

Presidential Immunity

Roman Mars: In 1960, a Massachusetts senator named John F. Kennedy--you've probably heard of him--was hoping to secure the nomination to be the Democratic candidate for president of the United States.

Elizabeth Joh: The Democratic National Convention that year was held at the LA Sports Arena. The arena doesn't exist anymore; they demolished it in 2016. At the convention, there was a Mississippi state senator named Hugh Lee Bailey. He was called the Donkey-Riding Senator or Ole Hootie.

Roman Mars: Ole Hootie.

Elizabeth Joh: Bailey couldn't find a taxi from the convention to the nearby Ambassador Hotel, where he was going to a party.

Roman Mars: The Ambassador Hotel was also the place where JFK's brother, Robert Kennedy, would be assassinated in 1968.

Elizabeth Joh: But in 1960, the Donkey-Riding Senator just needed a ride.

Roman Mars: There were presumably no donkeys available for Ole Hootie.

Elizabeth Joh: So, Senator Kennedy offered Bailey and his three friends the use of a car and driver. Kennedy wasn't in the car. The borrowed car, however, got into an accident. And in 1962, Bailey and the three other passengers filed two lawsuits in California state court against Kennedy.

Roman Mars: They sued Kennedy for \$450,000.

Elizabeth Joh: Bailey said that because of the car accident, he couldn't run a donkey, and he'd lose his nickname as a result. By 1962, Kennedy wasn't just an ordinary defendant. He was president of the United States. Kennedy's lawyer said that's why he couldn't be sued--just because he was president. But the judge rejected the argument. Kennedy could be sued just like anybody else. And so, President Kennedy eventually just settled the cases out of court. So, this case of the Donkey-Riding Senator versus President Kennedy does raise an interesting question. When can you see the president of the United States?

Roman Mars: It turns out there isn't one answer. There never is with this stuff.

Elizabeth Joh: It also turns out that President Trump is raising some new questions about what had kind of been an obscure, mostly dry topic about the presidency, the Constitution, and the idea of immunity.

Roman Mars: Not so dry anymore. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the nonstop, constant stream of news about Trump and channel that chaos into learning our Constitution like we never have before. Our professor is Elizabeth Joh, and I'm your fellow student and host, Roman Mars. If you want to sue the president, you had better stay tuned. We're back with presidential immunity.

Elizabeth Joh: So, let's say you think you've been legally wronged by the president of the United States. When can you sue him? Can you sue him at all? Here's one factor to keep in mind. When did the presidential wrongdoing take place? When the president was acting as president or about something totally unrelated? So, in 1968, an Air Force analyst named Ernie Fitzgerald testified before Congress. Fitzgerald was what you'd call a whistleblower. He exposed some massive cost overruns on the production of a cargo plane. This was pretty embarrassing for everyone. When Fitzgerald returned to his office later, his secretary supposedly asked him, "Have you been fired yet?" He wasn't fired right away, but Fitzgerald did eventually lose his job in 1970. The Air Force claimed, "Well, we just don't need your position anymore." But Fitzgerald thought, "You know what? You're punishing me." He appealed his firing, and he eventually got his job back. But in 1973, Ernie Fitzgerald also filed a lawsuit and asked for \$3.5 million.

Roman Mars: The case would eventually take him to the U.S. Supreme Court.

Elizabeth Joh: The most prominent person Fitzgerald sued was President Nixon. Why? Probably because White House tapes released after his firing revealed that President Nixon had ordered officials to--I'm quoting here--"get rid of that son of a bitch."

Roman Mars: Whoops.

Elizabeth Joh: Nixon's lawyers argued that a president has what's called "absolute immunity." That really means you just can't sue the president at all. And in the 1982 case of Nixon versus Fitzgerald, the Supreme Court agreed. According to the Supreme Court, the presidency was a unique position in the constitutional scheme. So, the basic idea here is if you allow anybody who's unhappy to sue the president for anything he does as president, the president never gets to do anything. He's too busy defending lawsuits. So, what Nixon versus Fitzgerald, the Supreme Court case, means is that you can't sue a president or even an ex-president, for that matter, for things that he's done as president--at least when you're seeking money for compensation.

