

# What Trump Can Teach Us About Con Law

## The Eastman Memo

**Roman Mars** [00:00:00] So we're recording on Thursday, September 30th at 2:41 p.m. And class is beginning again. So, what are we going to talk about today?

**Elizabeth Joh** [00:00:09] All right. Well, let's go back to the 2020 presidential election.

**Roman Mars** [00:00:13] Okay.

**Elizabeth Joh** [00:00:14] One more time. Now, there were good reasons, if you think back then, to worry about whether we were going to be able to pull off a legitimate Democratic election for president, right? So, let's go through a couple of those concerns. Number one, Trump and his allies kept stating--without any evidence at all--that the election was going to be fraudulent, that there were going to be ballot boxes stuffed, that there were going to be ineligible or dead voters voting, that voting machines were going to be tampered with, all kinds of stuff like that. And even months before Election Day, remember, Trump kept saying things like, "The only way we're going to lose this election is if the election is rigged." Now, these claims of election fraud never really died down. And in fact, they've kind of gotten more insistent. So that means that literally millions of Americans believe, falsely, that there was something wrong with the election of President Biden. Second, Trump and his allies tried a pressure campaign in some of the states by doing things like trying to prevent secretaries of state from certifying the results.

**Newscaster #1** [00:01:19] Decertify the election--that is the demand coming from none other than the former president, Donald Trump. And it comes in a new letter to Georgia's Secretary of state, Brad Raffensperger.

**Elizabeth Joh** [00:01:32] Or just flat out calling for some state legislatures to ignore the popular vote of their citizens. So, the third, we know that Trump tried to get the courts to try and overturn the results of the election. So, you and I have talked already about how in December of last year, the Texas attorney general filed a lawsuit. And in that lawsuit, the state asked the Supreme Court to basically overturn the election results. Remember, Texas was asking the Supreme Court to stop four states from casting their electoral votes for Biden. And we never did find out what the Court thought because the Court declined to hear the case. They said that Texas lacked standing. They lacked the ability to bring the lawsuit against these states. And then finally--and maybe worst of all--the Capitol attack on January 6th. Remember that Congress was going to meet in a joint session to count the Electoral College votes for president and to certify who is going to be the president and vice president elect. Now, if you take yourself back to that time--remember, the election had already taken place. And remember, it's the Electoral College that decides the winner of the presidential election, not the popular vote directly. When you vote, you're voting for a slate of electors in your state. So, what had already happened was that on December 14th, the electors in all 50 states had met all over the country and cast their votes. So, the next step is generally a ceremonial, non-controversial event. Congress certifies that result with the vice president as the president of the Senate presiding over this process. But of course, we had a riot--and hundreds of people left a rally headlined by Trump, and they attacked the Capitol. And we now know that because of that riot, five people died, including a police officer. And at this point, there are more than something like 500 people who participated in that riot who have been charged with crimes. So, you've got the lie, the pressure campaign, the courts, and the mob. Now, if we think now, some people might say, "Well, Trump's efforts seem kind of cartoonish or laughable. And it failed, right? And

we've moved on, right?" Well, not so fast. The events of the last presidential election are not in the rearview mirror, I'm afraid. So, some new information has come to light. And it's a warning sign of what might be to come.

**Roman Mars** [00:03:53] Oh. Well, let's heed the warning. 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--it still tends to involve Trump somehow--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 perpetual student and host, Roman Mars.

