicus or friend of the court briefs. These are briefs filed by parties who are not directly involved in the case but want to weigh in. And in an important Supreme Court case, it's common to see dozens and dozens of such briefs. But if you consider what the claims are in this case and what Texas was asking for, the friend of the court briefs are alarming. They include a brief filed in support of Texas by more than 100 House Republicans and a brief in support of Texas filed by 17 Republican state attorneys general--those are the top lawyers representing the states. What were they asking for? They were all asking for millions of lawfully cast votes to be thrown out. And the attorney general for Pennsylvania, one of the defendant states in this lawsuit, said in his reply that the Texas request to the Supreme Court was nothing less than a "seditious abuse of the judicial process." But on December 11th, the Supreme Court, in a brief, unsigned order, said, "The state of Texas' motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution." And just two days later, Trump tweeted, "The fact that the Supreme Court wouldn't find standing in an original jurisdiction matter between multiple states and including the president of the states is absurd. It is enumerated in the Constitution. They just chickened out and didn't want to rule on the merits of the case. So bad for our country." What is that tweet talking about?

Roman Mars [00:03:36] That's a good question. I don't even know if Trump knows what that tweet is talking about.

Elizabeth Joh [00:03:41] Yeah, it definitely came from his account. I'm not sure that he tweeted it. But in any event, what's original jurisdiction? Let's start with that. When we talk about a court's jurisdiction, we're talking about the ability or power of a court to hear cases. And the term "original jurisdiction" refers to a court's ability to hear a case that is filed directly for the very first time with that court. So that means it's not coming from an appeal from another court or some prior proceeding elsewhere. Now, when it comes to the United

States Supreme Court, the vast majority of cases start somewhere else. They might start in a lower federal court, or they might start in the state courts. These are cases that have started elsewhere. These are not cases that are about original jurisdiction. But the Constitution says that the Supreme Court can have original jurisdiction for a small number of cases, including where the states are a party. So, in fact, most of the Supreme Court's original jurisdiction cases are usually about two states or more suing each other, and they're usually about land or water disputes. So, Texas versus Pennsylvania fits, right? Well, there was another problem. And remember, Trump also puts in that tweet something about "standing."

Roman Mars [00:04:52] Right.

Elizabeth Joh [00:04:53] So what's that all about? The Constitution also requires that federal courts can only hear actual "cases or controversies." Those are words from the Constitution itself. And the Supreme Court has interpreted that requirement, so there are some hurdles that lawsuits in federal court have to pass before they can be heard. And one of those hurdles is standing. So, the basic idea behind standing is that the party who files a lawsuit has to have some kind of injury, which in theory is caused by the party being sued. And it has to be a kind of injury that a court can do something about. So, when you have standing in your federal lawsuit, that doesn't mean you win your case. It just means you can have your case heard in the first place. So, the doctrine can get pretty complicated, but that's the basic idea. So, if a party lacks standing, a federal court will dismiss the case. And what the court is essentially saying is, "You just don't have the right kind of injury, and we can't look at the claims you're making." Lawyers will often say that the court "didn't reach the merits of the case," just like Trump says in his tweet. Now in Texas versus Pennsylvania, Texas was claiming somehow that the COVID related election procedures in these four states hurt Texas. That sounds like a weak connection, right?

Roman Mars [00:06:10] It does.

Elizabeth Joh [00:06:11] So that's the basic idea. The Supreme Court's really saying, "Texas, you don't really have an injury here." And if Texas were right--that a state could sue another state if that state supposedly acts in a way that's unlawful and does something that the state doesn't like--that means that any state could pretty much sue any other state for anything. And that's why the Supreme Court said in December, "No, Texas. You lack standing." And that's why it couldn't have its case heard at all. Basically, Texas is upset and outraged, but that's not a kind of legal injury that we would consider for standing purposes.

Roman Mars [00:06:50] Can you imagine if the standing was that low of a bar when it came to Twitter? like, if you just were outraged, you could sue.

Elizabeth Joh [00:06:57] That would be endless lawsuits. And the reason why the Texas versus Pennsylvania case comes out when it does is because, you know, the Trump administration is running out of time. So, the Supreme Court says, "You don't have standing." And then on Monday, December 14th, the electors in all of the 50 states met all over the country and cast their ballots. And when California's electors cast its 55 votes for Biden, at about 2:30 California time, it was official. Biden was the president elect.

