

WHAT ROMAN MARS CAN LEARN ABOUT CON LAW

LAW-FREE ZONE

ELIZABETH JOH: A special note: we recorded this episode before the attempted assassination of Donald Trump. We discussed political violence in the episode because the Supreme Court itself brought it up but remind our listeners that we both condemn political violence.

ROMAN MARS: So, it is Friday, July 12th, at about noon. And we took our eye off the ball for, like, a couple of months, and things went crazy. So, what are we going to talk about today?

ELIZABETH JOH: Well, I thought we'd talk about maybe one of the most important cases of the Supreme Court.

ROMAN MARS: Let's do it.

ELIZABETH JOH: So, let me start at a different historical point. On May 1st, 2011, a covert U.S. military operation shot and killed Osama bin Laden in Abbottabad, Pakistan. And the raid was approved by President Obama. And Obama's approval was necessary because the president of the United States is--by the terms of the Constitution--the Commander in Chief of the Armed Forces. And the presidentially approved killing of bin Laden was carried out by the Naval Special Warfare Development Group. It's also known as Seal Team Six, a group of Navy SEALs that carries out some of the most risky American military missions. Now, Obama's decision to send in a Navy SEAL team to kill bin Laden was a decision by the president to target the head of a terrorist organization responsible for the 9/11 attacks and an ongoing threat to American National Security. But what if a president, acting as Commander in Chief, ordered Seal Team Six to shoot and kill his political opponent in order to eliminate his rival--not to further national interests? Could such a president be criminally prosecuted after he left office? This hypothetical has come up not just once but twice. Once by a federal appeals court in Washington D.C., and then by the Justices of the United States Supreme Court. And this crazy scenario cuts right to the center of the Supreme Court's decision in a case decided on July 1st. What if President Donald Trump had ordered Seal Team Six to murder candidate Joe Biden? And what if Trump were to be reelected in November and ordered the assassination of his next political rival? Could Trump be prosecuted, or does the Constitution say no? Time to find out.

ROMAN MARS: Let's do it. This is What Roman Mars Can Learn About Con Law, an ongoing series of indeterminate length and very sporadic release, although it's going to get much more regular from here on out--don't worry--where we look at our Supreme Court's creation of a law-free zone around the President and use it 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.

ELIZABETH JOH: Okay, so, Roman, in order to understand the immunity case, I think we should review some important background. All right?

ROMAN MARS: Yeah, it's been a minute.

ELIZABETH JOH: Yeah, it's been a little while. So, first there's a legal background. The Supreme Court hasn't decided that many issues about presidential immunity. The issue just hasn't come up that much. But we do know that a sitting president can be sued in a civil case for things that the president did before the president took office. And that's because in 1997, the Supreme Court decided that President Clinton could be forced to defend himself in a lawsuit brought by Paula Jones. And that lawsuit alleged that Clinton had sexually harassed Jones during the time he was governor of Arkansas, not while he was president. And second, we also know that a sitting president cannot be sued in a civil case for acts that are part of the president's official duties as president. And that's because the Supreme Court decided, in 1982 that an Air Force analyst, Ernie Fitzgerald, could not sue former President Nixon for allegedly ordering his firing. Now, Fitzgerald had become famous for publicly calling out the Pentagon for wasteful spending. Why not? Well, that's because the president, according to the Court, is constitutionally in charge of the Air Force and is ultimately responsible for how it is organized. And Fitzgerald losing his position--whether or not it was done legally--falls under the kinds of actions a president can take as the constitutional head of the Executive Branch. Yeah. So, the usual nature of these cases is that they lead to different results because of the kind of conduct we're talking about. Was the president acting as president? And in the Fitzgerald case, the Supreme Court made it clear that its main concern was protecting the president so the president could fully perform his or her duties without being afraid of being sued every time there was a controversial decision. And that's why Nixon could not be sued at all for his conduct as president of the United States. He and every other president can rely on what's called "absolute immunity." Now, in the Nixon case, the Supreme Court said that so long as the disputed presidential conduct was within what's called the "outer perimeter" of the president's official responsibilities, no lawsuit is permitted at all. So, keep in mind that the Nixon and Clinton cases focused on civil lawsuits. And until this year, the Supreme Court hadn't decided a case about the potential criminal liability of a former president.

