

The Hatch Act and The Election

Elizabeth Joh [00:00:01] Hey, Roman.

Roman Mars [00:00:02] Hey. How's it going?

Elizabeth Joh [00:00:03] Good. Little quiz for you. Two words. "Hatch Act." What does that mean to you?

Roman Mars [00:00:10] I've caught little bits of this in the news. And this is some kind of rule or law that means that a person in the executive can't use, like, their executive position to be running for office or something like that. Is that close?

Elizabeth Joh [00:00:29] Yeah, that's pretty good. That's pretty good. So, this has come up because of the Republican National Convention, of course. And what we've seen already is the use of the White House for the convention. So, the first lady has given a speech there and the president is about to give a speech on the South Lawn of the White House. So not only is this unprecedented for a modern president to use the White House in this way, it raises this idea of, well, aren't there laws about this kind of thing? So, there is this thing called "The Hatch Act." There are. But the answer is actually a bit complicated. So, the Hatch Act is a Depression era law that says basically government employees can't participate in politically partisan activities when they're on the job. I mean, the motivation for the law, I think, is pretty clear. Like, you don't want employees to be using the symbols of their job and then also advocating for their own political beliefs or working for partisan political activities while they're on the job. They can do things when they're at home or off duty.

Roman Mars [00:01:33] Presumably the president and the vice president are never really off duty. So how does it apply to them?

Elizabeth Joh [00:01:39] So here's the kicker. So, while you've heard a lot of things about the Hatch Act, the Hatch Act applies to all of these federal employees except for the president or vice president.

Roman Mars [00:01:51] Right because they have to campaign by necessity. I mean, that's okay.

Elizabeth Joh [00:01:54] Yeah, that's okay. So that's true. But the problem is, of course, it's not that Trump just goes up to the South Lawn himself. He has tons of his own employees helping him do this and setting things up and making sure everything goes smoothly. Presumably they're all subjected to the Hatch Act, too. You know, as far as "Well, isn't there a law that is supposed to take care of this so people don't do this?" Well, that's complicated, too, because, number one, if you're a political appointee, the office that's supposed to monitor for Hatch Act violations--which is called "The Office of Special Counsel"--they can recommend or find that someone has violated the Hatch Act. But if it's a political appointee--that is someone that the president has personally appointed during his term, like a cabinet member--it's up to the president to decide, "Well, you know, that's a fireable offense. I'm going to fire you for violating the Hatch Act," which is pretty unlikely for President Trump to do.

Roman Mars [00:02:51] I think so, yeah.

Elizabeth Joh [00:02:52] It doesn't apply to the president. But what's the big deal here? Just like we've been talking about for a while, it's all about norms. So, we're going to see an unprecedented shattering of the norms here as the president uses all the pomp and circumstance and the symbols of the federal government to use it as advertising for his campaign.

Joe Biden [00:03:11] He's using the White House as a prop now. I mean, look what's going on in terms of the Hatch Act. And I know people don't know what the Hatch Act is, but using federal properties to make political statements from--and political campaigns...

Roman Mars [00:03:27] Has anyone ever been fired or fined because of the Hatch Act or.

Elizabeth Joh [00:03:32] There are definitely instances in which previous administrations have had even high-level members of the president's team, you know, raise Hatch Act questions or perhaps even engage in Hatch Act violations. But I think what's so different here is that Trump is literally engaging in the kind of core activities that the Act is really trying to direct. It's the spirit of the law that he's violating, right? To say, "I don't care. I'm going to use the White House with the flags behind me and use all of my regular White House employees because I'm both the head of state and the head of a political party. And so what? I get to benefit from both things." And I think that's the core problem. So even though it's unlikely that the Hatch Act is going to have any meaningful role here right now with all that's going on with the convention, the spirit behind it is kind of a drain the swamp attitude, right? We have these kinds of laws because we don't want political corruption. We don't want politically minded partisan activities in our federal government employees. The problem is the person right at the top doesn't seem to care. There is a board called "The Merit Systems Protection Board," and they're responsible for making sure that Hatch Act violations are pursued and prosecuted. But there isn't a board right now. President Trump has left it empty since 2019. So, you can't really have a lot of enforcement if you don't have anybody there--literally no one there. So, it's kind of a gutted agency right now.

Roman Mars [00:05:01] Yeah. I mean, they're the violator and the police.