Roman Mars: So, Ernie Fitzgerald was out of luck.

Elizabeth Joh: It didn't matter whether Nixon actually and illegally ordered Fitzgerald's firing. As it actually appears, he did. The president simply can't be sued for it. The Nixon whistleblower case is different than the Donkey-Riding Senator case. In Kennedy's case, the claimed wrongdoing--the car crash--took place before Kennedy was ever president. So, what happens in those kinds of cases?

Roman Mars: Well, it turns out the Supreme Court has an answer to that one, too. You might be more familiar with this case.

Elizabeth Joh: In 1991, Paula Jones was working at the registration desk in Little Rock, Arkansas, for a conference. One of the speakers was the governor of Arkansas--a guy you probably know--Bill Clinton. Jones was told that the governor wanted to meet her, and she later claimed that this meeting involved some unwanted sexual advances. So, after the story broke a few years later, Jones demanded that Clinton apologize. When he didn't, Jones sued him, asking for \$700,000. Of course, by 1994, Clinton wasn't just the governor of Arkansas. He was the president of the United States. Remember, in the Nixon whistleblower case, the Supreme Court said that Nixon could not be sued at all. He had what's called absolute immunity.

Roman Mars: In Clinton's case, though, the Supreme Court sided with Paula Jones. She could sue the president.

Elizabeth Joh: And the reason why has to do with why Jones was suing at all. She wasn't suing Clinton for anything he did because he was president. She was suing him for things that had nothing to do with the presidency. He just happened to be president at the time that she was suing him. Justice Stevens, who wrote the Supreme Court opinion in the Clinton case, also didn't see the big deal of letting the case go forward. After all, he had said there had only been three times when sitting presidents had been sued this way. One of these times was the Donkey-Riding Senator case. So, in Justice Stevens' view, this case wasn't going to occupy hardly any of Clinton's time. Immunity denied.

Roman Mars: It turns out Justice Stevens may have a sharp legal mind, but he was maybe the world's worst fortune teller.

Elizabeth Joh: Paula Jones' lawsuit was allowed to proceed against President Clinton. As a result, in 1998, Jones' lawyers conducted a deposition of President Clinton. That just means that Clinton gave out of court testimony to Jones' lawyers. And it was in the Jones deposition that Clinton ended up denying a relationship with White House intern Monica Lewinsky. And you know how the story ends. One thing led to another, ending in impeachment proceedings against President Clinton. In 1999, President Clinton was acquitted of two impeachment charges in a Senate trial. So, it turns out that it was a big deal--that without the 1997 case of Clinton versus Jones, the whole incident would have been just a sordid sex scandal. So, to sum up, the Supreme Court has said you can sue the president for things he did before the presidency, but you can't sue the president for things he does officially as president--at least when you're seeking money.

Roman Mars: So, what if you're looking to stop the president from behaving in ways that you think are illegal?

Elizabeth Joh: A lot of the time when people are upset with the actions of an administration, they file lawsuits against the president's subordinates, like the secretary of education or the attorney general. By suing someone who works for the president rather than the president himself, you don't have to raise the tricky question of whether or not it's okay to seek what lawyers like to call "injunctive relief." That just means you're stopping the president from doing something you claim is illegal. A case that gets brought up a lot here comes from the period after the Civil War; it's called "Reconstruction." The case is called Mississippi versus Johnson.

Roman Mars: The Johnson in this case is President Andrew Johnson.

