

What Trump Can Teach Us About Con Law Executive Privilege, SB 8 update, and Rust

Roman Mars [00:00:00] So we're talking on Thursday, October 28th at 11:10 a.m. So, what are we talking about today?

Elizabeth Joh [00:00:05] Well, let's start with an update in the Texas abortion case.

Roman Mars [00:00:09] Oh, yeah, absolutely.

Elizabeth Joh [00:00:10] Remember that in May, SB 8 was signed into law. And the law is like a lot of other restrictive abortion laws because it bans nearly every abortion. But this one had a novel twist because usually the state is responsible for enforcing abortion laws. But with SB 8, the law is written so that private individuals--not the state of Texas--enforce the law. So that means that ordinary people get to sue, and they get to sue not just people who provide abortions but anybody who helps the pregnant woman obtain one. Now, that presents a huge challenge. Usually when you have a law like this, you can bring a lawsuit, even before enforcement, by suing the government official who's responsible for enforcing the law. Not so here. So, what's happened is that a group of abortion providers in Texas tried a different approach. They sued judges and court clerks in the state, as well as a private person who's threatened to bring a lawsuit under SB 8. That's an unusual tactic, but it's an unusual law. And the federal government has also stepped in and sued Texas.

Newscaster #1 [00:01:20] We want to go now to Attorney General Merrick Garland.

Merrick Garland [00:01:22] Last week, after the Supreme Court allowed Texas Senate Bill 8 to take effect, I said that the Justice Department was evaluating all options to protect the constitutional rights of women and other persons. Today, after a careful assessment of the facts and the law, the Justice Department has filed a lawsuit against the state of Texas.

Elizabeth Joh [00:01:42] Now, the federal government argued that they have the ability to sue Texas because it has an interest in ensuring that states respect federal constitutional rights. And because the law interferes with federal entities in Texas that might provide abortion services, the federal government also cites that as a reason as why they can step in and sue the state. Now, usually, as you can guess, a case has to take a long time before it reaches the Supreme Court; it has to go through a number of layers of lower court review. But on October 22nd, the Supreme Court agreed to hear these two cases. And there are a couple of unusual things about it. First is the schedule. The Supreme Court has scheduled arguments in these cases for November 1st, which is just over a week after they agreed to hear the case in the first place.

Roman Mars [00:02:32] That's amazing.

Elizabeth Joh [00:02:33] And that kind of speed almost never happens. Second, the Supreme Court thought these cases were important enough to hear right away, but not important enough to put a pause on the enforcement of the law. So, women still can't get legal abortions in Texas. Now, third, when the court granted review in these SB 8 cases, it seemed to be focused on procedural issues. So, when the Supreme Court agrees to hear your case, it usually tells the parties what particular legal issue it's interested in. You don't get to have every single bit of your case heard by the Supreme Court. That helps the parties focus their briefs and their arguments, but it also signals to everybody else what the court's really interested in. Now, in the federal government's lawsuit, the Supreme

Court said, "We'll consider the question of whether the federal government has the right to sue Texas at all." And in the provider case, the Court has agreed to consider whether Texas can avoid the usual ways these laws are challenged in federal court by precisely that strange mechanism--giving people who are private individuals the ability to enforce that law, rather than giving the enforcement power to the state itself. What you don't see here is a question that directly asks whether SB 8 violates the principles of Roe versus Wade, which is a slam dunk. It's an easy case. It absolutely does. And the Supreme Court's already agreed to hear in December another case--unrelated--coming from Mississippi that also involves a challenge to a law that basically bans almost every kind of abortion. In other words, the Supreme Court already has an opportunity this term to think about what to do with Roe versus Wade. But we shouldn't think about these Texas cases as just about procedure or that--oh--this is only a procedural case because what the Supreme Court has to answer in these SBA 8 cases is a very important question. Can a state do this? Can it pass a law so that no one can challenge a state law that allows you to be sued for exercising your constitutional rights? Because if the answer is yes, then--as important as reproductive rights are--this would be a green light for states to do this for any other constitutional right. And in fact, an amicus or friend-of-the-court brief was filed in the abortion providers case by maybe the most unlikely of allies--the Firearms Policy Coalition. And their argument? That SB 8 will, quote, "easily become the model for suppression of other constitutional rights."

