

What Roman Mars Can Learn About Con Law On the Eve of Trump's Arraignment

Roman Mars [00:00:01] On April 4th--that is tomorrow, as I record this--former President Trump will be arraigned in a Manhattan courtroom. He was indicted by a New York grand jury last week, but the exact charges against him remain unknown until he appears in court. On Thursday of last week, Elizabeth Joh and I recorded an episode all about the Manhattan district attorney's investigation into Trump's alleged hush money payments and the grand jury deliberations. About an hour after we finished that recording, the grand jury indictment was announced. All the reporting so far has indicated that the charges and circumstances around the alleged crimes conform to everything we discussed when we recorded our episode. So, I thought releasing it was still valuable, even though it is a developing story and things we discussed may have, you know, developed. Anyway, keep that in mind. Here's the show. So, we're talking on Thursday, March 30th at about noon. What are we going to be discussing today?

Elizabeth Joh [00:01:02] All right. Well, on March 18th, Trump posted on Truth Social this statement: "Illegal leaks from a corrupt and highly political Manhattan district attorney's office indicate that the far and away leading Republican candidate and former president of the United States of America will be arrested on Tuesday of next week." So, this was pretty shocking--for Trump to announce, of course, that he was going to be arrested imminently--because right now there are a number of investigations about Trump going on at the state and federal level. But his post was referring specifically to the district attorney's office in Manhattan and Alvin Bragg. Bragg had been reportedly presenting evidence before a grand jury about Stormy Daniels. Do you remember Stormy Daniels?

Roman Mars [00:01:51] I do. I do. Do I need to describe Stormy Daniels?

Elizabeth Joh [00:01:55] Well, we can get to that. But I'm glad you remember it because if you remember chronologically, that was two impeachments and one insurrection ago.

Roman Mars [00:02:03] Yeah, that was an early one.

Elizabeth Joh [00:02:04] That was an early one. And the Stormy Daniels case feels like just one of the many scandalous things that happened during the Trump presidency. And for a lot of us, that story had been overtaken by lots of other events--January 6th and Trump's decision to run for president again. But Tuesday came and went, Trump was not arrested, and in fact, he has still not been arrested. But Trump was right about something; he is facing an investigation in New York and one that might lead to formal criminal charges sometime soon in the future. And if that happens, Trump would be the first former American president to face criminal charges. And since he's the leading Republican nominee, he'd be a presidential candidate for the 2024 election while indicted. And maybe, like me, you couldn't remember all of the details of the Stormy Daniels scandal.

Roman Mars [00:03:02] No.

Elizabeth Joh [00:03:03] Yeah. So how did that hush money scheme become criminal? And what does it mean for ex-president current candidate Donald Trump? Time to find out.

Roman Mars [00:03:13] Let's do it. This is What Roman Mars Can Learn About Con Law--or more and more What Trump Can Teach Us About Criminal Law--an ongoing series of indeterminate length, where we take the alleged criminal activity and legal woes

of the 45th President of the United States 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. How can you break through the clutter and attract the most qualified candidates for your business?

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Elizabeth Joh [00:05:09] So, Roman, why don't we go back to the beginning when the story first broke? So, in 2015, Trump decided to run for president, and David Pecker at the time was the publisher of the National Enquirer and a friend of Trump's. And they agreed that Pecker would help Trump by burying any embarrassing stories that might harm Trump's chances. And just a year later, Pecker did just that. There was a former Playboy model named Karen McDougal, and she approached the Enquirer in June of 2016. She wanted to tell her story about having had an affair with Trump in 2007. And it was a pretty timely story now that Trump was running for president and was about to win the Republican nomination. But The Enquirer bought her story for \$150,000 in August of 2016, but then never published it. It buried McDougal's story. And why? Well, AMI--that's the company that owns The Enquirer--later admitted its principal purpose was to suppress the story so as to prevent it from influencing the election. And then on October 7th, 2016, the Access Hollywood tapes dropped. Now, do you remember what you thought when that came out?