Elizabeth Joh: Johnson assumed the presidency after Lincoln was assassinated, and he spent a lot of his presidency fighting with a Congress he detested. And they detested him, too. One of the things Congress did during this period was to pass what were known as their Reconstruction Acts. One of the acts was they divided the southern states--and we're talking about the former Confederacy--into military districts. In other words, the southern states were going to be under federal military control. So, the state of Mississippi decides, "We're going to sue President Johnson himself. We want you, President Johnson, to not enforce the Reconstruction Act." In 1867, the Supreme Court decided that it had no power to decide this case. Mississippi just could not sue the president to get him to stop from behaving in a way that he was supposed to--that is, doing his job and enforcing federal law. So now that is one case. It's not exactly the last word on this kind of situation--whether

you can stop the president from doing something he would otherwise officially get to do because he happens to be president of the United States. Since that time, there have been a number of cases where lower courts--that means courts other than the Supreme Court--have permitted these kinds of cases to proceed.

Roman Mars: So, let's get to what this means for Trump.

Elizabeth Joh: Each of the three cases I've just told you about has a role to play. So, let's start out with something the Supreme Court said in the Clinton versus Jones case. Part of the reason it was okay for Paula Jones to sue President Clinton for things he did as governor was because it was highly unlikely--and I'm quoting the Supreme Court here--that "a deluge of such litigation will ever engulf the presidency." Translation? No president is ever going to be sued for a lot of stuff he did before the presidency, right? Never. It's not going to happen. Well, Trump, as head of the Trump Organization, oversees a lot of Trump-related business. By one count, Trump's been sued thousands of times over 30 years. And a lot of these lawsuits will continue even while he's president. So, because the Supreme Court has already said a president can have what's called absolute immunity here, Trump's going to have to defend these lawsuits and any other new cases that aren't related to him being president. That puts a tweet from Trump posted right after the election in some perspective. On November 19th, Trump tweeted about a group of lawsuits against the former Trump University. It's out of business now. He said--and I'm quoting--"I settled the Trump University lawsuit for a small fraction of the potential award because, as president, I have to focus on our country." Okay, so being busy is probably one reason that Trump settled these Trump University claims for \$25 million. But the legal reason is because he couldn't claim that the lawsuits had to be thrown out of court. They had nothing to do with him being president. A little detail here, too: the judge who approved the Trump University settlement was Gonzalo Curiel. You know, the judge that Trump tweeted about last May as, quote, "very unfair. An Obama pick. Totally biased-hates Trump." Trump questioned the judge's legitimacy. That would be a theme Trump the president would pick up later.

Roman Mars: It's also the subject of Episode #1 of this very program.

Elizabeth Joh: President Trump has also been sued by Summer Zervos. She was a contestant on The Apprentice a long time ago. Zervos says that Trump sexually assaulted her in a hotel room in 2007. This is a decade before Trump becomes president. Trump then responded publicly that she lied. So now here's the twist: Zervos is now suing the president for defamation in New York state court. So, she is basically claiming that Trump is damaging her reputation by accusing her of lying. So, does this sound like a situation we've heard about before? Sort of. You would think it would be like Paula Jones' case against President Clinton. After all, Paula Jones sued a sitting president for something that had nothing to do with him being president. It kind of seems like this is the Summer Zervos case. So, Trump has to defend the lawsuit. That's the logic.

Roman Mars: Well, not so fast.

Elizabeth Joh: Trump's lawyers say that the Clinton versus Jones case could apply here, but it doesn't. Why? Because Paula Jones files her lawsuit in federal court while the lawsuit is taking place in state court. That's why the case should be thrown out. I don't know about that. We'll see if the judge buys the distinction. There are also, at the moment, three separate lawsuits against Trump that argue that he's in violation of the Constitution's Emoluments Clauses. So, these are the parts of the Constitution that say the president