Roman Mars [00:05:12] Wow. I mean, they're right. That's the thing. I mean, like, the concept of suing gun manufacturers or a person who owns a gun, and all of a sudden, this law that conservatives seem to love--they will not love it.

Elizabeth Joh [00:05:28] Oh, sure. And you can imagine that those kinds of analogies will be raised during the oral argument, saying, "Is this really something that should be allowed just in the abstract for a wide variety of constitutional rights?"

Roman Mars [00:05:40] Do you think that not having a pause on SB 8 while this is being decided tells you something about what the Justices are thinking about it?

Elizabeth Joh [00:05:53] That's hard to say other than just a general hostility by a majority of the Court to having an expansive interpretation of their own right. So, it is a kind of puzzle. If they think it's so important, why didn't they just simply put a kind of emergency pause on the law while they figure out what to do, which is more often than not what happens in other cases? They decided not to do it here. So, this is one of those cases where it's so unusual for so many reasons that, you know, a lot of people will be tuning in when the oral argument takes place.

Roman Mars [00:06:24] I will definitely be paying attention. This is What Trump Can Teach Us About Con Law--an ongoing series of indeterminate length, where we take current events in the world of government and politics, still reeling from the direct effects of Donald Trump, 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 fifth year first year law student, Roman Mars.

Elizabeth Joh [00:07:16] All right. Well, it's time to return to Trump yet again.

Roman Mars [00:07:21] Okay, here we go.

Elizabeth Joh [00:07:23] Here we go. After the January 6th Capitol attack, remember there were calls for a bipartisan independent commission to investigate what happened. But after Senate Republicans blocked the necessary votes to bring up the bill last May, the idea died. So instead, what we have is a different solution. The House formed a select committee in June to investigate the Capitol riot. Now, the committee's charter charges the committee to investigate the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol. They got to work. And on August 25th, the committee sent a request for documents and records to the archivist of the United States. And that's the person in charge of presidential records. What they asked for were all documents and communications relating in any way to remarks made by Donald Trump or any other persons on January 6th. So, they're looking for things like calendars, schedules, movement logs for anything that Trump did or attended--getting at just what he was doing in the days and hours before the Capitol attack. And on September 23rd, the committee also subpoenaed four of Trump's advisers and asked them to turn over documents and show up for questioning. One of those recipients was Stephen Bannon. Bannon reportedly told Trump to focus his efforts on January 6th. And on January 5th, Bannon also said on his radio show that "all hell is going to break loose tomorrow," which seems as if he knew something dramatic was going to happen.

Roman Mars [00:09:03] What does it mean to focus his efforts? Is there some interpretation of what that means?

Elizabeth Joh [00:09:08] We don't know yet. And that's what the committee is trying to find out. Now, as for three of the people that have been subpoenaed, there have been some delays and reportedly some communications. But Bannon has made it clear that he's not going to comply. Bannon told the committee that he will not cooperate until there's either some agreement with Trump or some court has issued a ruling about compliance. Now, Roman, you and I have already talked before about what it's like to refuse to comply with a congressional subpoena. And, you know, Congress does have an inherent contempt power to punish people who refuse. Remember the sergeant-at-arms?

Roman Mars [00:09:44] Totally.

Elizabeth Joh [00:09:45] But they're not going to use it.

Roman Mars [00:09:47] Oh, come on. It would be so fun to arrest Steve Bannon.

Elizabeth Joh [00:09:53] It's not going to happen.

Roman Mars [00:09:54] Okay. All right. Well, that's their loss.

Elizabeth Joh [00:09:57] Instead, the committee voted unanimously on October 19th to recommend that Bannon be found in criminal contempt of Congress. And a couple of days later, the House voted--mostly on party lines--to find Bannon in criminal contempt. So, what this means is that the matter is now referred to the Justice Department and they have to decide whether to prosecute Bannon. And it is a crime; refusing to comply with a congressional subpoena, in theory, can result in fines and up to a year in jail. But even if the Justice Department decides to do something about it, it's going to take months--maybe years--to resolve some theoretical criminal case against Bannon. And in the meantime, there's no cooperation with Congress.

Roman Mars [00:10:40] And so what about Trump's records for that day, in terms of the archivists and all that stuff?

Elizabeth Joh [00:10:45] Well, there's some important background here. The Federal Presidential Records Act allows a former president to weigh in on whether presidential records can be released by the archivist. But federal law specifies that if both the former and the sitting president agree to withhold documents, then the documents are withheld. But if the sitting president doesn't agree with the former president's claim that the records should be secret, then the archivist is supposed to release them.