ROMAN MARS: We hadn't had a criminal president yet.

ELIZABETH JOH: We just never had occasion for it. Okay. So, now let's turn to the other important background--what's happened in the federal criminal election interference case against Donald Trump.

ROMAN MARS: Okay.

ELIZABETH JOH: Okay. So, on August 1st of last year, a federal grand jury indicted Trump for his actions after he lost the 2020 election and then tried to overturn the results of the legitimate election that sent Biden to the White House. Now, the indictment in the federal case discusses four basic types of conduct that Trump allegedly engaged in. So, first is that Trump and his allies tried to pressure state legislators and electors to change the electoral college votes and to send in a slate of fake electors for the official certification. Second, the indictment also charges Trump with trying to pressure the Justice Department to conduct sham election investigations. Third, Trump and his allies tried to threaten and pressure Vice President Pence into changing the election results. Remember, the Vice President has an official role in certifying the votes of the electoral college. And then finally, the indictment charges Trump with tweeting and talking to and encouraging the crowd on January 6th, right before the riot at the Capitol occurred. Now, Trump argued to the federal judge in his case, Judge Tanya Chutkan, that he was absolutely immune from criminal charges. And this isn't an argument that Trump didn't cause his followers to attack the Capitol. It's not about his First Amendment rights or anything like that. Instead, it's an argument that says, "No matter what I did, I can't be criminally prosecuted because I was acting as president when these events happened." And Judge Chutkan, the federal district court judge, ruled against Trump and decided that there was no immunity for Trump at all in his case. And then Trump appealed that decision to the appeals court in Washington. And it was during oral argument--the first time we hear about this SEAL Team Six hypothetical,

ROMAN MARS: Yeah, okay.

ELIZABETH JOH: Right. In which case, his lawyer actually didn't provide a very clear answer--very disturbing. But then in February of this year, the appeals court--in a unanimous decision--decided against Trump also. They decided that a former president is a citizen and no longer has any special immunity. So, it was this decision that Trump then appealed to the Supreme Court. The Court heard oral argument in Trump v. the United States on April 25th. Now, the SEAL Team Six hypothetical came up again before the Supreme Court, too. And while we were waiting for the Supreme Court to finally decide what it was going to say in Trump's case, on May 30th, a New York jury convicted Trump of 34 felony counts for falsifying business records. All of this was related to the hush money payments made to Stormy Daniels in 2016. And so, Trump, while he was waiting for the federal case, became the first American president to be convicted of a crime in a state case. But the Supreme Court didn't issue its own decision until July 1st, and that's troubling for its own reasons. But now I think we can talk about the case. It's a very important case in constitutional law. It's really troubling. And unfortunately, it's also really confusing. But the short answer is it's a win for the President--and most importantly, it's a win for Trump personally. So, we can try to break it down, okay?

ROMAN MARS: Okay.

ELIZABETH JOH:

All right. So, the Court splits along ideological lines. The three liberal Justices--Sotomayor, Kagan, and Jackson--dissent. And then the three Trump appointees plus Alito, Thomas, and the Chief Justice are in the majority. And the Chief--Chief Justice Roberts--writes the majority opinion. Now, on the surface, the majority opinion in the immunity case introduces an analysis that, I think, is pretty straightforward. And some of it's not controversial. Now, the Supreme Court establishes three ways we can classify a president's conduct. I was thinking of a way that we could imagine their analysis, and here's my idea. Think of a bullseye with a target--a series of concentric circles that gets smaller as they approach the center. So, at the outermost edge of our circle is unofficial conduct that a president engages in. So, we can call this Category Three. So, unofficial conduct is not protected by any immunity, so a former president can be criminally prosecuted for unofficial conduct. That conclusion in this opinion is not very controversial. Just like a president can be civilly sued for unofficial conduct, so too can a president be prosecuted for it. So, I don't think anybody would disagree with that. No surprise. Now, at the very center of our target--the bullseye--is presidential conduct that the Court calls "conclusive and preclusive." This is another way of saying that the constitution gives the president some powers that are only for the president. Congress doesn't share those powers, and Congress can't interfere with those powers either. Now, one form of interference, believe it or not, would be if Congress passed a criminal law, even if it applies to everybody--not just the president--and having that law apply to presidential conduct. So, when we're talking about the president's so-called "conclusive and preclusive" constitutional powers, the court in the Trump case says that the president has absolute immunity from criminal prosecution. So, that's the bullseye. Let's call that Category One, right? That's the center. So, the Supreme Court has decided, just in a couple of subject areas, that the Constitution gives the president powers and only the president alone that Congress can interfere with. So, one example would be the ability to recognize foreign nations. Only the president's allowed to do that. And Congress can't disagree with the president and can't legislate around the president's decisions. Another one is the president's pardon power. That's also absolute. Congress can't tell the president how to issue pardons. So that view, too--that there's some limited, core presidential conduct that can't be criminally charged--is another conclusion, at least if we're not talking about Trump in the abstract, that some serious people could agree with. So, that's the straightforward part. We've talked about the center and the outer limits of our target. So, what about in between? Well, here, the Court says that there is a "presumption of immunity for presidential conduct that falls within the outer perimeter of his official responsibility." Now, this is Category Two, right? That's our middle, concentric circle. So that "outer perimeter" phrase is just lifted from Ernie Fitzgerald's case. Of course, that was about civil lawsuits. But now the Court is using that phrase in this criminal context. So, this presumption for Trump means that even official conduct that isn't part of that limited core set of powers could also be immune from criminal prosecution. Now, the only way the government can get around this is if it can show, in the Court's words, that "prosecuting a former president would pose no dangers of intrusions on the authority and functions of the Executive Branch." Easy test, right?

ROMAN MARS: Yeah.

ELIZABETH JOH: So, it's very much a new standard within a series of categories that the Court introduces here. But anyway, that's the setup. In the case, we now have three categories of presidential conduct. Category One in the center--core, conclusive and preclusive, official power that gets absolute immunity. No criminal prosecution is possible. The outside--unofficial conduct--that receives no immunity at all. And so, a president can be criminally prosecuted. In the middle is official conduct that doesn't receive absolute immunity, but nevertheless, there is a presumption of immunity that the government may or may not have a hard time overcoming.

ROMAN MARS: Got it.

ELIZABETH JOH: But there is more surprising news in the opinion, right? So, remember, the Supreme Court is trying to issue an opinion--at least in its view--that's going to guide lower courts, not just for Trump's case but for future presidents who might theoretically exist and also engage in crimes. And in Trump's decision, the Supreme Court says that, when we're trying to distinguish unofficial (no immunity) from official (at least a presumption of immunity conduct), courts may not inquire into the president's motives. So, Roman, let's think about how this might work. What if--let's say--a hypothetical president offered military aid to a foreign nation and wasn't indirect about it but just said, "Hey, I want to get political dirt on my arrival, and it's just for my own reasons." So, is offering military aid official, do you think?

ROMAN MARS: Offering military aid is official. And we would normally be a little upset with the motive. But if you can't inquire into the motive, then it really just is about the official conduct of giving military aid.

ELIZABETH JOH: Pretty disturbing, right?

ROMAN MARS: It's extremely disturbing!

ELIZABETH JOH: We can't look at the motive. The Court says, under this new analysis that they introduced, "No matter how corrupt it might seem, a court cannot consider the president's motives." We're only looking at the conduct itself, even if that would be relevant in proving a case in any other kind of ordinary criminal prosecution.

ROMAN MARS: Yeah!

ELIZABETH JOH: So, that's pretty bad. And then it gets even worse. The majority decides that Trump is absolutely or presumptively immune for all official acts, and that means he can't be criminally charged with these acts. But the majority also then goes further. They say, "Look, that's not enough to protect the president. What we're going to do is say that the government is forbidden from relying on official conduct as evidence in a prosecution for other crimes." So, let's break down

what that means. Here's an example. Roman, let's say that the president takes a bribe in exchange for some official act. Off the top of your head, does bribery sound like a presidential duty?

ROMAN MARS: Bribery does not sound like a presidential duty at all.