Joe Biden [00:07:30] Our democracy pushed, tested, threatened, proved to be resilient, true, and strong. The Electoral College votes, which occurred today, reflect the fact that

even in the face of a public health crisis unlike anything we've experienced in our lifetimes, the people voted.

Elizabeth Joh [00:07:49] Now the election related cases, none of which really went Trump's way, seem finally to be winding down. And that means we're headed to the last days of the Trump presidency. So, it's a good time, I thought, for us to revisit a topic we wondered about at the beginning of Trump's term. What is Trump going to do with the pardon power?

Roman Mars [00:08:09] Oh my God. Here we go. This is What Trump Can Teach Us About Con Law--an ongoing series of definite length where we take the tweets and norm breaking actions of the 45th President of the United States and use them to examine our Constitution like we never have before. Our music is from Doontree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow remote learning student and host, Roman Mars. So, you and I did talk about pardons on episode three, but let's review a little bit the pardon basics just so we remind me of them.

Elizabeth Joh [00:09:11] Sure. Article II of the Constitution actually sets out the president's power to, quote, "grant reprieves and pardons for offenses against the United States, except in cases of impeachment." So, this power is often called the power of presidential clemency, and it just has a few restrictions in the Constitution itself. It can clearly only apply to federal offenses, and it can't be used to interfere with Congress's impeachment power. Now, state governors also have a similar kind of clemency power, but that power is something that comes from state law and usually from the state's constitution. But here we're only talking about what the federal Constitution gives to the president.

Roman Mars [00:09:54] Is the nature of a governor's pardon power similar, or does it tend to have more restrictions in state constitutions, just like as a general course?

Elizabeth Joh [00:10:03] So it varies state by state. The basic idea is it can be something like the president's clemency power. In some states, they seek guidance or must have the guidance of a clemency board. So, there are sometimes some restrictions that are not the same thing as what the president of the United States has to do. The president's pardon power can take many forms. For instance, there are reprieves that would delay the execution of a sentence. A commutation reduces a sentence or a fine that was originally imposed. And then there are full pardons, which can be given out to individuals, but they can also be given out to groups. And mass pardons are called amnesty. Now, Lincoln, of course, famously pardoned people who participated in the rebellion against the United States. And more recently, President Carter pardoned thousands of Vietnam draft evaders. Now, a full pardon essentially wipes out the legal consequences of the offense. The president does not have to wait for that person to be convicted or even charged at all. The Supreme Court made that clear in an 1866 case when they said, "The pardon may be exercised at any time after commission." So, when you hear the term "preemptive pardon," the idea here is that a pardon can happen even before there are any charges, let alone a conviction, that have been filed at all. And that pardon--once it happens--can't be revoked or modified by the next president. That is a pretty enormous power on the part of an American president. Now, as an administrative matter, there is now an office of the pardon attorney within the Justice Department. And the basic idea here is they're supposed to process the many thousands of pardon applications that come to the federal government. But there's absolutely no constitutional requirement that the president has to use that office or get an okay from that office or anything like that.

Roman Mars [00:11:58] So what does a pardon have to do or say for it to be valid? I mean, obviously, it has to specify if it's a commutation or a full pardon or something like that, I would imagine. But is there any other thing about it that needs to sort of adhere to any sort of form?

Elizabeth Joh [00:12:13] So as far as the content of a pardon, it's not totally clear what a pardon must say for it to be constitutionally effective. Now, as a matter of practice, most pardons are written pretty specifically in a way that describes exactly which crimes or actions they apply to. But there's no obvious prohibition on the president writing a very broadly written pardon, just covering all kinds of possible federal offenses.

Roman Mars [00:12:38] And so if you receive a pardon, does that mean there is an admission that you actually did the thing you need to be pardoned for?