Elizabeth Joh [00:05:04] Exactly.

Roman Mars [00:05:09] This is What Trump Can Teach Us About Con Law--an ongoing monthly series of indefinite length, where we take the tweets and shenanigans 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 remote learning student and host, Roman Mars.

Elizabeth Joh [00:05:34] So let's talk about election shenanigans 2020. Okay. So, the way that Americans elect the president might sound a little strange to people outside of the United States. In fact, it's actually probably strange to a lot of Americans.

Roman Mars [00:05:49] It's strange to me.

Elizabeth Joh [00:05:51] Every four years, voters around the country cast ballots in the presidential election. But the thing is that American voters actually indirectly elect the president. And that's because of this funny institution called the "electoral college." It's actually spelled out; it's required by the Constitution. So, let's talk about some basics. The Constitution itself has some specifics about this indirect method. There are 538 positions that are called "electors." One for each senator, one for each representative, and three for

the District of Columbia. Now, every state decides how to select their own electors. And it's the state electors that actually vote for the president of the United States. So how do these voters--these electors--know who to vote for? Well, they rely on the popular vote of the voters in their state. So even though most of us focus on election day, November 3rd, and November 3rd is absolutely important, under the Constitution, that's not everything that's required. And that means that when you cast a vote for president on election day, that is also a vote for the elector who's already been selected by the political party of that candidate. So, let's say that a majority of voters in-state vote for Trump. Then the Republican group of electors is elected for the state. And the reverse is true, too; if a majority vote for Biden, the Democratic electors are elected. Almost all the states here have a winner take all system. And that means that if a presidential candidate wins the popular vote, say, in Florida, which has 29 electoral votes, then he or she receives all of them. So, it's still not done. In December after election day, the electors of each state meet. They cast their ballots for president. And they're still not done. In January, Congress needs to count these electoral votes. So, it's only at this point we now have a formal, constitutionally approved president elect. So, it's the electoral college that actually decides who is president. So, while the popular vote in the United States is definitely important, it's important to remember that we also choose our president in this kind of indirect way. And this explains why it's possible for a candidate to win the popular vote but also then lose the electoral college and thus not become president of the United States.

Roman Mars [00:08:17] And is there something in the Constitution that mandates that all of the electors in a state vote in a block like that, or is that determined by the state?

Elizabeth Joh [00:08:27] That's determined by the states. So, the states decide whether-- And so, in fact, we have just a handful of outlier states that don't do that. But the vast majority of the states in the U.S. have a winner take all system.

Roman Mars [00:08:39] And presumably then you could have an electoral college that more closely mapped the popular vote if they were awarded proportionally in a state.

Elizabeth Joh [00:08:52] And that's right. But this is not spelled out by the Constitution at all. But we've kind of left it up to individual state choice. So, let's get to 2020. Okay. So now you take this system for electing the president. It's a little bit weird. It's a little bit surprising for first time listeners. You add a pandemic. You add a president who's known for spreading misinformation and doubt. And you have a really, really big problem. So many Americans right now are fearful about acquiring COVID-19, and that means they might be discouraged from voting in person. They don't want to go to the polls in person for understandable reasons. But President Trump has made the situation worse. For example, in April, he tweeted that when it comes to statewide mail-in voting, there was tremendous potential for voter fraud. Why did he tweet that? What's going on here? Well, first, Trump has made this huge distinction between absentee voting and mail-in voting. So, for instance, in June, he said that absentee ballots were the equivalent of going to a voting machine or sometimes even better because you have to go through a whole process. And the president himself votes by absentee ballot and has done so many times. But mail-in ballots? Trump keeps telling everybody that these are fraudulent, they can't be trusted, there's something wrong with them...

Roman Mars [00:10:15] Is there any difference? Like, I mail in my absentee ballot, so I don't understand the difference.

Elizabeth Joh [00:10:21] Well, that's exactly right. The short answer is that this alleged huge distinction doesn't really exist. So, it's worth clearing up some confusion here. So, remember, we just talked about how the Constitution sets up the electoral college. But how individuals cast ballots is a matter left totally up to state and local governments. So that's federalism for you. So, one way people use these two terms--absentee and mail-in ballots--is this: How you receive your ballots. And traditionally, what that means is that an absentee ballot was a ballot sent to a voter who could not physically go to the polling place. They couldn't go. So, for example, during the Civil War, absentee ballots allowed soldiers in the Civil War to cast their ballots in their home states, even though they couldn't physically go to the polls. But categories of people who were allowed to cast an absentee ballot have grown over time. Like, if you have a disability or you have an emergency or you have to be in the hospital or something like that.