Roman Mars [00:06:29] I mean, I remember thinking that this was the end of the Trump candidacy for president. I think a lot of people did. I remember, like, all these really bold headlines saying that this was the end--a total meltdown of the campaign. It did not end up being the end.

Elizabeth Joh [00:06:44] That's right. I mean, it wasn't the end at all. But at the time, I think a lot of people thought, "This is it. This is the final straw." And the tapes, of course, were comments that Trump had made in 2005 to Billy Bush of the Access Hollywood Show. And we don't need to get into it. But Trump made some pretty demeaning remarks about sexually assaulting women and famously said the "When you're a star" remark. So, it did seem like maybe his candidacy was over. And now, the day after the Access Hollywood tapes came out, the Enquirer heard from Stormy Daniels. Now, Stormy Daniels is just the stage name for Stephanie Clifford, and she is a porn star. She claimed that she had had an affair with Trump in 2006. Michael Cohen, who was Trump's personal lawyer at the time, got involved. And Cohen ended up negotiating a payment of \$130,000 in exchange for her silence. But then there was the question of how Stormy Daniels was going to be paid. So, Cohen met with Trump and Allen Weisselberg to figure this out. Weisselberg was the chief financial officer for the Trump Organization. And Cohen and Weisselberg came up with some options. But as Cohen later testified, they, quote, "got to the point where it was down to the wire. It was either somebody wire the funds, or it was going to end up being sold to television. And that would have interfered with the election." Cohen decided to make the payments himself with Trump's approval. So, on October 26th,

2016, Michael Cohen took out a \$131,000 personal home equity loan--his own loan. He transferred those funds to a shell company that he'd created called Essential Consultants. Then Cohen wired that money from the shell company to the lawyer for Stormy Daniels the very next day. So that deal, including a nondisclosure agreement, was finally completed on October 28th, 2016, just days before the election. The Stormy Daniels story was buried. And then Trump won the White House. So, I think you can see why Cohen took these elaborate steps, right?

Roman Mars [00:09:05] Yeah, He had to make sure it didn't seem like Trump was actually paying off Stormy Daniels.

Elizabeth Joh [00:09:09] Yeah, I mean, Trump couldn't write a check directly to her because anybody who even got a picture of that check had a story to sell, right? And so, Trump was concerned about the effect it would have on the campaign; that was what Cohen said later in his testimony. And public knowledge about Stormy Daniels might have completely doomed Trump's chances. Of course, we never found that out. So even though we don't know the story in 2016, then there's a new problem: How does Cohen get reimbursed? So, Cohen later testified that Trump agreed to pay him back. And Allen Weisselberg rejected the idea of one large check being written by Trump because that would look fishy. So, they decide Cohen will be paid on an installment plan. Cohen is supposed to provide invoices for legal expenses, and then he's supposed to be paid in monthly installments. And some of these reimbursement checks are actually personally signed by Trump. Now, in court filings that we found out about later, the Trump Organization--Trump's business--falsely described these as part of retainers for legal services. But of course, there were never any legal services, and there was no retainer either. It was just all a lie. And this elaborate scheme had only one purpose. Cohen later said that the goal was to keep Trump as far away from "it" as possible. So, we can think of the entire payoff scheme to Stormy Daniels as a way to hide both the source and the purpose of the payments. But in 2016 and '17, nobody knows much about this at all. This is pretty much a secret. So, Roman, let's imagine an alternative universe where Trump, the candidate, follows all of the applicable law. So, what would law abiding Trump do? So, if you think about this payment, it kind of helped him in the election, right?

Roman Mars [00:11:06] Yeah.

Elizabeth Joh [00:11:06] And it wasn't just a payment made to Stormy Daniels out of embarrassment. So, you might say that the payoff was a benefit or a contribution to Trump, the candidate, and to Trump's campaign. Now, there's a couple of ways that federal campaign finance law might have characterized that \$130,000 payment made by Cohen and then reimbursed by Trump. And without getting too much into the details of federal campaign finance law, you can think of it this way. Trump, like any other person running for federal office, is supposed to disclose contributions made to his campaign and also abide by campaign contribution limits. So, the \$130,000--if that's a benefit to Trump's campaign--it's far in excess of the \$2,700 limit for individual contributions in 2016. And then no one--not Trump, not Cohen, not the Trump Organization--reported the payoff as an election contribution. So federal law treats this as a potential crime, and there are higher penalties if you knowingly or willfully violate federal campaign finance law. That means you break the law with higher penalties if you know your actions are unlawful and not just a negligent mistake.