ELIZABETH JOH: Yeah. I would agree with you.

ROMAN MARS: Phew.

ELIZABETH JOH: In fact, it's one of the reasons you can impeach a president.

ROMAN MARS: Exactly.

ELIZABETH JOH: But after this decision, the president is probably effectively immune because, in order to prosecute a bribery case against a former president, the government would probably want to rely on evidence of official acts--let's say conversations the president has had with his or her advisors. But the Court says, "Nope, that's not allowed. The government can rely on public records but not on any testimony or private records that relate to official conduct of the president of the United States." So, this is a further extension of immunity for Trump. So, these parts all together make up the basic analysis of Trump v. the United States--that there is at least presumptive and sometimes absolute immunity for criminal charges for official acts by the president and no immunity for unofficial acts. Courts can't look into the motive for official acts, even if we can all see--plain as day--that they're manifestly corrupt. And the government can't rely on evidence of official acts even to prosecute charges for other crimes--totally different crimes. So, so far, what I've described to you is actually the easy part. There are really two big problems, in the opinion, that we haven't talked about yet.

ROMAN MARS: Oh, my God. Okay.

ELIZABETH JOH: Yeah. So, here's the first problem. How do you tell one category from the other? The consequences are enormous. So, let's go back to the conduct that's charged in the federal indictment. So, I wanted to get your take on this. So, remember, there's four kinds of conduct we've talked about that Trump is accused of. So, let's start out with Trump pressuring the Justice Department to start a fake election fraud investigation. What's your take on that? Does that sound like official or unofficial conduct?

ROMAN MARS: Okay, so... This is tough. I feel like this could go into the realm of official, just because the president is the executive who does have control over the Justice Department. And setting priorities is part of that job.

ELIZABETH JOH: And that sounds about right because it's part of what he does. He's in charge of the Executive Branch. But then, the actual facts make us sort of uncomfortable.

ROMAN MARS: Well, right. But if you eliminate motive or eliminate the idea that we know it's false, every right-thinking person knows that all this is false. But I don't know how you can get into the state of mind of a president who doesn't know those things or who is pretending to not know that it's false just to have political cover. But still, this seems like within the realm of setting a priority that he thinks is important.

ELIZABETH JOH: Okay. So, what about pressuring Pence--pressuring the Vice President to change the results on January 6th? Does that sound like official or unofficial conduct?

ROMAN MARS: Okay. So, the president can tell the vice president what to do. I imagine that's pretty normal. That's an official power. I think there's a reason why this is Pence's job and not the President's job. And so therefore, getting in the way of that somehow smacks a little more unofficial to me.

ELIZABETH JOH: Yeah, because it's not exactly the president's job to count the votes--especially the loser.

ROMAN MARS: There's a reason why constitutionally that is the vice president's job. And so, that seems to me like that's something that would be outside official conduct.

ELIZABETH JOH: And that intuitively sounds right to me, too. Okay. What about Trump pressuring state officials to change the electoral votes?

ROMAN MARS: So, this seems like the whole separation of powers is to avoid this type of thing--that the president can make phone calls and do things a little bit, but this is not allowed.

ELIZABETH JOH: Yeah, and it's also about the states, right? What does he have to do with state elections?

ROMAN MARS: I mean, that's not his official job, of course. But you can imagine a president calling up a governor or calling up state legislators to do something as a favor or to be part of the party or do something. But that seems normal. But this version of it seems abnormal.

ELIZABETH JOH: Right. And then finally, what about all the tweeting where he is encouraging his supporters to come to the capitol, support him, and march up to the capitol? How does that sound?

ROMAN MARS: Yeah, I mean, again, tweeting out an agenda or presenting an agenda or giving a speech does seem like that's what the job... Like a Fireside Chat--seems like that was within Roosevelt's purview. I wouldn't say that he was off the clock when he was doing that. But it's the encouraging of a riot, which seems unofficial.

ELIZABETH JOH: We keep coming back to the specifics of Trump and finding that we really don't want this to be part of what's protected, right?

ROMAN MARS: Not at all.