Elizabeth Joh [00:12:47] That's a great question. This is generating a lot of confusion over the internet right now. So, does a pardon mean that you've just admitted to guilt? Well, not necessarily. So, a lot of recent commentary lately has pointed to one phrase in a 1915 Supreme Court case where the Court said, "A pardon carries an imputation of guilt--acceptance, a confession of it." Now, that case is called *Burdick versus the United States*. But it bears a closer look before you draw any conclusions from that particular phrase. George Burdick was a newspaper editor at the *New York Tribune*, and he refused to answer questions before a federal grand jury about his sources for an article on fraud that he was writing about the U.S. Customs House in New York. Burdick did something that everyone's heard about; he said, "I can't answer because my answer might incriminate me," which people are allowed to do. So, the prosecutor here said, "Hey, I have a solution. Let's have the president pardon him." So, the very next day, Burdick is handed a pardon from President Woodrow Wilson. Problem solved, right? Well, Burdick refused to accept the pardon, and so he continued to refuse to answer questions. And as a result, Burdick is convicted of criminal contempt for refusing to answer questions. And the reasoning here was, you know, since he's pardoned for any possible offense arising out of talking, he can't rely on any right to silence--he doesn't have it anymore. So, the Supreme Court takes up this case to answer what they call "the narrow question"--what's the effect of an unaccepted pardon? So, the quick answer is an unaccepted pardon isn't a pardon. It was Burdick's right to refuse it. So that's the legal answer. Burdick stands for a very narrow answer to a narrow question. The part they talk about--assumption of guilt--is just kind of a little extra thing, but it's not something that the Supreme Court was actually deciding. So, we can't really point to that case and say, "Well, the Supreme Court has definitively decided that when you are pardoned, you are guilty of something." Of course, you surely may be guilty of something, but that doesn't necessarily prove it. Now, social media has a different take on this maybe, but that's really the clear answer from the case.

Roman Mars [00:14:58] It really points to the precision of language that is required when you're doing a Supreme Court case, because, you know, they were not thinking of this other application--that accepting it meant you're guilty. It does in that sense. Like, it feels that way. But that's just one of those things that just, like, hangs out there ready to be used on the internet a hundred years later.

Elizabeth Joh [00:15:23] Absolutely. And it's one of the dangers of you just can't Google a phrase and think, well, the Supreme Court said it, so it's binding. Of course, there's a lot of things we have to pay attention to. What question were they trying to answer?

Roman Mars [00:15:34] So Burdick refused his pardon. But is there anyone who can't be pardoned, like, you know, according to the Constitution?

Elizabeth Joh [00:15:40] Well, no, as long as it's for a federal offense, the president can pardon anyone, even the members of his own family.

Roman Mars [00:15:48] Yeah, that's what I was going to follow up with.

Elizabeth Joh [00:15:48] Yeah, there's nothing in the Constitution that prevents this from happening, so anybody is fair game. And that's even true about the motivation. So, if a pardon is given for corrupt or illegitimate reasons--you know, let's say a president gives a pardon to buy someone's silence about criminal behavior or even takes money for a pardon--that wouldn't undo the pardon itself, at least as far as our experiences so far. It can definitely be a crime to try and bribe your way to a pardon. And a president who grants a corrupt pardon like this, in theory, could face theoretically a criminal investigation. But that doesn't mean that the pardon itself would be undone. So, there might be collateral consequences from a corrupt pardon, but it doesn't seem to affect the pardon itself.

Roman Mars [00:16:36] That's really a power built on either a trust of that as an office or maybe the infallibility of kings or something. Like, it seems to be built on something that is not present today.

Elizabeth Joh [00:16:49] It's definitely built on an assumption that anything a president does is in the public interest. So, with that, let's get to Trump. Historically, presidents have granted pardons and commutations at a higher rate just as they're about to leave office than they have done during the rest of their term.

Roman Mars [00:17:09] Sure.

Elizabeth Joh [00:17:10] And very often presidents tend to leave controversial pardons to the very last minute. And so, it's certainly not the case that Trump would be the first president to issue a controversial pardon; there's been lots of those in the past. A lot of people are expecting that Trump will use his pardon power in the same ways that he's used his other constitutional powers or attempted to for the last couple of years--in norm breaking ways, in ways that we haven't seen before. Now, Trump has already used his clemency power to help people in his political circle. Now, you might remember in July, Trump commuted the sentence of his longtime adviser, Roger Stone.

Newscaster #1 [00:17:49] Roger Stone was due to report to prison next week for lying to Congress and witness tampering for a stay of more than three years. But the president just commuted the sentence of his longtime confidant so he's not going to go to prison at all. White House calling him a victim of the Russia hoax tonight...

