

What Roman Mars Can Learn About Con Law Gag

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Roman Mars [00:00:29] Okay. It is Friday, October 27th at 11:25 a.m. And what are we going to be talking about today?

Elizabeth Joh [00:00:36] All right. If you were a kid in the 1960s, the very first episode of a very popular TV series began with this voiceover.

Roman Mars [00:00:46] "The name? Dr. Richard Kimble. The destination? Death row state prison. The irony? Richard Kimble is innocent, proved guilty. What Richard Kimble could not prove was that, moments before discovering his murdered wife's body, he saw a one-armed man running from the vicinity of his home. Richard Kimble ponders his fate as he looks at the world for the last time, and he sees only darkness. But in the darkness, fate moves its huge hand."

Elizabeth Joh [00:01:14] That's the opening scene of the very first episode of *The Fugitive*, which aired from 1963 to 1967. And the show told the story of a doctor wrongfully convicted of his wife's murder. He escapes from custody and searches for the real killer, a mysterious one-armed man. And the show was allegedly inspired by a true-life story--the trial of Dr. Sam Sheppard. Now, Sheppard was accused of having murdered his pregnant wife, Marilyn Sheppard, in their home in Ohio on July 4th, 1954. Sheppard told the police that he had struggled with a stranger he'd discovered in their bedroom. And according to Sheppard, the stranger escaped. But the police always considered Sheppard the prime suspect. And while the TV series focused on the fugitive's pursuit of the mysterious one-armed man, in real life, it was Sam Sheppard's trial that became the focus of attention. And from the beginning of his trial, there was intense media interest. A coroner asked Sheppard to reenact what he remembered at Sheppard's home in front of the police and a group of reporters. The coroner also demanded that Sheppard appear at an inquest held in a school gym that was broadcast live. And in attendance were several hundred spectators and a large group of reporters and photographers. The local papers also published the names and addresses of everyone chosen as a potential juror. And during the trial, a special seating arrangement was made so that 20 reporters could sit just behind the counsel table. On the first day of trial, jurors were taken to the scene of the murder, and hundreds of reporters and onlookers showed up to watch them. Sheppard was eventually convicted for second degree murder. But in 1966, the United States Supreme Court described the nine-week trial of Sheppard as having been tainted by "massive, pervasive, and prejudicial publicity." That atmosphere was so harmful to his case that it violated Sheppard's constitutional rights. He deserved a new trial. That "carnival atmosphere," as the Court described it, could easily have been avoided had the judge done something about it. The judge could have been stricter with the reporters. The judge could have insulated the witnesses. The judge could have protected the jurors. And more specifically, the judge might have, in the words of the Supreme Court, "prescribed extrajudicial statements by any lawyer, party, witness, or court official on any matter that might have hurt Sheppard's case in any fundamentally unfair way." In other words, the

judge could have imposed a gag order or controlled the intense publicity in some other way. Now, the Supreme Court's decision in the famous case of Sheppard versus Maxwell is well-known for recognizing that defendants sometimes need protections against inflammatory public statements so that they can receive a fair trial. That can include a gag order. But what if you have inflammatory statements that might interfere with a criminal trial that are coming from the defendant himself? And what if that defendant is Donald Trump? Can a judge force him to shut up? Time to find out.

Roman Mars [00:04:35] 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 ways extremely patient judges are trying to minimize the former president's bullying tactics and use them to examine our Constitution like we never have before. Our music is from Doomtree Records, our professor and neighbor is Elizabeth Joh, and I'm your fellow student and host, Roman Mars.

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Elizabeth Joh [00:05:55] So, Roman, why don't we start by reminding everyone about Trump's criminal case?

Roman Mars [00:05:59] Which one?