Roman Mars [00:12:28] Yeah.

Elizabeth Joh [00:12:29] And so that's one of the reasons that Michael Cohen ends up as a convicted felon. In August of 2018, Cohen pleaded guilty to eight charges of tax evasion, fraud, and campaign finance violations. Now, the campaign finance charges were related to his involvement in the payments to Stormy Daniels and also to Karen McDougal; Cohen had a role in that payment, too. Now, federal prosecutors in Cohen's case laid out the facts of these payments in court filings. And in their description of the payoffs to McDougal and Daniels, prosecutors said that Cohen, quote, "acted in coordination with and at the direction of Individual 1." Do you remember Individual 1?

Roman Mars [00:13:15] I do remember this. Yeah. I do.

Elizabeth Joh [00:13:16] And who might he be?

Roman Mars [00:13:20] I think that only has to be Trump.

Elizabeth Joh [00:13:21] And yes, he was referred to that way because he was a sitting president. Now, at the time of Cohen's guilty plea, he was a president--sitting president. And there is a longstanding Justice Department policy that a sitting president cannot be charged with a federal crime. Here's what the official guidance says--that "the indictment or criminal prosecution of a sitting president would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions." So, they weren't going to do it. They weren't even going to name Trump in Cohen's guilty plea. So, it's one of the primary reasons why, for instance, Special Counsel Robert Mueller did not consider an indictment of Trump during the Russia investigation. And it's also why it was Cohen, not Trump, who was charged with campaign finance violations in 2018. Cohen was given a three-year sentence. And that very intense focus on Cohen and the Stormy Daniels story faded because so much else happened after that, right? In 2019, we had the Mueller report--that 22-month investigation into Russia's interference in the 2016 election. In December of 2019, the House decided to impeach Trump on charges of abuse of power and obstruction of justice--that was all related to Ukraine. Then there was the January 6th, 2021, attack on the Capitol. And then there was the second impeachment of Trump on January 13th, charging Trump with incitement of insurrection. He was acquitted again, and Trump became the first president to be impeached twice. And then, of course, during 2022, there were all of these televised hearings by the House committee investigating the January 6th insurrection. I think a lot of people simply forgot about the story.

Roman Mars [00:15:11] Yeah, it seems small in comparison to those other things.

Elizabeth Joh [00:15:15] I think that's right. But now, even after Trump left office, there was still the possibility that the Federal Election Commission might pursue an enforcement action against Trump. The FEC is the federal agency responsible for the civil enforcement of federal campaign finance law. And what's interesting here is that the FEC issued an internal report in December of 2020. It was written by their career attorneys, not any political appointees. And their conclusion? They concluded that there was, quote, "reason to believe that Trump had violated several provisions of federal campaign finance law by paying off Stormy Daniels." But nothing ever came of that. In April of 2021, the FEC formally announced that they were dropping the case. Two Republican commissioners nominated by Trump voted to dismiss the case. Two Democrats voted to move forward, but that wasn't enough, and the case went away. So here we are. So, Roman, now we can return to Trump's own prediction of his arrest. But I want to just pause for a moment. This whole story--does that sound like a federal or a state case to you?

Roman Mars [00:16:25] It sounds federal. If it's FEC, that seems like the Federal Election Commission.

Elizabeth Joh [00:16:29] Yeah, and it seems like so far, a story about breaking federal law--federal finance, campaign finance law. But the arrest prediction was about Manhattan DA Alvin Bragg and his going before a grand jury to indict Trump on state criminal charges. Actually, shall we talk a little bit about a grand jury and what they do?

Roman Mars [00:16:49] Yeah, please.