**Elizabeth Joh** [00:04:47] All right. So, remember, the Constitution provides for how the president becomes president of the United States. Article II says that "the states shall appoint electors in such a manner as the legislature thereof may direct." And that means every state today allows their electors to be chosen by the votes of ordinary Americans. Once the Electoral College meets, Congress is supposed to meet. And the 12th Amendment says the president of the Senate--that the vice president--"shall, in the presence of the Senate and House of Representatives, open all of the certificates and the votes shall then be counted. The person having the greatest number of votes for president shall be president if such number be a majority of the whole number of electors appointed." Still awake? A federal law called the Electoral Count Act that dates back to 1887 also gives us some more procedures. Now, that law specifies how Congress is supposed to go through the process of counting votes--like meeting on January 6th after a presidential election. So, let's go through a couple of those rules. Congress is supposed to meet in a joint session that convenes at 1:00 that day, and the vice president is supposed to open and present the certificates of the Electoral College votes from the states and the District of Columbia in alphabetical order. After the votes are read, the vice president is supposed to announce whether any candidates have received the required majority to be the next president and vice president. So, as you can imagine, this whole process can be kind of tedious. So, when there's no controversy, the joint session can just say, "Let's speed it up and get it over with." So, for example, they did that in 2013, when the joint session was just 23 minutes long. So, the federal law also sets down these procedures if there is an objection to any of the electoral votes from any particular state. So, an objection has to come from at least one senator and one representative. And if that happens, then each house then has to go meet in their respective houses separately and then decide whether to count those disputed votes. Finally, there's one interesting provision of the act that says a state legislature can send in its own choices for presidential electors when the state has, quote, "failed to make a choice." Now, it's not entirely clear what this means, but it seems to be that a state can have electors, even if there was, for example, like, a natural disaster that prevented people from voting. So, so far, we've just gone over a lot of seemingly tedious, you know, ideas and procedures; it's usually pretty ceremonial, and most of the time nobody has any idea what's going on because it's just a foregone conclusion. But Bob Woodward and Robert Costa have just published a new book. And in it, we find out about a very specific plan developed for January 6th by the Trump campaign. Now, after the election, an adviser to the president, named John Eastman, wrote a short memo--it was two pages--about how Vice President Pence could proclaim a Trump victory no matter what the Electoral College results were. So supposedly, Trump and Eastman had met with Pence before January 6th, and Trump personally said to Pence, "You really need to listen to John. He's a respected constitutional scholar. Hear him out."

**Roman Mars** [00:08:09] So what were the contents of John Eastman's memo?

**Elizabeth Joh** [00:08:12] It's pretty short. It's a six-step plan. Here are the important parts. So, you can imagine you read this, and you think, "Well, as the presiding officer of the Senate, Pence is supposed to start going through the states in alphabetical order and count the electoral votes." But then, according to the memo, without conceding, he is actually following the Electoral Count Act. Then when Pence gets to Arizona, he's supposed to say that he had multiple slate of electors for that state. Therefore, he is not going to do anything about Arizona until he finishes other states. So, let's pause for a moment. That is just crazy. No state--Arizona, no other state--ever put in any alternate competing slates of electors. Remember, the election results of every single state had already been certified on December 9th, the Electoral College had convened on the 14th, and every one of the 538 electors cast votes for president. There were no disputes. But according to the Eastman memo, Pence is supposed to keep going like this. Pence is supposed to set aside the results from seven states with the idea that there's some dispute or some irregularity. Of course, there isn't, but that's what the memo tells him to do.

**Roman Mars** [00:09:27] Is there a reason why it was Arizona to start with versus--I don't know--Alabama or Alaska? Did the memo require some kind of collusion with Arizona to make it feasible?

**Elizabeth Joh** [00:09:41] Well, presumably these were the states where the, you know, campaign thought that Trump had a chance or had some ability to meddle with the results in some way. But no, there's no rationale; it's just a very short two-page memo.

**Roman Mars** [00:09:52] I see.

**Elizabeth Joh** [00:09:53] Then the memo goes on, and it assumes that Pence gets to the last state in alphabetical order and announces, "Because of the ongoing disputes in the seven states, there are no electors that can be deemed validly appointed in those states."

**Roman Mars** [00:10:09] But I'm confused. Like, what is the theory behind this? I don't get it.

**Elizabeth Joh** [00:10:14] So this appears to be the theory. So, remember, the 12th Amendment requires that the winning candidate for president receive a majority of the whole number of electors appointed. So, after you throw out seven states, Trump has more votes than Biden. So according to the memo, easy-peasy. Pence then, quote, "gavels Trump in as reelected."

**Roman Mars** [00:10:37] By throwing out a certain set of total electors, then it tips the balance in Trump's favor, and then he gavels in.