Elizabeth Joh [00:06:01] Well, not the Florida one, not the New York one, not the Georgia one, but the one in Washington, D.C. dropped by a special counsel, Jack Smith, and his team. And last August, a grand jury in the District of Columbia voted to indict Trump over his alleged attempts to overturn the 2020 election results. So why don't we just recap what the case is about? There are four counts. One charges Trump with conspiracy to defraud the United States. And this is basically accusing Trump of trying to overturn the results of the election through a wide-ranging scheme. So doing things like pressuring state legislatures and officials to change electoral votes in places like Arizona and Pennsylvania, trying to organize fraudulent slates of electors, pressuring the Justice Department to conduct made up election crime investigations, pressuring Vice President Pence to alter the results of the certification on January 6th, and continuing to make false claims of election fraud, even as it became clear that a mob riled up by Trump was attacking the Capitol. Now counts two and three charge Trump with obstructing an official proceeding and conspiracy for the same thing. And these counts accused Trump of trying to disrupt the session of Congress that certified Biden as the winner of the 2020 election. And this particular charge is one that federal prosecutors have used many, many times against hundreds of people who are part of the January 6th attack on the Capitol. And then finally, count four accuses Trump of conspiracy to violate civil rights. This final count really accuses Trump of depriving voters of their legitimate votes because he was trying allegedly to alter the real legitimate votes in some of those key states in the 2020 election. So, this case, like the Georgia criminal case, is accusing Trump of trying to subvert the democratic process. But unlike the Georgia case--and of course, we've talked about RICO before, which is this big, sprawling, and somewhat controversial criminal statute that accuses Trump of being part of a vast, sprawling, criminal enterprise--that's really not at the heart of the federal case. Instead, Jack Smith and his team have made some very

specific choices. Trump is only charged with the counts that I've just described. He's not being charged with incitement or seditious conspiracy charges that maybe would be more easily attacked by Trump's legal team. And Smith has decided to charge Trump and Trump only in this indictment. Now, in the indictment, you actually see some quotes that are quotes of Trump's own tweets, including maybe the most famous one on December 19th, where he announced, "Big protest in D.C. on January 6. Be there. Will be wild." And it's what Trump did online that takes us back to these gag orders. In September, the special counsel's office asked the judge in the D.C. case, Judge Tanya Chutkan, to impose on Trump an order that restricts certain extrajudicial statements. But we can just call them a "gag order."

Roman Mars [00:09:11] And so what are the reasons for the order in Trump's case?

Elizabeth Joh [00:09:15] Well, the government says, "Look, ever since the day Trump was indicted, he's been publicly attacking everybody associated with the case." The day after his arraignment, he posted on Truth Social, "If you go after me, I'm coming after you." He attacked the prosecutors. He called them a "team of thugs with the deranged Jack Smith." He attacked a bunch of potential witnesses, like his former attorney general, Bill Barr. He called them "slow thinking" and "lethargic." He attacked his former vice president--called him "delusional"--another potential witness. He said Pence "made up stories which are completely false." He said of Mark Milley, another potential witness, and the former chairman of the Joint Chiefs of Staff, that he committed treason and perhaps should be executed. He attacked what he called the "filthy and crime ridden embarrassment that was Washington, D.C.," which is, of course, where the jurors in this case will be drawn from. And Trump even attacked Chuck and the judge, calling her a "biased, Trump-hating judge" and a "fraud dressed up as a judge." Now, the government's argument is that these posts and statements are intimidating, threatening, and will interfere with the criminal case. And they ask Chutkan for a broad gag order that would ban Trump from making statements about the identity, testimony, or credibility of potential witnesses and any inflammatory remarks about any party connected to the case. And as you can imagine, Trump's lawyers have argued that no gag order ought to be imposed at all. And on October 17th, Chutkan did, in fact, issue a gag order. She didn't give the government everything that they asked for. But instead, she said that Trump's statements did, in fact, pose what she called a "significant and immediate risk" that first, witnesses would be intimidated or influenced by the potential of harassment, and that two, attorneys, public servants, and other court staff might be targets for harassment because of Trump's posts. So, on the specifics, the actual gag order that she did in fact allow tells Trump that he can't target Jack Smith, his staff, the court staff, or any reasonably foreseeable witness for the substance of their testimony.

Roman Mars [00:11:30] Those are the things he can't do. What can he do?

Elizabeth Joh [00:11:33] Well, even with the gag order, he's still free to say a lot. It means that he can still attack President Biden. He can attack the Justice Department. He can say the whole prosecution is politically motivated. He can say the system is rigged. Under the terms of the gag order, he's even allowed to attack the judge herself.

Roman Mars [00:11:52] So how does this jive with, you know, the First Amendment and things like that that we hold sacred?