Roman Mars [00:11:23] So maybe I mischaracterized my own self, and I didn't actually have an absentee ballot. In California, I have a mail-in ballot.

Elizabeth Joh [00:11:29] Let's come back to-- I'll quiz you on this. Okay. So, every single state allows some voters to receive their ballots in this particular way--as a so-called "absentee voter with an excuse." But now a majority of states let anybody receive an absentee ballot; even without a specific excuse, you can just ask for one. And that's called, confusingly enough, "no-excuse absentee voting." And that includes the state where Trump votes--Florida. Florida lets you just ask for an absentee ballot. Now, in a couple of states, a ballot is automatically mailed to every eligible voter, whether or not you asked for one. That's basically sometimes called "all-mail voting." So, this happens in states like Colorado and Washington, but it's a minority of states. And to make matters even more confusing, some states call what I just described as absentee voting "mail-in voting" because literally you're mailing in your vote, right? The short of it is there's no magical difference between the two terms in terms of how you receive your actual ballot if you're not physically present at the polls. So, then there's the issue of how you send in this ballot once you get it. Every single state lets you mail in your absentee or mail-in ballot through the mail. And some states make this even easier. They might give you a pre-paid envelope to let you send it in. Some states, allow you to drop it off in person with your local election office, or they might have a set up secured voting drop box. Some states even allow you to change your mind and then say, "You know what? I want to go in person and vote anyway." But how you send in your ballot--whether you call it absentee or mail-in--there's no magical difference here either. So, Trump's wrong on that as well. Then there's the issue of timing. Some states say you have to turn in your ballot by the close of polls on election day. And some places say, "Just have it postmarked by election day." So now with the pandemic, some states are trying desperately to make it easier to vote in alternative ways. So, New York actually just passed a law about this. The New York law allows voters to request an absentee ballot. And the excuse that they're going to recognize is "You're worried about contracting the virus." So that's an example of expanding the categories of people who request an absentee ballot because of COVID-19.

Roman Mars [00:13:51] That makes sense.

Elizabeth Joh [00:13:52] To answer the question, what are the rules for voting by mail in the United States? What do you think the answer is?

Roman Mars [00:13:58] It just matters where you are.

Elizabeth Joh [00:14:00] Yeah, it totally depends. It totally depends. We have decided as a country we're going to have this really highly decentralized, super local way of administering elections, even when it comes to voting for the president of the United States. And then there's another topic that President Trump keeps returning to, and that's voter fraud, which in his view, is somehow so much more likely if you vote by mail. So, in August, Trump said, "Absentee ballots--by the way--they're fine. But universal mail-ins that are just sent all over the place--that's the thing we're against." And then he tweeted pretty recently, "So now the Democrats are using mail drop boxes, which are a voter security disaster. So, he calls them a "big fraud." Is any of this close to true? Absolutely not. So, whether you're talking about absentee voting or voting by mail or in-person voting, numerous, multiple nonpartisan studies have said that voting fraud is very rare. It's extremely rare. So, I'll give you an example--a specific one. There's one study that's been cited a lot. It looks at absentee ballot fraud between the year 2000 and the year 2012. There were 491 prosecutions for absentee ballot fraud. So that sounds like a lot, right? Like--whoa--that's hundreds. But this is a time period in which there were literally billions of votes cast during this time. So as a percentage, it's a minuscule amount of fraud. It's not enough for anyone to worry about the voting system at all. And impersonation fraud--you know, where you show up to a polling place and you pretend to be someone who's dead or doesn't exist--that's basically a nonexistent crime, almost nonexistent in real life. But you wouldn't think that if you looked at social media, right? You'd think that people were pretending to be your dead grandma and walking in and voting on election day.

Roman Mars [00:15:57] It's an extremely inefficient crime. It sort of amazes me that anyone would think that that would be a huge problem--to have an individual person, one at a time, go in and cast a vote for somebody else, pretending to be a person that they're not. That's crazy to me. This reminds me of, like, whenever I go into an Apple store, I download all of my podcasts on all the devices that are on display.