Roman Mars [00:11:15] Yeah.

Elizabeth Joh [00:11:16] Now, after the committee issued its request, President Biden said that on October 8th, he wouldn't make any claim of secrecy about these documents. Actually, the official letter from the White House says that the documents shed light on events within the White House on and about January 6th and bear on the select committees need to understand the facts underlying the most serious attack on the operations of the federal government since the Civil War. And that same day, Trump asserted privilege over some of the very same documents. But since federal law says that the sitting president has the final say, the archivist told Trump that the office is going to release the records on November 12th under the timeline established by federal law, unless a court tells them to do otherwise. So, can you guess what Trump did next?

Roman Mars [00:12:07] Took it straight to court?

Elizabeth Joh [00:12:08] Exactly. And October 18th, Trump filed a lawsuit in federal court to keep those records secret and prevent the release to the January 6th committee.

Roman Mars [00:12:18] So what is Trump's argument here in this case?

Elizabeth Joh [00:12:20] Well, the background principle here is executive privilege. And the Supreme Court has said that the Constitution allows presidents to keep some communications they have with their top aides secret. And that privilege has even been extended to former presidents. This idea is that, even though the term isn't explicitly mentioned in the Constitution, the Supreme Court has recognized that it's a fundamental part of how presidents should be able to exercise their constitutional responsibilities. But even so, the Supreme Court has also said that it's not an absolute ability to keep things secret. Sometimes the president's assertion of executive privilege has to give way when there's some more important interest at stake. Now, here, Trump's claiming that executive privilege allows him to keep the archivist from releasing the documents to the committee. And Biden, as the sitting president, has said, "Nope, I'm not claiming any executive privilege at all." If you take a look at the lawsuit--the complaint that Trump has filed--Trump does spend a lot of time talking about executive privilege, but he spends an enormous amount of time talking about something else. And that is that the January 6th committee is going beyond its constitutional authority by asking for these records. And his lawsuit relies heavily on the Mazars case. Do you remember the Mazars case?

Roman Mars [00:13:39] No. I don't. Please remind me.

Elizabeth Joh [00:13:41] All right. Sure. Now, Mazars was one of the two cases about Trump's financial records that the Supreme Court decided in its previous term. So, remember, in April of 2019, a House Oversight Committee issued a subpoena to Trump's

personal accounting firm--that's Mazars--asking for financial records that were going all the way back to 2011. And Trump sued to prevent Mazars from turning over that information. Now, what the Supreme Court decided was they rejected both the House and Trump's arguments. The House said it had nearly unlimited authority to get these kinds of records from President Trump. But Trump said no records could be released whatsoever. The Supreme Court said neither one of those were going to work. So instead, they set down a couple of factors that lower courts had to consider before ordering any information to be turned over. Then they kicked the case back down to the lower court. And since then, in the Mazars case, Trump hasn't fared too well. So just this past August, the federal judge in that case decided that the House Oversight Committee could see some of Trump's tax records. It wasn't as Trump claimed some baseless fishing expedition. According to the court, the Oversight committee did have a legitimate reason to see those records because it might want to legislate around things like the Constitution's Emoluments Clause or the lease that Trump had with the federal government. But some of the older records, the federal judge said, didn't meet the Supreme Court standards, and so the committee doesn't get to see those. So, this Mazars decision was a loss for Trump, who wanted to keep all of his records secret. But Roman, were you aware of what happened to Mazars after the Supreme Court was done?

Roman Mars [00:15:23] Not at all.

Elizabeth Joh [00:15:25] Nobody else was either. So, in that way, it was a strategic win because it's been more than two years since the House Oversight Committee requested those documents. And that is a hallmark of how Trump uses the courts to keep the clock running until everybody has lost steam and lost interest.

Roman Mars [00:15:44] Hmm.

Elizabeth Joh [00:15:45] So now let's return to the lawsuit against the January six committee. Okay. So, in this lawsuit, Trump says, "Look, the Supreme Court's decision in Mazars means I win in this case." But that was a very different case. Now, remember, the Supreme Court decision in Mazars was fundamentally about a conflict between Congress and a sitting president. The Supreme Court was concerned about Congress unconstitutionally interfering with a sitting president being able to do his job. So, if you look at Mazars itself, the Supreme Court talks about things like "a rival branch"--that's Congress--"interfering with the ability of the president to discharge his official duties." Well, Trump's not in office anymore. And Mazars was not about anything other than the personal documents of a sitting president. It has nothing to do with privilege.