Elizabeth Joh [00:11:58] Well, that's kind of the problem. The law here is unclear. So, the Supreme Court has decided that criminal defendants do have a right to be free from extrajudicial--that's outside of the proceedings--statements that will hurt their ability to have

a fair trial. That's the concern in the fugitive case--Sam Sheppard's case--that it was really hard to see how any juror could be impartial because the Supreme Court said that was a "carnival atmosphere trial." And courts definitely have a duty and the power to ensure that this kind of prejudice doesn't hurt or criminal defendant's due process rights. Now, in other cases, the Supreme Court has also said that there are strong presumptions against barring the press from reporting on what happens in courtroom proceedings. So, for instance, in a 1976 case called Nebraska Press Association versus Stuart, the Supreme Court decided that there was a First Amendment violation when a state court barred journalists from reporting on a mass murder in a small town in Nebraska. And even though the gag order was limited--it was only supposed to last until the jurors in the case were selected--the Supreme Court said that this ban on speech, what we call a "prior restraint," went too far, even if it was motivated by the concern that the defendant have a fair trial. And in the Nebraska case, the Supreme Court said that one of the main purposes of the First Amendment is to prevent against prior restraints on the press. So, the Court has made it very clear that when it comes to prior restraints on speech and publication, these are the "most serious and least tolerable," that's the Court's words, "interferences with First Amendment rights." So, in other words, it has to be a pretty extraordinary case to impose a prior restraint on the press that would be permitted under the First Amendment. But I think you can see the problem here with Trump, right?

Roman Mars [00:13:50] Well, he's not the press, and he's actually attacking the Court.

Elizabeth Joh [00:13:54] Yeah, that's right. It doesn't really fall under these two categories--these pretty well-established categories. Judge Chutkan has not barred the press at all under the terms of the gag order. And she's certainly not trying to shield Trump from any prejudicial comments made by other people. In fact, it's the opposite, right? She's trying to protect everybody else from Trump. So, there isn't really any direct Supreme Court decision on that kind of case. The Supreme Court has never decided a case where a court has imposed a gag order on one of the parties in the case and has decided whether or not that's permissible or at least to what are the circumstances under which it's permissible.

Roman Mars [00:14:33] So if the Supreme Court has never sort of weighed in on a case of whether or not a gag order can be applied to a defendant, like, how do you know if it's constitutional or not?

Elizabeth Joh [00:14:44] Well, it's hard to say, right? It sort of depends, like many, many other instances, because on the one hand, the things that Trump has posted and personally said in front of reporters--they're pretty disturbing, and they are pretty vile. But Trump's own arguments aren't frivolous either. That's the problem. They're pretty serious, or at least some of them are serious, because his lawyers say, "Look, Trump isn't just any old criminal defendant. He's running for president against Joe Biden." And political speech is definitely a category of speech that the Supreme Court says is highly protected speech. And remember, a core part of Trump's campaign message--even if you or I don't agree with it or think it's a complete lie--is that this is a politically motivated prosecution of President Biden's opponent in the next election. And so, Trump's argument is that "Look, if Biden can attack me with political speech, then I have to be able to respond. You can't silence me in my core political speech." And, of course, you know, even if his nonstop stream of attacks are disgusting or vile or we absolutely violently disagree with them, he actually has a First Amendment argument that's not frivolous. It's serious. In fact, Judge Chutkan has acknowledged that even though Trump's attacks are potentially dangerous,

threatening, intimidating, another important consideration for her was his rights as he runs for political office.

Roman Mars [00:16:08] Yeah. Well, that's why, you know, Biden wasn't part of the gag order.

Elizabeth Joh [00:16:13] Biden wasn't part of the gag order. That's right. But I still think there are potential problems with the actual gag order that she imposed.

Roman Mars [00:16:19] Okay. Like what?