Elizabeth Joh [00:16:22] Sneaky, but yet very inefficient.

Roman Mars [00:16:25] And super inefficient. It only happens a couple of times a year, but I take great joy in it.

Elizabeth Joh [00:16:33] Well, wait. You think, "I thought I heard about more election mischief," right? And you might have seen Trump's tweet in May where he said something about Michigan. He tweeted, "Breaking. Michigan sends absentee ballots to 7.7 million people ahead of primaries and the general election." Then he talks about voter fraud. So, he says, "Look, this was done illegally and without authorization. I will ask to hold up funding to Michigan." So apart from conditioning federal funding on getting states to do his political bidding, which pretty much stinks of unconstitutionality, Trump isn't factually correct here. Michigan was actually sending absentee ballot applications to voters. So, what that means is you would have received an application in the mail, which you then had to decide to fill in, which then had to be verified by the state, and then you would actually get the ballot. So that wasn't right at all. And remember, mailing in a ballot isn't automatically a vote. When you turn on your ballot, then election officials have to verify your signature. You sign an affidavit on the ballot envelope. And if there's a discrepancy, you have a chance to try and correct it. But ironically, absentee ballots actually might have a greater chance of being rejected than people who vote in person and have problems because you're not necessarily going to find out very quickly that you have to correct it. And there are also just some mistakes. Lots and lots of people forget to sign their ballot, and so then their ballot doesn't get counted either. So, there are certainly going to be some really big issues in the November election. So, states are going to face an unprecedented

number of people who've now decided that they want to mail in their votes rather than go in person. And so, verifying and counting them is going to take a really long time. And that's a problem now because the election between President Trump and Joe Biden looks like it's going to be close in terms of winning the electoral college; that's what's key. And it may take longer to count votes if we have this huge number of mail-in ballots. So that makes Trump's tweets and statements even more alarming. They are turning up doubt and confusion both now and certainly on election day. And all of these claims are meant to raise questions about the legitimacy of an election--"Should Biden become elected president?"

News caster [00:19:00] The Trump campaign suing the state of New Jersey today for planning to mail ballots to every registered voter in the state. Democratic Governor Phil Murphy noting that the state already tried this during the primary because of the coronavirus pandemic. And he says, "It was an overwhelming success." The Trump campaign claims this...

Roman Mars [00:19:18] Presumably the electoral college, at least in part, was set up to deal with the inefficiencies of colonial era voting and how things could get lost or people take a long time to get to a polling place or can't get to a polling place or whatever. And so, is it possible that the electoral college is actually a safeguard against bad things happening in the popular vote because of these, you know, mail-in voting or it being different election commissions being unprepared or that sort of thing?

Elizabeth Joh [00:20:01] So I think what you're raising is this idea--and it's a good one--that, like, maybe we have the electoral college to make sure, like, "Look, we have this other system to demonstrate that this was a legitimate election." But I think part of what's going on now that might be a problem is even to get to that electoral vote in every single state, depending on the state, it might take some time. You know, if you're in Michigan or Wisconsin, let's say, you've got COVID, you've got people confused about, you know, what is the legitimate way to have my vote counted. You know, we might not actually know on the night of election day what the total electoral count is. So even though there's some sort of buffer built in, there are so many things that are unusual to this presidency and to this year that even that system might not do everything that it's supposed to do.

Roman Mars [00:20:49] Right. But it sounds like to me that if what truly elects the president is the Congress counting the votes in January that were cast in December that were determined in November, that it's really the expectation that we have watching TV on election night that determines the presidency, which is the norm that has to be somewhat, you know, modified so that when we don't get an answer that night, we realize that what really needs to happen is this all needs to be done by December and everything will be okay as long as the thing in December happens.

Elizabeth Joh [00:21:28] You know, that's an absolutely great point. I think the problem here is that the president is already actively warning people that if we don't know the results through the popular vote on election night, then something is definitely wrong. But to your point, if we count everyone's votes and we go through all of the careful processes the states and local governments have set up, then it should be okay for us to have a little bit of uncertainty, particularly in a very close race. But there really isn't a public campaign to make sure people understand what the electoral college is all about.

Roman Mars [00:22:05] That's what our campaign is.

Elizabeth Joh [00:22:06] Exactly. "The electoral college--know it and embrace it."