Elizabeth Joh [00:16:50] Yeah. So, a grand jury is not a trial jury. A trial jury determines guilt or innocence in a criminal case. But many states like New York require that felony charges be issued by a grand jury. So, this is a system that goes back several hundred years to England. And that means that we just have a group of ordinary citizens that serve on a grand jury for weeks--sometimes months--and they hear evidence presented by the prosecution. So, a grand jury works completely differently than a trial jury. The work of a grand jury is not adversarial. And by that, I mean, it's the prosecutor's show; the defendant is not there, the defense counsel is not there, and the judge is only there for part of it. So basically, it's the prosecutor's entire program of showing evidence to the grand jury and recommending that charges be issued in an indictment that would be voted on by the grand jury. And then it's up to the grand jury to decide. So, in New York, 12 of them would have to agree that there is legally sufficient evidence to charge the person with a crime. Or they might vote to dismiss the proposed criminal charges. The other part about a grand jury that's different than a trial jury is that all of this is secret. And that's why we don't really know any official information about what's happening with Alvin Bragg, the Manhattan DA and what is going on with the grand jury there.

Roman Mars [00:18:18] What is the grand jury convening on? Like, what charges are they considering?

Elizabeth Joh [00:18:23] Okay. So, we don't know exactly what the charges are that have been proposed by the DA, but there's been some reporting suggesting that the DA's office might rely on the fact that Trump recorded Cohen's reimbursements--that's the coverup--as legal fees because under New York law, it's actually a crime if a person makes or causes a false entry in the business records of an enterprise. So basically, falsifying your business records. And that could include saying that you're paying your lawyer for legal expenses when you're really reimbursing him for the money that he paid to a porn star to buy her silence when you ran for president. But the problem here, I think, is that the crime all by itself of falsifying business records--it's actually only a misdemeanor in New York. It's a crime, for sure, but it's not a very serious one. And it's hard to think of why the Manhattan DA would bring an historic indictment of a former president for a misdemeanor. So, it also turns out that the state crime--falsifying business record--can be charged as a felony--a much more serious crime. And that would happen if the person is accused of falsifying a business record when, quote, "his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof." So, in plain English, the idea is that you can be guilty of the felony of falsifying a business record if the reason you're doing it is to commit or hide a different crime--a second crime.

Roman Mars [00:20:04] Right. And could that crime be a federal crime or--I don't know--it doesn't count? Does it only matter who draws up the charges, or is it a federal crime before a federal prosecutor prosecutes you? You know what I'm saying? What makes it a federal crime?

Elizabeth Joh [00:20:20] That's exactly the big question around this. Again, all of this is speculation. We don't really know what's happening. But if the DA were to charge this, well, what is the other crime? It certainly seems to be that the most obvious answer is federal campaign finance law. And if that's the case--in other words, Trump would be accused of breaking New York criminal law, which would then be attached to hiding or committing federal criminal law violations--that would be a novel legal theory. And the state criminal statute--you know, actually what the words say--it doesn't exclude the possibility of relying on federal law, but it doesn't obviously allow federal law to be the hook for this crime either. And I think that means the prosecutors here would be taking a risk because if that's the basis of the criminal case against Trump, certainly, I think, Trump can argue that the federal campaign finance law is not within the scope of New York state criminal law. You know, when the legislators passed this law and made it a crime, they were thinking about the other crime being a state law crime but not necessarily a federal law crime. That's certainly a plausible argument for Trump. And the problem is, if he were to win on that, that would lead to the dismissal of felony charges--and you'd only have a misdemeanor then, which is kind of not a great look for the Manhattan DA. And then there are the other kinds of issues that Trump could raise. Remember, the legal theory of this potential case, again, might be something like, "You, Trump, falsified business records in order to violate campaign finance law." But, you know, Trump could also argue that "Well, I wasn't paying off Stormy Daniels to better myself in the eyes of the public as I ran for president. I was only trying to save my family from embarrassment." Like, paying somebody off in this way is not by itself illegal. And Trump might say, "Well, it has nothing to do with my running for president." But there's a problem with that for Trump, and that is all of the timing, right? It just so coincidentally happened that he had this decade old allegation of an affair, and he just really decided to pay it off just days before Election Day. It seems like more than a coincidence.