Elizabeth Joh [00:16:20] Well, we can think of Chutkan's order in Trump's case as potentially unconstitutional in a couple of ways. First, there's the general argument that she silenced a political candidate about the content of his political speech. So, no matter what he says, if a lot of what he is saying is about political speech, that is protected as a matter of the First Amendment--and that includes criticizing government officials even in a really ugly way. That kind of sounds like the sort of speech that maybe we shouldn't be prevented from making--the ability to say there is something wrong with this government official. And second, there's the argument that the gag order is just too broad, even if some parts of it are okay. So, remember the order. It says, "Don't attack the special counsel or his staff. Don't attack the court staff. Don't attack any potential witnesses or undermine their credibility." But it's really hard to see how Trump's attacks are going to prevent him from getting a fair trial, right? That's one of the core concerns. Is it likely that if Trump attacks Jack Smith or his prosecutors--are they going to be deterred from prosecuting him? Doesn't seem very likely. Is it likely that what Trump has said since his indictment in the Washington case--is that going to prejudice any potential jurors? I mean, he has been tweeting and posting and talking since he was president himself and, in fact, before he was president. So, there's the problem of that. And then the gag order about potential witnesses is maybe a bit harder because arguably, when he says, "If you go after me, I'm coming after you," might be considered some kind of intimidation. But so far, the witnesses he's attacked are people like Bill Barr and Mike Pence. They're really prominent public figures. Are they really intimidated by his bluster? Maybe it's just a lot of theatrical drama.

Roman Mars [00:18:16] I mean, I don't know if that's significant in the case of a trial, but everyone seems to be intimidated by his bullying. Yeah.

Elizabeth Joh [00:18:21] Yeah, but in a way--I hate to say it or to put it this way--we're all sort of used to his bullying tactics, too. And that's part of the problem. Maybe it's just a lot of theatrics. And so, of course, if Trump were to actually direct immediate violence against people through his posts or things he said to the press, then he'd be doing something criminal and that would be a different problem altogether. But, you know, if you'll notice, he doesn't ever really do anything. He never gets very, very close to that line. And so that's sort of the core problem here. He's saying things that a lot of people find absolutely disgusting. And if an ordinary criminal defendant would do it--well--I'm not sure that they would be given this much leeway. But he is a former president of the United States, and he is running for reelection. And I think that's part of the key legal and constitutional problem. And, in fact, the ACLU has written a friend of the court brief in support of Trump in this case.

Roman Mars [00:19:15] Oh no! ACLU, how could you?

Elizabeth Joh [00:19:17] That's right. The ACLU admits in their brief, "Yeah, the stuff he says is pretty disgusting." But in their view, Trump retains a First Amendment right to speak and the rest of us retain a right to hear what he has to say. So, I think it's kind of unclear whether Chutkan order has struck the right balance between recognizing Trump's speech rights and using the court's authority not just to have a trial that's fair for Trump but an orderly trial that's not chaotic in any other way. Now, Trump has already notified Chutkan that he's going to appeal a gag order to the appeals court. And Trump asked Chutkan to put the order on hold while he appeals. And she agreed to do that, at least temporarily. But then here's the problem. After she suspends the gag order temporarily, on October 24th, Trump posted on Truth Social an attack on Mark Meadows, his former chief of staff. There had been this reporting that Meadows had spoken to the special counsel and in fact testified before a federal grand jury in exchange for a grant of immunity. And Meadows told the special counsel's office that he kept telling Trump after the election that there was no evidence for Trump's voting fraud claims. This is in direct contradiction to what Trump kept saying about Meadows and Meadows supporting and agreeing with him. So, Trump then posts that Meadows, who is a potential witness in the D.C. case, of course, was a "weakling and a coward." So, remember, the gag order said he wasn't supposed to comment on potential witnesses. And so, after this, the special counsel filed another legal brief, and they relied on this post to argue not just that Chutkan should re-impose the gag order, but they said something else. They said that Chutkan should modify the conditions of Trump's release. So he is, of course, free in the world right now. But he has to abide by certain conditions. So, the conditions of his release are those things he has to do in order to be free pending trial. So, they're saying, "Look, why don't you make compliance with the gag order itself as a condition of his release?" And that would make more enforcement power or bring more enforcement power to the gag order.

Roman Mars [00:21:30] It certainly would. So, it means they could put him in jail if he violates the gag order?

Elizabeth Joh [00:21:35] Well, that's one of the theoretical punishments that he could face. Yeah. And of course, this is only one of the two gag orders against Trump. Should we talk about the other one?

Roman Mars [00:21:45] Yeah, sure. Let's do it.