Roman Mars [00:22:11] We'll know it at least. I don't know. You could get rid of it as far as I'm concerned, but I'm just like, "While it's here, why don't we just use the one good thing it has, which is it has a time delayed, contemplative body that does something different than just counting numbers?" I think you're right that in the vacuum of that time, when you don't know what the result is in the popular vote and the time that the electors actually do their job, a lot of conspiracy and nonsense can foment during that period of time.

Elizabeth Joh [00:22:42] Oh, you could absolutely imagine all of the shenanigans that could happen in a scenario where we don't actually know with certainty who the winner is on election night. And then all of the kind of aggressive misinformation that will be put out there to say that, you know, things are being skewed behind your back. And that's why, you know, people really have to be careful about where to get truthful information and really try to understand their own system and why there might be a perfectly legitimate reason that we might not know with perfect certainty on election night. Now, we may know, in fact, there might be a clear winner one way or the other. But it's also possible we may not. But that doesn't mean that the system is entirely broken down. And that gets us to the other big, dark idea that Trump has suggested, which is delaying the election. So, in July, he tweets out, "Well, this is going to be the most inaccurate and fraudulent election in history." "Delay the election until people can properly, securely, and safely vote," he tweeted. There's a really simple answer to this. He can't do it. He just cannot do it. And that's because no president can personally cancel or delay the election. And that's actually in the Constitution. It's up to Congress to have the power to choose the timing of the general election. And they've done that. Since 1845, federal law means that the first Tuesday after the first Monday in November is election day. So, if we want to have a change to the date of the general election, that's up to Congress. Is there a scenario where President Trump passes an executive order delaying the general election? That would be unconstitutional. He would not have the power to do it. Could he try to do it? I wouldn't put it past him. But there is a stop gap here, right? Even if there were some extra constitutional emergency that Trump tried to declare, well, the 20th Amendment says that the incumbent president's term ends at noon on January 20th. Full stop. Nothing allows the incumbent to stay in office. So how do you vote?

Roman Mars [00:24:57] I get what I would call an absentee ballot--but I guess it's just a mail-in ballot--for every primary, every general election. And then most of the time, I find a polling place, and I drop it off on election day in a box. What about you?

Elizabeth Joh [00:25:15] Same. There's that time of year where I get my giant ballot. I spread it out over my dining table.

Roman Mars [00:25:21] Exactly. Yeah.

Elizabeth Joh [00:25:21] I try to figure out what's going on and then, you know, drop it off at my local drop box. Never had a problem. Pretty convinced that my vote has been counted. Hoping to do that again.

Roman Mars [00:25:32] I like that. That night, like, I begin to research because there's these, you know, judges. You know, I'm like, "I don't know who this judge is." And so, I look up different endorsements and stuff like that. So, it's a big night for me.

Elizabeth Joh [00:25:46] Right. You know, "Are you familiar with measures AAABZ?"

Roman Mars [00:25:50] Yeah, because California--a lot of people don't have this in their states--but we have lots of, you know, issues that we vote on directly.

Elizabeth Joh [00:25:58] So many issues.

Roman Mars [00:26:00] Which is generally a mistake, actually.

Elizabeth Joh [00:26:02] Right. Like, "Do you support the negative increase of the non-funded, unfunded mandate of the--" And you have no idea why there's so many negatives in it.

Roman Mars [00:26:10] Totally. And so, they require a bunch of research. And so those are actually, I think, really, like, a problem for democracy in general. But the voting part of it is not a problem. I really enjoy it. And even though I do have the capability and do like to go into the polling place--I do like to drop it off at the polling place, I've, like, brought them coffee, and I love the whole process of voting a lot--I always do it through a mail-in ballot.

Elizabeth Joh [00:26:36] Yeah. And for me, it's always about the sticker that I get when I drop it.

Roman Mars [00:26:39] Yeah, I like the sticker. I like the sticker. I like to say "hi" to the, you know, septuagenarians who live in my neighborhood. I like the whole process of it. It's great.

Elizabeth Joh [00:26:50] That's awesome. All right. Great.

Roman Mars [00:26:52] Thanks.

Elizabeth Joh [00:26:53] Thanks.

Roman Mars [00:27:19] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. Intro music is from Sims' More Than Ever, which is a modern classic. And the outro music is from Lazerbeak's forthcoming solo record, Penelope. I have a preview copy. It is so good. You're going to love it. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.