ELIZABETH JOH: Well, here's what the Court said. So, when it comes to pressuring the Justice Department, the Court actually agrees with you that this seems like the kind of thing that presidents do. They're in charge of the Justice Department. And in an abstract way, we would say that, of course, any president is going to be involved in investigation and prosecution of crimes and thinking about his or her own Justice Department and how they ought to go about that--in the abstract. But the problem is, of course, that Trump was trying to use his own Justice Department for his own personal reasons--to use the Justice Department to try and cook up a fake election fraud investigation. But the Court doesn't want to look at that at all and instead says, "This is actually core presidential conduct," meaning that his power here is using that phrase "conclusive and preclusive." In other words, when it came to Trump trying to pressure his own Justice Department in ways that most of us find pretty abhorrent, the Court says, "Sorry, he receives absolute immunity." Okay. Then pressuring Pence--well, just like you said--the Court says, "Look, the president and the vice president are supposed to talk to each other a lot as part of their official duties. And when they talk about their official duties, that's official conduct." But on the other hand, the Court says that when Pence is presiding over the certification of the votes, he's actually not just the vice president, he has the temporary role of the President of the Senate, which is different than being the vice president of the United States. So, talking to the President of the Senate at that time--it's certainly not core presidential conduct. So, when Trump talked to Pence, this is official conduct. But the Court says that it's presumptively immune rather than absolutely immune. And so, that means when they send the case back to Judge Chutkan--that's the federal district trial court judge--she's going to have to hear from the government if they can overcome that presumption by saying that there's some interference with Executive Branch functions if they prosecute this charge. Of course, the Court doesn't explain to us how exactly Jack Smith and his colleagues are going to satisfy the will not intrude on Executive Branch functions standard, but they're kicking it to the lower court.

ROMAN MARS: Especially if you can't investigate official records.

ELIZABETH JOH: Yeah, that's going to be hard. And as far as pressuring state officials? "That's a toughie," says the Court. I'm actually not sure why. When Trump argues why he was doing this, his argument before the Supreme Court was: "I was trying to make sure that the federal election was going in a way with integrity and without fraud, even if it was being carried out at the state level." And the government said, "Absolutely not. When you're calling up people and telling them to put in fake slates of electors, that's private conduct. It has nothing to do with being president of the United States." But the Supreme Court didn't decide. They didn't decide whether it was official or unofficial. And they said, "Well, Judge Chutkan will have to figure that out." And then as far as the tweeting and speechifying right before the riot, here is really where the court gave Trump the benefit of the doubt. Again, regarding this conduct, the Supreme Court said, "Well, a whole lot of what the President of the United States says is likely to fall

comfortably within the outer perimeter of his official responsibilities." They don't decide, but they leave it to Judge Chutkan to figure out whether this is official or unofficial. So, as a result, the Supreme Court refused to classify any of Trump's actions in the election interference case as unofficial. So, that's pretty important because imagine if they did. Imagine if they said, "Some of this conduct is clearly unofficial." That would've given Jack Smith one possible path to proceed. He could have said, "Okay, we will drop the charges regarding the official conduct. And we'll keep the criminal case going with the unofficial conduct." But the Court doesn't do that. They basically leave a lot of things up in the air, and it's going to be up to the government to try to persuade the judge that some of the charges relate to unofficial conduct. So, that's one huge problem in the immunity decision. How is the court going to figure this out?

ROMAN MARS: Alright, so what happens next in this case?