Elizabeth Joh [00:18:04] Remember, Stone had been convicted of several felonies, including obstructing a congressional investigation, witness tampering, and lying to Congress. You might remember that the career prosecutors in Stone's case quit in protest in February after senior officials at the Justice Department decided against a harsher sentencing recommendation. Even after that, though, Stone was facing a 40-month prison sentence, which was wiped out by Trump's commutation. In other words, what you have here is a close political ally of the president, who refused to reveal information about the president, was convicted, and then was essentially rewarded with a commutation. And Stone was the first person directly tied to Trump's political circle who was rewarded or at

least benefited from Trump's clemency authority. But I think it's the recent pardon of Michael Flynn that suggests what might happen in the next couple of weeks before Trump's term comes to an end.

Roman Mars [00:19:06] I mean, one of the things that was funny about the Flynn pardon was when the Flynn pardon happened, I thought the Flynn pardon had already happened.

Elizabeth Joh [00:19:12] Yeah, I think that just speaks to our experience of the year. So, yeah, it's a really convoluted story. So, remember, Michael Flynn is Trump's former national security advisor. So, here's sort of a quick refresher on what happened to him. He was dismissed in February of 2017 after the White House found out that he had misled them about his Russian contacts. And remember that in 2016, the FBI was trying very hard to understand the nature of Russian interference in the presidential race and whether Trump's campaign had any involvement in it. And it was Flynn that Trump referred to in that now famous conversation with former FBI Director James Comey.

James Comey [00:19:53] I've seen the tweet about tapes. Lordy, I hope there are tapes. I remember saying, "I agree he's a good guy" as a way of saying I'm not agreeing with what you just asked me to do. Again, maybe other people would be stronger in that circumstance, but that's how I conducted myself.

Elizabeth Joh [00:20:11] Remember, Comey said that Trump asked him to end the FBI investigation of Flynn. Remember, he said, "I hope you can see your way clear of letting this go, to letting Flynn go." And the FBI didn't. In December of 2017, Flynn pleaded guilty to lying to the FBI about his conversations with Sergey Kislyak, the Russian ambassador, during that transition period before Trump became president. That's not the end of Flynn's case--far from it. In January of 2020, Flynn tried to withdraw his guilty plea. He had fired his original lawyers and hired an unknown lawyer named Sidney Powell. Then, on May 7th of this year, the Justice Department moved to drop its federal criminal case against Flynn. Now, Trump had been tweeting a lot this year with complaints that the FBI had mistreated Flynn. But the career prosecutors in Flynn's case--the apolitical ones--had said that the conversations Flynn lied about were very important parts of the Trump-Russia investigation. And it's really unusual for the government to try and throw out a case after the defendant has already pleaded guilty. But does that end the case? No, it doesn't automatically end the case. The judge has to sign off on it. But the judge in Flynn's case, Judge Emmet Sullivan, didn't immediately allow the Justice Department to drop the case. Instead, he appointed another judge, a retired federal judge, to review whether the Justice Department's move to drop the case was proper or illegitimate. And in June, that retired judge's answer? No. Judge Gleeson--that's his name--he issues a 73-page report. He accused the Justice Department of a gross abuse of prosecutorial power--that the government has engaged in highly irregular conduct to benefit a political ally of the president. And that's the end, right? Not even close. Flynn tries to get the federal appeals court to order the judge to dismiss his case, but then loses in August. And the day before Thanksgiving, Trump tweeted, "It is my great honor to announce that General Michael T. Flynn has been granted a full pardon. Congratulations to General Flynn and his wonderful family. I know you will now have a truly fantastic Thanksgiving." So, Flynn's case is pretty remarkable. He lied to the FBI about conversations he'd had with a Russian diplomat at a time when there was an active investigation about Russian interference in our elections. And when Trump's Justice Department tried to get rid of the case where the defendant had already pleaded guilty, the trial judge said, "Something's not right." And the judge he appointed to take a look at it said, "This stinks of political corruption." And the federal appeals court said, "No, we are not going to get involved here and force an outcome." And

Trump's response was... a full pardon. And on December 8th, Judge Sullivan--that's the trial judge here--said he had no other choice and dismissed the case. But in doing so, he made it pretty clear in his opinion that he wasn't happy. So maybe, Roman, you could read this one portion of his opinion for us.