**Elizabeth Joh** [00:10:44] Yeah, right. Because the only remaining ones, of course, have a majority for Trump. That's the theory of the memo. So, again, none of this is remotely plausible because factually speaking, there were no alternate slates of electors submitted by any single state. And then second, the 12th Amendment doesn't suggest anything about the vice president's role in this process as being anything but ceremonial. But the Eastman memo says, "The fact is that the Constitution assigns this power to the vice president as the ultimate arbiter." So, this, too, is bonkers because if that were the case, why even bother with the argument that you have dueling slates of electors? If the vice president is the ultimate arbiter, well, can't Pence just get up and decide who's president? And that, of course, can't be right in our system if it was all along up to the vice president

of the United States to choose the president. So maybe the most alarming thing of all in the memo--apart from giving step by step instructions about how to ignore a legitimate election and install somebody else--is the attitude towards our institutions. The memo goes on to say, "The main thing here is that Pence should just do this without asking for permission, either from a vote of the joint session or from the court." And it gets worse. Eastman's memo says, "If the illegality and fraud that demonstrably occurred here is allowed to stand and the Supreme Court has signaled unmistakably that it will not do anything about it, then the sovereign people no longer control the direction of their government, and we will have ceased to be a self-governing people." Now, of course, nothing in here happened. Pence rejected the idea of going along with it. But the fact that the memo wasn't followed doesn't mean we shouldn't be worried about it. If you think back to the fall of 2020, this idea of Trump attempting a coup seemed like a very crazy fringe conspiracy thing that people talked about online. But was it? I mean, if you think about Eastman's memo--if we put it in the best light--I'm going to go out there and just say, "You know, why would he do such a thing?" Well, you might do it if you think there was rampant fraud in the 2020 presidential election--this is the way to deal with it. But the problem is there's never been any credible evidence of rampant voter fraud in the election. None at all. So, Roman, imagine--let's think of the alternative--what if Pence had followed the instructions?

**Roman Mars** [00:13:16] Yeah. I mean, it's hard to imagine--an inconceivable overreach. Like, I've never seen anything like it.

**Elizabeth Joh** [00:13:22] It might have been another term for Trump, but it certainly wouldn't have been a legitimate second term in any sense that we've understood it.

**Roman Mars** [00:13:30] I mean, I know that there's a certain group of people that would always align with Trump, no matter what, or align with their political interest, no matter what. But no rational person could just say that the vice president gets to choose who the next president is. It's just crazy.

**Elizabeth Joh** [00:13:43] Yeah. I mean, so it's just really hard to imagine, right? How does a vice president get to do that? We would have had a kind of, I imagine, a complete breakdown of all of our institutions that would really mean that nothing had worked at all in the way it was supposed to. So here we are. It's, you know, now late into 2021. There's this accountability problem. We have this series of prosecutions--dozens and dozens of people who participated in the attack on the Capitol, who are now facing really serious criminal charges. Why? Well, because they tried to interrupt a constitutional process, but we've not yet seen anything remotely similar for people who are much higher up and who actually were quite open about wanting to overturn the results or trying to change results in a legitimately held election. Now, all of this matters--even this really strange Eastman memo--because it's not in the past. Trump is almost certainly going to run in 2024. And even though Trump has been de-platformed--he's not tweeting anymore--he's never backed away from those false claims about a stolen election. So, if Trump runs again, what if Biden wins reelection, for example, and the GOP controls Congress? What then? You know, it's not that we should think simply of the Eastman memo as just a total cartoonish failure. It just failed that one particular time. You know, circumstances might change where we might not think of that as being so foolish or cartoonish.

**Roman Mars** [00:15:12] We talk about this all the time--the intent to do a crime is a crime. But so, who is this John Eastman? Why is he so bold as to think overthrowing our democracy is within his purview?

**Elizabeth Joh** [00:15:23] Well, so that's the most interesting part that people should know about. Eastman is not your crazy uncle ranting on Facebook. Not remotely. He is a pedigreed lawyer. He was a clerk for Supreme Court Justice Clarence Thomas. When he met with Pence before January 6th, he was still a law professor at Chapman University. He was also the former dean of that law school. And he only retired after protests at his university because of his participation at the rally before the attack on the Capitol.

**Roman Mars** [00:15:56] Wow.

**Elizabeth Joh** [00:15:57] And then, until pretty recently, Eastman had a leading role in the Federalist Society.

**Roman Mars** [00:16:02] So I know a little bit about the Federalist Society and how they've shaped our judiciary up to this point. So, could you describe a little bit more of what the Federalist Society is?