Elizabeth Joh [00:21:46] Okay.

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Elizabeth Joh [00:22:18] So the New York Attorney General, Letitia James, has brought a state civil fraud case against Trump and his family businesses in the state of New York. And the lawsuit accuses Trump of fraud. And the idea here is that Trump has fraudulently inflated his net worth to receive favorable loans from banks. And in the New York case, the judge, Judge Arthur Engoron, has already found that Trump is liable for fraud. So, this is really about, you know, what he owes or what the penalty should be. But Trump has already called the judge "deranged." And the trial in the New York case has already started. And on the second day of trial, Trump posted on Truth Social a picture of the

judge's permanent clerk standing next to Democratic Senator Chuck Schumer. And Trump mocked her as "Schumer's girlfriend." And then this woman, who is not a public official--she's a clerk for Judge Engoron--he linked to the poor woman's Instagram account here. And there is a picture of her at some event where the clerk happened to have her picture taken next to Schumer. They don't know each other. She just attended some sort of political event. But predictably, Trump supporters saw this post and then began attacking her and harassing her, of course. Now one piece of common knowledge among lawyers is that you never, never attack the judge's staff in a case before the court. Not ever. Not only can the staff make your life miserable, but I think it's important to know that judge's chambers are typically small, and the permanent staff are, like, the judge's family. So, when you attack a clerk, you're attacking the judge's work family. This is dumb. So, Judge Engoron hears about this. He's enraged. He orders the post to be deleted. But then Engoron issued a gag order on Trump. And it only said that Trump was "forbidden from speaking publicly about any members of my staff." Then just a few weeks later, Engoron found out that the picture was never removed from Trump's campaign website. It was taken down from Truth Social, but it still remained on the campaign website. So, on October 20th, Engoron said, "Look, you violated the gag order. I'm fining you \$5,000." He's mad. But he says, "Look, Trump represented that this was inadvertent. So, this is the first time. Don't do it again." But then he did it again.

Roman Mars [00:24:47] Yeah.

Elizabeth Joh [00:24:48] October 25th was another day of trial. It was the second day that Michael Cohen, his former lawyer, testified at the fraud trial. And during a break in the trial, Trump made a statement before reporters in the hallway outside of the courtroom. And Trump said, "This judge is a very partisan judge with a person who's very partisan sitting alongside him--perhaps even more partisan than he is." So, Judge Engoron hears about these remarks because they just happened in the break outside the courtroom. So, he orders Trump to be on the witness stand. And, of course, Trump says under oath he's talking about Michael Cohen, who testified that day, not Engoron's clerk Engoron says, "I don't believe you. I don't believe you at all." And in his written order, he said he found Trump's testimony "rings hollow and untrue." Second offense--\$10,000 fine. So that's where we are right now. Judge Engoron's gag order in the civil trial is extremely narrow. It just says, "Don't attack my staff." And that probably withstands some challenge, I would think, because they're not public figures--they're not public servants that asked for this at all. And attacking this clerk is really not at the core of Trump's political speech, right? It's not about running for reelection. But all of it raises the question about whether there's any kind of accountability for his really awful, vile speech. And, you know, the answer may be not a whole lot.

Roman Mars [00:26:24] Wow. It's just kind of like everything else we've seen with Trump--everything being so unprecedented--that the system just isn't prepared for him at all.

Elizabeth Joh [00:26:34] I think that's right. I think that's right. I mean, we're all sort of exhausted and worn down by this. But at the same time, you know, in a way, you've never seen a defendant like this, right? What kind of criminal defendant would decide it would be a good idea to attack all of the government officials involved in the case? Not most ordinary criminal defendants. But Donald Trump absolutely does. He's found it's sort of, like, the best campaign conduct he can engage in because he is telling all of his supporters, "Look at this absolute persecution of me." But because we've never had anyone like him, there's actually no real legal precedent for most people to say, "Well, you

are allowed to do this. Are the courts allowed to impose a gag order on you, even in a limited way, or not?" The answer is just not that clear because, again, most criminal defendants would never dare do such a thing.

Roman Mars [00:27:29] And the purpose of the gag order is to protect the defendant's right to a fair trial not to protect the public at large or--you know--the people just trying to do their job inside of a court. I mean, it's just not made for this.