Roman Mars [00:23:22] Here it goes. "The history of the Constitution, its structure, and the Supreme Court's interpretation of the pardon power make clear that President Trump's decision to pardon Mr. Flynn is a political decision not a legal one. Because the law recognizes the president's political power to pardon, the appropriate course is to dismiss this case as moot."

Elizabeth Joh [00:23:43] Now, Flynn's case might be a clue to what Trump might be looking to do next--looking to help out people within his circle and to cross all kinds of lines that we used to think of as normal. So, we could categorize some potential pardons this way, right? There might be what we might call "Fox News pardons." These are maybe Trump pardoning people who are popular in right wing media, where it seems like a motivating factor is just to anger Trump's opponents. So, these are people like Dinesh D'Souza, who's already pardoned.

Dinesh D'Souza [00:24:16] Lincoln was elected to unite a country and stop slavery. Democrats smeared him, went to war against him, assassinated him. Now their target is Trump...

Elizabeth Joh [00:24:29] And former Arizona Sheriff Joe Arpaio. Both of them received pardons. They were very popular in right wing media. Then you could have what you might call "deep state pardons" to try and strike back at the intelligence agencies because Trump's just mad about them. These would include potential people like Julian Assange, the founder of WikiLeaks, Edward Snowden, who was a whistleblower leaking classified information about the NSA's mass surveillance program. There are definitely civil libertarians--non-Trump supporters--who have supported the possible pardons of these people, too. But definitely Trump could have a motivation to pardon them.

Roman Mars [00:25:04] And that would be just to irritate the State Department in some way?

Elizabeth Joh [00:25:08] Exactly. Exactly. Then there are kind of reward pardons--reward uses of the clemency power--people who stuck with the president, stayed silent. So, Roger Stone's commutation fits into that category. And then there are what you might call "protection pardons"--people who are in possible future legal trouble. And if they're in legal trouble, they might cooperate and reveal information that Trump would be upset about. So, The New York Times has reported that Trump has already discussed pardons for his three eldest children, Don Jr., Eric, and Ivanka, and for his son in law, Jared Kushner. Now, if you remember, Don Jr. was investigated by the special counsel for contacts he'd had with the Russians about damaging information that they had on Hillary Clinton in 2016. Kushner--among the things that have been reported--he omitted information about his foreign contacts for his security clearance. And as an aside, it's a federal crime to provide inaccurate or incomplete information for somebody to check. It's not as clear why Ivanka or Eric would need a preemptive pardon. And of course, we just don't know the whole story of what might emerge. And remember, as you and I just talked about, there's no bar on a president pardoning family members. In 2001, President Clinton pardoned his half-brother, Roger, for a drug conviction. But that's not even close to what we're talking about here.

You know, Roger Clinton had nothing to do with what Clinton was doing at the end of his presidency.

Roman Mars [00:26:35] He'd already served his sentence, too.

Elizabeth Joh [00:26:37] That's right. That's right.

Roman Mars [00:26:38] That's interesting.

Elizabeth Joh [00:26:39] There's also Trump's personal lawyer and former New York City Mayor, Rudy Giuliani. Giuliani has been a key figure in pushing these evidenceless, meritless claims about voting fraud during the election. Now, Giuliani might face his own criminal liability--not about the election, but remember, federal prosecutors were looking into his business dealings in Ukraine and whatever role he might have had in getting rid of the U.S. ambassador there. Remember, the whole Ukraine affair was a central part of Trump's impeachment.

Roman Mars [00:27:09] Yeah.

Elizabeth Joh [00:27:10] Then there are other people--possible people--in Trump's orbit, such as Allen Weisselberg, who's the chief financial officer of the Trump Organization. He's been investigated for any possible criminal activity that the Trump Organization might be involved in.

Roman Mars [00:27:28] I think a lot of people are expecting the feds to slap handcuffs on Trump as soon as he leaves the dais on inauguration day. What are some of the things that he might be facing in terms of criminal charges?