can't take gifts from foreign nations without Congress' permission and they can't take any gifts from the state or federal governments at all. So, they're sort of anti-corruption clauses. All three lawsuits say, "Well, Trump has all these hotels and properties, and they're getting increased business precisely because he also happens to be the president of the United States." That, according to the lawsuits, violates the Constitution. One of these emoluments cases was brought by a government watchdog group that's called CREW--it stands for the Citizens for Responsibility and Ethics in Washington. So, CREW is asking a judge to declare that Trump is violating the Constitution. They're just saying to the court, "Please make Trump stop violating the Constitution." They don't want any money. Trump's lawyers--they say, "Hold on there. Court can't stop a president from doing something he's doing as president." So according to Trump's lawyers, this was already decided in Mississippi versus Johnson. Remember, that's the Reconstruction Era case where the Supreme Court said, "Nope, we don't have the power to order the president personally to stop doing something he officially does as president." Trump's lawyers may or may not be right about this, but they're using the 19th century case from the Supreme Court to support their arguments.

Roman Mars: One final example.

Elizabeth Joh: A restaurant in Washington, D.C., the Cork Wine Bar, has also filed a lawsuit against President Trump. The Trump International Hotel is located on federal property that's called the Old Post Office Pavilion.

Roman Mars: The owners of the wine bar claim that the Trump International Hotel is getting a bunch of extra business just because Trump is president--and that's unfair.

Elizabeth Joh: So, the bar's owners say, "Look, there's this clause in the lease. 'No elected federal official can have any part of it.'" What's weird here is that Donald Trump owns the company that owns the Trump International Hotel, and he's also the head of the federal government that leased out the property. It sort of sounds like he's leasing it to himself, right? It's complicated and weird. In the wine bar case, Trump's lawyers have also filed a legal brief saying, "No, this lawsuit has to be thrown out, too." The claim? This is just like Nixon versus Fitzgerald--that's the whistleblower case--meaning that the wine bar can't sue a president for being president. There's one small problem here for President Trump and his lawyers. Unlike Ernie Fitzgerald, the whistleblower, the wine bar owners don't want any money. They just want Trump to stop acting illegally--you know, close the hotel. Or they have another suggestion: just resign from being president. "Doesn't matter," say Trump's lawyers. "This is just like the Nixon whistleblower case. Dismiss."

Roman Mars: We'll continue to grapple with presidential immunity when Trump Con Law continues. It's really not clear how the presidential immunity claims by Trump's lawyers will be resolved in any of these cases.

Elizabeth Joh: The Apprentice case, the emoluments cases, or the wine bar case. But Trump's presidency means that the interpretation of these Supreme Court cases on immunity are being challenged in new and unexpected ways. Here's maybe one of the biggest questions when it comes to presidential immunity. If you can't sue the president for things he does as president, doesn't that put him above the law? Justice Powell, who wrote the Supreme Court opinion in the Nixon whistleblower case, said, "Well, there are other important checks. There is constant scrutiny by the press."

Roman Mars: I guess.

Elizabeth Joh: "There is vigilant oversight by Congress."

Roman Mars: Eh. Not so much.

Elizabeth Joh: "There's the threat of impeachment."

Roman Mars: Remote--but at least it's there.

Elizabeth Joh: "And," and I'm quoting here, "there is the need to maintain prestige as an element of presidential influence."

Roman Mars: Oh, yeah. We're doomed.

Elizabeth Joh: All of these are really limits based not so much on law as they are based on norms and customs. And of course, to some degree, each of the limits here have already been tested by this president. Do you know why they called Bailey the Donkey-Riding Senator? Because he promised that if he were elected to State Senate, he'd ride a donkey 90 miles from his home to the state capitol in Jackson. He was, so he did.

Roman Mars: That's great. This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com, on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop collective. In this week, we featured instrumental tracks from the all-new Shredder's EP featuring P.O.S, Sims, Lazerbeak, and Paper Tiger. Here is some more of it with them rapping and me shutting up. So good. Get it on iTunes, Bandcamp, SoundCloud--wherever you get your music. We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and Radiotopia donors just like you.