Elizabeth Joh [00:27:44] That's right. And part of the problem is that you can see that the judges here--Judge Chutkan--they're struggling with how to maintain some sense that there is protection against any real threat but understanding that we have in our legal system a tolerance of people saying really, really awful things that walk right up to the line of, "Well, just you wait. We're coming after you." If they're kind of vague and it's not imminent, then it's not going to be criminalized.

Roman Mars [00:28:15] And so is the Chutkan order still...? I mean, as of today--we're recording on Friday--that's still suspended right now?

Elizabeth Joh [00:28:24] Yeah, as of today, it's suspended. He has decided to appeal. And we'll hear what the D.C. Court of Appeals, the Federal Court of Appeals, and the District of Columbia will say or do. You know, let's not forget the human part of judges being judges. They're sensitive, particularly to attacks of their own staff, again. I think it made a difference that Engoron already had a gag order. And the gag order was about "Don't attack my staff," and Trump went ahead and did it anyway. Judge Chutkan was certainly aware of that when she imposed her own gag order. And it's hard to think of a situation where... Judges are all kind of in the same boat here where they realize, "Okay, it's not just about generalized attacks on the prosecutor. Maybe he'll come after the staff, and maybe we need to draw a line in these kinds of situations." You know, and of course, it's Trump himself. And courts really want to be careful about political speech. And the problem is where does it go for Trump if he continues to violate gag orders?

Roman Mars [00:29:31] Right. Well, I mean, because if these fines are \$5,000 and \$10,000, those can't be all that dissuasive for him, you know?

Elizabeth Joh [00:29:40] That's right. I think they're really very minor for him, although he's notoriously cheap...

Roman Mars [00:29:46] I wouldn't expect that check any time soon.

Elizabeth Joh [00:29:50] Yeah, I don't think you enjoy paying that. But I think the real question that people are asking is sort of, well, could he be imprisoned for this? Of course, even Judge Engoron theoretically brought that up as an ultimate punishment if Trump doesn't stop. But you have to think that both Judges Chutkan and Engoron want to avoid the absolute circus of potentially jailing a former president and current candidate for president for the next election. And, you know, Trump, of course, would absolutely relish this fight. And he would relish the drama and be focused on this particular topic alone and not the substance of the cases themselves. And then, of course, there's the logistics. How do you actually put someone behind bars who was a former president of the United States, even for a short period of time? So, I would guess that they'd want to avoid it completely. But then, of course, there's the problem. How do you get him to stop violating these gag orders? I think in Chutkan's case, she has another tool. Right now, she has scheduled the trial for March 2024 in the D.C. case. Trump wanted it to take place after the election.

She's like, "Nope." But the judge has warned Trump that if he keeps up with the threatening behavior, then she's prepared to move the trial date up. And that would make his life much more difficult as all of these different cases are now underway. And that's kind of the one threat that could be a problem for him.

Roman Mars [00:31:24] Interesting. Yeah.

Elizabeth Joh [00:31:25] And as the ACLU itself has said, there may never have been a better-known criminal case in American history or a better-known defendant. And that's, of course, in part because of what he said.

Roman Mars [00:31:38] Totally. It's kind of like when you're parenting a child there's a certain point where you realize that you kind of just have to have them agree to be punished because they can totally not accept punishment. Like, it's kind of a volunteer thing.

Elizabeth Joh [00:31:54] It is. And in a way, it's kind of worn us all down to a point where we've kind of become used to these attacks. And that's actually, unfortunately, part of the analysis. That's the serious analysis in a case like this. Do we really feel intimidated because he's attacked people so much? If you think about it, that's a pretty sad state of affairs.

Roman Mars [00:32:13] Absolutely. It really is a sad state of affairs. That could be just the name of the show that we do.

Elizabeth Joh [00:32:19] A Sad State of Affairs. That's right.

Roman Mars [00:32:22] Thanks again. This is great.

Elizabeth Joh [00:32:24] Thanks, Roman.

Roman Mars [00:32:38] This show is produced by Elizabeth Joh, Sarah Baik, and me, Roman Mars. 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 merch, and learn about their monthly membership exclusives at doomtree.net. We are part of the Stitcher and SiriusXM Podcast Family.

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