Elizabeth Joh [00:27:42] Well, Trump is facing a lot of post-presidential legal trouble. Remember, you and I have talked about the kinds of special legal protections or immunity that any president has or doesn't have. So very briefly, remember, the Supreme Court has said that the president can be sued for things he did before and unrelated to the presidency. But the president can't be sued, according to the Supreme Court, for things that he does as president of the United States. And even though the Supreme Court has never ruled on this directly, it's been the norm that a sitting president can't be criminally prosecuted. This has been long-standing Justice Department policy. And again, remember, that's the reason why the Mueller report--the special counsel's report--was so careful and unfortunately kind of confusing about why it would not come to a conclusion about whether Trump had committed the crime of obstruction of justice during the federal investigation of Russia's attempts to interfere in our elections. That's because you can't accuse someone of a crime when they're actually not going to be prosecuted for a crime and can't defend themselves. When Trump's term ends, however, that policy about not indicting a sitting president ends, too. And so does Trump's pardon power. So, here's what we know so far. Just in the state of New York, his old haunt, Trump faces a couple of civil lawsuits. So, for instance, Jean Carroll has accused Trump of sexual assault in the 1990s. Trump called her a liar, and she sued him for defamation. The case has been ongoing. A very similar defamation suit was also brought by Summer Zervos, former contestant on *The Apprentice*. That case is also ongoing. Now state and local prosecutors in New York have also reportedly been investigating Trump, his family members, and the Trump Organization. The New York state attorney general reportedly is involved in a civil fraud investigation about whether Trump and his company misrepresented the value of their assets to try and minimize their taxes. And the Manhattan D.A., Cyrus Vance, is involved

in a criminal investigation of some type regarding Trump, possibly his family members, and the Trump businesses--maybe about insurance or financial fraud. They haven't disclosed the details. And that fraud might involve the hush money payments made to two women who allegedly had affairs with Trump right before he was president. These payments were made supposedly to buy their silence. Also, there may be some investigation of false information on loan applications regarding the Trump businesses. Now, remember, this case has already gone up to the Supreme Court for at least one trip already. You remember that Vance wanted financial records regarding Trump, his family, and his business? And actually, you and I talked about this. The Manhattan D.A. sought them from Trump's accounting firm. But Trump argued, "Look, it's fine for there to be a criminal investigation. But because I'm a sitting president--I am currently president--I'm absolutely immune from having to respond to a subpoena right now." And the Supreme Court's response was, "No, Mr. President. You're not absolutely immune from a criminal subpoena seeking your papers." So, he lost that round. Now, none of these cases--state and local cases--can be reached by Trump's pardon power. But there are also some potential federal cases. We know that there is the federal prosecution of Michael Cohen, Trump's former personal lawyer. Now, remember, he pleaded guilty to crimes involving those hush money payments. And he was acting for someone named as Individual 1 in court filings, but which everybody understood to be Trump. Individual 1 because the idea was the sitting president could not be indicted or accused in any way. And there are certainly concerns that there are matters that might emerge later about possible federal offenses that we won't find out about until after January 2021. And Individual 1 loses his presumptive presidential immunity as soon as his term is over. Now, just a few weeks ago, Fox News show host Sean Hannity said on his show that Trump needs to pardon his whole family and himself.

Sean Hannity [00:31:56] And if that's what they want to do, if Biden ever became president. I tell Trump, "Pardon yourself and pardon your family." These people are based on a phony dossier...

Roman Mars [00:32:06] Okay, so we know that he can pardon his whole family. That's been the precedent. Let's revisit this nightmare scenario that we talked about a long time ago. Can he pardon himself?

Elizabeth Joh [00:32:17] Well, Trump certainly thinks so. In 2018, he tweeted, "As has been stated by numerous legal scholars, I have the absolute right to pardon myself. But why would I do that when I have done nothing wrong?"

Roman Mars [00:32:30] Oh. Of course.

Elizabeth Joh [00:32:33] Well, the constitutional answer is we actually don't really know. No president has ever tried to pardon himself. And there are serious, respectable scholars who say "yes" and also who say "no." The easiest argument for saying that self-pardons are allowed is to point to the Constitution itself. It doesn't impose any limit, it doesn't exclude the president, so they're allowed. That's a pretty easy answer. The arguments against self-pardon are kind of trickier. It could be based on policy. How can the president be the judge of himself? Or there's a text-based argument; you could say that the Constitution's use of the word "grant" means that pardons can only be given to another person by the president. So that excludes the president. Or history--like the founders would never have allowed this to happen or never intended self-pardons to happen.