ELIZABETH JOH: In the federal criminal case, Judge Chutkan has to decide whether or not to have kind of, like, an evidentiary hearing--a mini trial--about the nature of these charges. Is Trump going to receive some kind of immunity or not? I think everyone agrees that there is now zero chance of an actual trial before the election--no chance. And that, of course, has a lot to do with the Supreme Court itself. They heard oral argument in April but then didn't issue the case until July 1st. And that is also a choice because in the Nixon tapes case the Court heard argument. And about 16 days later, they issued an opinion. So, the Court is certainly capable of having a rapid opinion come out. They decided not to. And, of course, every delay in a case like this is a win for Trump--no matter what the opinion would've said. But that's not the only criminal case against Trump. There's the Georgia criminal case against Trump for state election interference. Then there's the Florida classified materials case against Trump. Then there's the New York State hush money case. Even though Trump has already been convicted, the case isn't over because he hasn't been sentenced yet. And after the Supreme Court issued its immunity decision, Trump has already argued that his New York conviction should get tossed because why? "I am totally immune from being convicted in court." And so, because it's a non frivolous argument, the judge in that case has actually postponed sentencing in the New York case until at least September. But in each of these cases, the judges are going to have to grapple with if these cases are allowed to proceed based on how to characterize the conduct in question. So, that's problem one. Problem two is a totally different kind of problem. Why did the Supreme Court decide the case this way? Even the Court acknowledges that there are two totally different dangers in this situation. One danger is about allowing the case to go forward because if you allow the case to go forward the court says that it is afraid that the fear of prosecution will keep presidents from behaving fearlessly in their duties. We won't have a robust president. We'll have a fearful president who's always worried that he or she will be prosecuted in the future.

ROMAN MARS: Sounds good to me.

ELIZABETH JOH: But on the other side is another fear. And that fear is that if we recognize a very broad form of immunity, well, what's the incentive for any president to behave lawfully? "Why does it matter how I behave if I'm not going to get prosecuted ever?" So, the problem in the immunity decision is that the Supreme Court decides that it's obvious to them that the bigger danger is having a president who's going to be what they call "chilled from taking bold and unhesitating action." But that's kind of the problem. The Supreme Court just decides. They never really fully explain to us why one fear should outweigh the other fear. And in other words, what's worse--having a lawless president or the possibility of revenge prosecutions of former presidents? The Court just says, "Well, it's obvious to us," but they don't really tell us how they made that decision. And then the decision leaves us with very little comfort because the Chief Justice says, "Well, the Court cannot afford to fixate on present exigencies." That's just a fancy way of saying, "We're not really concerned with Trump in particular." Well, I am concerned with Trump in particular. And so are you, I think, right?

ROMAN MARS: Yeah. That's fair to say.

ELIZABETH JOH: We do need to fixate on Trump, but the Court is really acting as if they are kind of ruling for eternity without looking at the former President right in front of them. It's not a unanimous opinion. Justice Sotomayer writes a dissenting opinion that we can turn to. Justice Sotomayer accuses the majority of creating what she calls a "law-free zone" around the President. And you may have heard of some of the extreme language that she used. But she says, "What might happen?" And she gives a series of hypotheticals. So, here's what she says: "Orders the Navy's SEAL Team Six to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune, immune, immune." Now, what's interesting here is that, in the way that the Supreme Court issues an opinion, they'll go through multiple drafts, especially when there are dissents and concurring opinions. So, they all have a chance to respond to one another. So, Justice Sotomayer obviously is very upset with the consequences of the decision. And she has these really terrible hypotheticals, including the SEAL Team Six one. And in the majority opinion, the Chief Justice accused Sotomayer of taking a tone of "chilling doom." But what's interesting is he doesn't refute her hypotheticals. He never says, "Well, of course that's not going to happen. Of course there is going to be prosecution in those cases." He doesn't refute them at all. And that's why I think that Sotomayer concludes her dissent with what she calls a "fear for our democracy."

ROMAN MARS: Okay. Yeah. That's a period. Okay.

ELIZABETH JOH: I mean, we usually try to find something lighthearted, I know, in our discussions, but this was a hard one to do. There's no silver lining in this one.

ROMAN MARS: It's really rough. Okay, so let me try to find at least something here. So, does the fact that the hush money case that led to the 34 convictions was for an act that happened before he was president somehow make this sidestep this a little bit?

ELIZABETH JOH: In theory, that ought to be the right answer because it has nothing to do... In fact, all of this happened before he became president. But the problem is that the immunity decision gives Trump the ability to just start to throw up immunity as a way to delay these cases. If we want to get into the weeds a little bit here, what's happened as a result of the Trump immunity decision by the Supreme Court--Trump is allowed to raise these immunity cases. And, unlike in some ordinary criminal cases, because immunity is so important, if he loses an immunity decision... In other words, "This conduct is immune." "No, it's not." He's allowed to immediately appeal that decision, which would then add another layer of delay. So, in the New York case, maybe it's kind of a loser. But for now, all he needs to do is to keep the clock running. And every time he does that, it's in his favor.