Roman Mars [00:22:39] Isn't it also a problem that Cohen was convicted of this being a crime. Like, he wasn't acting on behalf of himself, he was acting on behalf of Trump. And so, doesn't that mean that Trump also committed that as a crime?

Elizabeth Joh [00:22:54] Well, in our system, you can't have this kind of guilt by association. So, it certainly seems fishy for sure. And we have somebody who was, in fact, convicted for being involved in the same course of conduct. But again, I think the argument here for Trump is not so much "I didn't do it" as much as is "Look, why are you making up this crazy idea that I violated New York State criminal law?" And it's legalistic, but I think it's an important kind of argument that criminal defendants make all the time, which is, "Hey, this isn't what the law was intended for. You're not supposed to punish me for this."

Roman Mars [00:23:29] Right. Given all the stuff that seems kind of tenuous--we don't really know what's going on--why does this matter at all?

Elizabeth Joh [00:23:36] Well, it would be historic if this, in fact, happens and sometime soon. This would be the very first-time criminal charges have ever been filed against a former American president. And so that by itself would be unprecedented. And remember, Trump is now an ex-president, so he's lost the ability to argue that you can't indict a sitting president. He doesn't enjoy any other kind of immunity because, you know, we allow an immunity for presidents for their official acts. But this has nothing to do with his actions as president. In fact, most of the conduct happened before he was actually elected president. Then there's the role of the criminal law itself--calling people to account. And if you think about it, you know, if this is all true and can be proven, then it matters to make sure that

you send a signal that people aren't supposed to do things like this, right? Think about 2016. It was an extremely, extremely close presidential election. Paying off Stormy Daniels came at a time when Trump's candidacy was in peril. And so, what if that story had come out just in the same week as the Access Hollywood tape? Could it have changed the outcome of the election? We have no way of knowing for sure. But Trump did everything he could to conceal this information from voters right before the election. And in fact, one of the federal election commissioners who voted to go forward with the case against Trump put it this way--that "there were well-grounded charges that the former president of the United States knowingly and willfully accepted contributions nearly 5,000% over the legal limit to suppress a negative story mere days before Election Day." So, it seems like a small deal maybe--falsifying business records--but at the time, it might have made all the difference in the world.

Roman Mars [00:25:32] Yeah. Yeah.

Elizabeth Joh [00:25:33] And then there's the question of what an indictment means for now candidate Trump. So, at the moment, Trump is the clear favorite for winning the Republican nomination. And let's assume then he becomes the nominee for 2024.

Roman Mars [00:25:46] And so how does it affect that? Like, does it stop him from running? Does it stop people from, you know, putting forward charges? What does it do?

Elizabeth Joh [00:25:56] Well, it doesn't stop him at all, actually, at least in the Constitution's view because the Constitution has only three qualifications for being president. You have to be at least 35--check. You have to be a natural born citizen--check. And you have to have lived in the United States for at least 14 years--also check. And the problem is, we generally understand these three qualifications as not the minimum qualifications but the only qualifications to be president. So what that would mean is even a hypothetical Congress--not the one we have now--but one that said, "Hey, you know, we want to make sure that people running for office don't commit crimes," they probably couldn't pass a law that imposed presidential candidates can't be indicted statute because, again, the idea that's widely accepted is that the Constitution has the only qualifications for running for president.

Roman Mars [00:26:51] Yeah. Wow.

Elizabeth Joh [00:26:55] And so we'll find out if he is going to be that Teflon Don that he's always claimed himself to be. I think one of the real issues is will the law ever, ever catch up to Donald Trump?

Roman Mars [00:27:07] We'll find out. Thanks so much. This was super cool.

Elizabeth Joh [00:27:10] Thanks, Roman.

Roman Mars [00:27:18] The show is produced by Elizabeth Joh and me, Roman Mars. 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 a Stitcher and SiriusXM podcast family.