Roman Mars [00:33:28] Yeah.

Elizabeth Joh [00:33:29] Then there's the kind of, you know, absolute out-there kind of theories about, "Well, maybe Trump doesn't even need to do this. He could temporarily declare himself disabled under the 25th Amendment, get Acting President Pence to pardon him, and then immediately take back his powers." But that seems pretty far fetched, and it doesn't sound like Trump at all.

Roman Mars [00:33:49] No, that's not his style.

Elizabeth Joh [00:33:51] Yeah. So, I think all we can say is that Trump might try to pardon himself. It would certainly upset people, and it would be pretty nearly impossible to challenge. And the reason why is that no one would really have standing to challenge a self-pardon. And in fact, the only way it could come up is if Trump himself were to be prosecuted and he would raise his own self-pardon as a defense.

Roman Mars [00:34:22] He would have standing in that case.

Elizabeth Joh [00:34:25] Right. He would be the defendant. And of course, all of these scenarios assume that a Biden Justice Department would try and prosecute ex-President Trump. And there's going to be some pressure from some portions of the Democratic Party to do that. But a Trump prosecution, of course, risks Trump remaining the center of national attention, which is kind of where he likes to be.

Roman Mars [00:34:44] Yeah.

Elizabeth Joh [00:34:45] And then in recent days, we've now learned that the pardoned Michael Flynn has been in the White House reportedly, meeting with Trump, where Trump discussed naming Sidney Powell, Flynn's defense lawyer, as a special counsel to investigate voter fraud. You might remember that she has been the lawyer saying that there is a plot involving Venezuela, Hugo Chavez, and rigged voting machines. Trump also reportedly asked Flynn about his talking points on right wing media and his call to use the military to rerun the election.

Newscaster #2 [00:35:24] He could order-- Within the swing states, if he wanted to, he could take military capabilities, and he could place him in those states and basically rerun an election in each of those states. I mean, it's not unprecedented. I mean, these people out there talking about martial law like it's something that we've never done. Martial law has been instituted 64 times.

Elizabeth Joh [00:35:47] And, you know, the fair thing to say is that in the next couple of weeks, we're likely to see at least a few strange, bizarre things that might happen. But they won't be unexpected.

Roman Mars [00:35:59] When I hear people expressing the opinion that Trump should use the military to rerun the election in states where he lost, I have to admit, at this point, it just feels like we're not picking up on it as much as we used to as a serious threat because we're just anticipating him going and we're all just collectively sighing and just going, "Okay, well, have your dumb tantrum. And this will all be over with in under a month." I don't know. How do you see those kinds of statements, you know, by the president or on behalf of the president?

Elizabeth Joh [00:36:38] Oh, I think they're still dangerous, even if they're ineffectual. And the way I like to explain it to people is, you know, there's a reason why in criminal law we punish attempts--even ridiculous attempts--because we're always worried about the kind of person who wants to go through with something. I mean, to expand on that, in criminal law, we don't say, "Well, we only prosecute the successful bank robbers." We prosecute also people who totally failed and didn't rob the bank because we realize that they're a danger to other people. They're a danger to the public interest. And if you take that position broadly, it is a huge problem when the president is totally--in a way that seems goofy and ineffectual--saying things that are damaging. I don't think the right response is, "Well, he's never going to do it. He can't possibly do it, so who cares?" I think the answer has to be there's something wildly dangerous about this idea just being floated around, even in, you know, dark parts of the internet--on Reddit or Parler or whatever. There's literally millions of people who think that these ideas are okay and worth discussing.

Roman Mars [00:37:47] Okay. We will keep vigilant for just a little bit longer.

Elizabeth Joh [00:37:51] We'll make it. The year is almost at its end.

Roman Mars [00:37:55] All right. Thanks.

Elizabeth Joh [00:37:57] Thanks. Be well.

Roman Mars [00:38:07] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. Thanks to the electorate, we're going to be changing the focus of this show a little bit. But we do plan to keep making it. See you in 2021. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.