ROMAN MARS: But why can't the judge just immediately rule? Because this is before he was president, so this doesn't apply. They could just interpret it that way and expedite it. That seems to me like something that could happen. Why is that not possible?

ELIZABETH JOH: Oh, because--in all fairness--Trump is a criminal defendant. When you have these kinds of arguments, you have to give both sides the opportunity to brief the arguments and perhaps argue before the judge. And that's the kind of typical practice. We wouldn't want a system in which any judge for any defendant would just say, "I already decided you lose." And that's kind of the problem. I mean, in all of these things, are we talking about the issue of immunity in the abstract or the danger of Trump in the particular? And that, I think, is one of the biggest mistakes in the Supreme Court's decision. When you have a court that's sort of unwilling to confront the danger right in front of them... And they kind of wanted to treat it as if it were a classroom hypothetical. And I say this as a teacher. But they're saying this as if it were just an interesting abstract problem, but it isn't.

ROMAN MARS: Right. But even as an interesting abstract problem, in general it seems wrong, too. Is there a specific kind of maybe hypothetical that you can imagine that you think that this breakdown of official conduct and unofficial conduct makes sense--outside of Trump?

ELIZABETH JOH: Well, certainly the core and the periphery of our target idea. I mean, I think there's some things that make sense. I think some of the serious discussion around immunity is stuff like... Let's say a president orders a very controversial drone strike. Do we really want to have that president later prosecuted for murder? Some people might say yes, but a lot of people would say, "Wow, I'm not sure I feel comfortable with that because these are controversial foreign policy decisions that presidents have to make." So, that might be at the core part of it--that we think, "Okay, some people will agree a president needs some protection here." But it's the expansiveness of the immunity that's a real problem. I think you're right. Even in general in the hypothetical, there is so much that appears to be protected. And the Court makes it a test that has to be hashed out in every single case in a very fact-specific manner. It's not easy. And

in fact, I guess if either one of us were president, maybe it wouldn't be so clear what we could get away with. And I think the thumb is on the scale of "I guess I can get away with it."

ROMAN MARS: Especially when you cannot inquire into motive or investigate official records to figure that stuff out. If it's going to be fact-based and case by case, why hamstring those two investigative avenues?

ELIZABETH JOH: Yeah. And what's wrong with being somewhat afraid of going too far and breaking the law?

ROMAN MARS: Exactly! I want our presidents a little bit afraid! And the whole thing is this is what the White House Council is for. So, like, what? Do we just fire all those people? I mean, I'm sure Trump doesn't care. But it's to ask lawyers who care about these things or at least--I don't know--care about protecting their client. "Is this okay or not?" Isn't that their job?

ELIZABETH JOH: Yeah, I think that that's exactly right. And the irony, of course, here is until 2024 every president theoretically lived with the threat of criminal prosecution. And so far, it's worked out okay. Nobody has said that any particular president was terrified of criminal prosecution so they weren't a fearless president.

ROMAN MARS: Totally. That is something that is... For a court that is completely ensorcelled by the idea of history and tradition--can't look at the history of the presidency and look at that they have not had their hands tied by this type of fear is just sort of beyond me.

ELIZABETH JOH: Yeah, and for a court that really wants things to be part of either a text or history and tradition--thinking, "I don't know. Uh, Dobbs?" This is a case where just the idea of absolute immunity, presumptive immunity, and new immunity--that whole analysis kind of comes out of nowhere. And they feel comfortable--completely comfortable--making that choice.

ROMAN MARS: Yeah. Well, I think "chilling doom" is, like, right on the money.

ELIZABETH JOH: Right on the money. And unfortunately, now SEAL Team Six is part of the canon of constitutional law.

ROMAN MARS: Yeah. How many hypotheticals can we throw SEAL Team six into? Well, despite the results of this decision, it's a real pleasure to be back together talking with you. I appreciate it.

ELIZABETH JOH: Yeah. It's great. Good to be with you again.

ROMAN MARS: This show is produced by Elizabeth Joh, Isabel Angell, 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

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