Roman Mars [00:16:39] So the Mazars decision doesn't apply because that's about the sitting president and rivalries between branches. But does executive privilege apply in any way as a former president?

Elizabeth Joh [00:16:49] Sure. In this case, a court is going to have to say something. Remember, executive privilege is absolutely a constitutionally based doctrine. But it's not absolute. And the Supreme Court said that if there are other countervailing interests, they might outweigh the president's need for secrecy. And there's a big countervailing interest here. Think about what the committee is trying to find out. We already know from lots of other evidence, including lots of tweets before Trump was de-platformed, that Trump was involved in spreading a lot of lies--disinformation about voter fraud--and he tried to undermine the results of a legitimate election.

Roman Mars [00:17:27] Yeah. Still doing that.

Elizabeth Joh [00:17:29] That's right. And when the Supreme Court first recognized executive privilege, they said that the principle existed to help the president in the process of shaping policies and making decisions about his official duties. But, you know, the committee wants to see documents regarding the events of January 5th and 6th, including the rally that had happened before the attack on the Capitol. It's hard to think of what Trump might have done with regard to those activities that would be part of being president--part of his official duties. And if those documents, if the committee were to ever see them, if they reveal something about an attempt to overturn the results of a legitimate presidential election--it's really hard to see how that also could be part of a president's official duties. There's no way that Trump can make a claim that these documents are about national security or diplomatic secrecy--the real reasons any president might make about keeping confidential communications secret. So, while executive privilege is a legitimate, important constitutional principle, you can see why a court might say it has to give way in a case like this. So, I can't predict the future, and there are no absolute answers here, but there are a lot of reasons that a federal court could decide against Trump. Now, Bannon, too, is trying to argue that he's not going to comply with the subpoena against him until there's some agreement with Trump or a court order. His case is unclear as well, even if there is executive privilege--and that privilege can keep secret conversations that a president has with his top aides. The question is: Does it cover someone like Bannon, who wasn't even working at the White House during the time the committee is interested in? He had already left at that time. Success in this case really depends on what the goal is. If the goal is secrecy and delay, then Trump is still winning.

Roman Mars [00:19:29] Truly it's antithetical to the notion of executive privilege if the sort of thing being protected is the overthrow of the government.

Elizabeth Joh [00:19:40] You think so, right? I mean, you'd think that would be something that is just absolutely the case where the committee ought to find those things out. I mean, part of the problem is there's a lot of writing about executive privilege. There's not a lot of case law about executive privilege because those conflicts typically get worked out informally between Congress and the White House. So, because it's usually negotiated out, you don't have a lot of cases saying, "See? This case makes it obvious that the result here should come on in this particular way." So, you know, it will be interesting to see what a court says in that case. But it's not likely then, because of the lawsuit, that the committee is going to have access to those documents any time soon.

Roman Mars [00:20:20] Wow. It's just amazing that with enough money, you can always stall and win in some way.

Elizabeth Joh [00:20:27] And so we don't want to be too harsh on the court system. I mean, courts exist for a really good reason, and people do file lawsuits for really important reasons. But it's really just about Trump himself and his kind of M.O. of using the courts in a bad faith manner just to run out the clock. That's what's at stake here. Well, Roman, do you want to stray from constitutional law for a moment?

Roman Mars [00:20:52] Oh, yeah, sure. Let's do it.

Elizabeth Joh [00:20:53] Yeah. So, maybe we could talk about that fatal shooting on the film set of a movie called Rust.

Roman Mars [00:21:00] Okay. I mean, a lot of people have been talking about it, and I am interested to know your angle on this.

Elizabeth Joh [00:21:06] Yeah. So, let's remind people. The actor Alec Baldwin fired a 45 caliber Colt revolver, and tragically, it killed the cinematographer in that case and seriously injured the director. So apparently and also unsurprisingly, it's standard practice when you have a film set, you're not supposed to use live ammunition. You're supposed to use things like dummy rounds or blanks, which don't have bullets. But somehow, apparently, a live bullet was loaded into the gun.

Newscaster #2 [00:21:37] Authorities in Santa Fe, New Mexico, say they have the gun that they believe Alec Baldwin fired while rehearsing on the set of his new film--shooting a live round that killed cinematographer Halyna Hutchins and wounded the film's director.

Roman Mars [00:21:52] There's been a lot of chatter about this. And even though Alec Baldwin was the person who fired the gun, my read on this is Alec Baldwin has no fault in this. But is there a chance that he's in trouble?

Elizabeth Joh [00:22:07] Well, so, let's walk through that, right? So, he actually literally shot the gun that killed the victim. And in criminal law terms, it's not just the people who intend to kill their victims who are held responsible for their deaths. So, there's the person who literally shot the gun--that's Alec Baldwin. But if you behave in a way that you know is highly likely to lead to someone's death--even if you didn't actually know or you should have known better--even in those circumstances, you can be criminally responsible for somebody else's death. So that's the background idea. So, a lot depends on what the emerging facts reveal. So far, it looks like Baldwin was given a gun by the assistant director and told it was a "cold gun," meaning that it was safe to shoot with no live ammunition. Apparently, according to the search warrant, the gun did, in fact, have a live round. So, if Baldwin was told that it was okay because this gun was safe and then he had no idea, then he didn't intentionally try to kill the victim. So, if he reasonably believes that he was following standard procedures and etc. of being safe with standard practices, he'd be unlikely to be charged as an intentional shooter, who intentionally caused the victim's death.

Roman Mars [00:23:24] Of course.

Elizabeth Joh [00:23:24] Now there are other people on the set who loaded the gun and were responsible for checking the gun, like the prop person and the assistant director who handed the gun to Baldwin. So, if any of what happened before handing over the gun was the result of some incompetence or not following standard procedures, then those persons might be held responsible criminally because they were criminally negligent or reckless. Those are the terms that we might hear. And apparently here, too, there were definitely some problems. So according to the search warrant and the reporting about it, the assistant director told the police he didn't check all of the rounds in the gun before giving it to Alec Baldwin. So that doesn't seem like doing what you're supposed to do. And the person in charge of gun safety told the police that they didn't have any live ammunition on the set. Apparently, the investigators in the case have retrieved several hundred rounds of ammunition, including what they say they suspect are live rounds. That also suggests that safe procedures weren't being followed. Now, let's get back to thinking about Alec Baldwin. I think so far, most of the reporting has said and agreed with me that he's not going to be criminally charged as someone who intended to kill the victim. I think that's absolutely right. But there's a different problem here. He apparently was also the producer, and there

is a production company responsible, presumably, for everything that happens on the set. Now, if a production company was so lax or so negligent in setting the safe procedures for filming this movie, then you can also have a case where a company faces criminal charges. And that's where Baldwin might face different problems as the producer in the movie--not as the actor who literally fired the shot, but as the producer who is responsible, I think, for all of the details, at least in a general way, for what happens on the filming set. Again, this is a very loose analogy, but this kind of thing does happen, right? You know, in the criminal law, you've certainly had cases where, for instance, there's been a terrible fire that breaks out at a nightclub and the owners of a nightclub--even if they're not there on the night of the fire--they've been held criminally responsible because they're ultimately responsible for setting the safe conditions in this place where there was some tragedy. So, I don't think it's the case that there's a 100% certainty that Baldwin's in the clear. And the other thing that's definitely for sure is Baldwin will be sued civilly for what happened. Civil lawsuit is standard because it's money at stake not your liberty. And so, the victim's family will almost certainly sue Baldwin, the production company, the other crew members. That's for certain. But it's certainly a tragic and interesting set of issues that have emerged.

Roman Mars [00:26:10] Wow. Yeah, I hadn't really thought about him being responsible in the global sense of being in charge of the whole thing. But it's amazing to sort of conceptually go through the logic of it--that pulling the trigger isn't the criminal act.

Elizabeth Joh [00:26:25] Well, not for him. I mean, it certainly may be for others. But, sure. I mean, because he has this dual role, I think there may be some questions about that.

Roman Mars [00:26:33] It's fascinating. And cool, I like this diversion to criminal law from constitutional law. Thank you. That was so good.

Elizabeth Joh [00:26:40] Thanks, Roman.

Roman Mars [00:26:48] The show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. 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 part of the Stitcher and SiriusXM Podcast Family.