**Elizabeth Joh** [00:16:10] Sure. The Federalist Society is a conservative legal group. It's founded in the 1980s. It's actually started by law students and academics at Yale and the University of Chicago. And it began in a way that's pretty understandable--to bring conservative ideas, legal thinking, to campus as, you know, one voice among many. But today, it's an entirely different thing altogether. There's sort of two things going on. There are still student chapters of the Federalist Society at law schools everywhere, and they have speakers and things like that. But when you hear about the Federalist Society in the news, we're referring to something else. We're referring to a huge network of lawyers, academics, and judges. And the Federalist Society has had one longstanding and hugely successful project--and that is to actively establish conservatives in positions of power, whether as lawmakers or policymakers but especially judges. And with respect to judges, they've been incredibly successful. So, you know, we've talked about how does a judge become a judge. In the federal judiciary, the president nominates someone, and the Senate confirms. Presidents don't personally just decide on their own who's going to be a judge; they usually have advisers and people who help them make these decisions, whether they're official advisers or unofficial advisers. And it's hard to think of a group with more influence on Republican choices for federal judges than the Federalist Society. So, if you think about Presidents Bush, Reagan--both Bushes--they all relied on Federalist Society members that were either working inside their administrations or outside of the administrations for judicial nominations. And that was especially true for Trump. So, when he ran for president in 2016, Trump promised that if he were elected, his judicial nominees would all be picked by the Federalist Society. When Justice Scalia died, he even released a list of potential Supreme Court nominees just to show sort of his bona fides--the idea that he'd had this Federalist Society vetting of these candidates.

**Roman Mars** [00:18:15] Justice Scalia died when Trump wasn't in office; this is when Obama was in charge.

**Elizabeth Joh** [00:18:21] So this is, like, a, you know, campaign promise.

**Roman Mars** [00:18:23] Yeah, exactly. Yeah.

**Elizabeth Joh** [00:18:24] So even though Trump had just one term, he was remarkably successful. Trump has appointed more than 200 judges during his one term. What matters isn't the number, which isn't the largest number by far, but where. Trump appointed a huge

number of federal appeals court judges. 30% of judges on the federal appellate courts were appointed by Trump--by one president. So, the federal courts around the country are divided by geographic region, and we call them "circuits." And court watchers keep tabs on whether a majority of judges on a circuit are Republican or Democratic nominees. And Trump, during his administration, ended up flipping the balance of several appeals courts from Democratic to Republican majorities. And, you know, you and I generally talk about the Supreme Court a lot, but the federal appellate courts practically matter a whole lot because as much as we lionize the Supreme Court and obsess about it, for most people and for most cases, the appeals court is the last stop. And so federal appeals courts, by default, decide a huge amount of really important law. And there is the Supreme Court. Trump ended up appointing three Supreme Court Justices--Gorsuch, Kavanaugh, and Barrett. And six of the nine current Justices on the Supreme Court are current or former members of the Federalist Society. So, they do things like speak at the organization's national convention, which is like a who's who for everyone within conservative law and politics. So, all of this is to say Eastman does not work on the fringe.

**Roman Mars** [00:20:04] Yeah.

**Elizabeth Joh** [00:20:04] The author of the takeover memo is pretty squarely within mainstream Republicanism.

**Roman Mars** [00:20:11] Well, that's terrifying. Is there any notion that there's any accountability to him?

**Elizabeth Joh** [00:20:16] Well, certainly, you know, with the commission looking into what happened on January 6th, there's a lot of interest now in that memo and who was involved in talking about it, including the author himself. You know, we may see more developments on that. But it's all part of this kind of question: Why hasn't there been more accountability for people who are even just talking and discussing these ideas as potentially something that might be acted upon? And they're pretty scary ideas. And that's why, you know, it's important to think of that Eastman memo as not just a crazy, implausible idea or an implausible interpretation of the Constitution. It's much more that it's a warning sign of what we might face in the next presidential election--not that memo specifically. But you have a large number of voters who've been told and are still being told today that there was something deeply flawed about the last election--even though there's no proof that there was anything deeply flawed about the last election--that the processes that are part of our institutions can't be trusted, and that GOP losses are likely to be the result of fraud. And so, it's not just a warning sign, of course, about the presidential election. You know, in our state, Roman--California--we just have finished up an attempted recall of our governor.

**Roman Mars** [00:21:34] That's right.

**Newscaster #2** [00:21:36] New overnight, the effort to recall California Governor Gavin Newsom from his office has failed.

**Newscaster #3** [00:21:41] According to the latest poll numbers, 67% of Californians voted "no" on the recall effort.

**Roman Mars** [00:21:47] And the math of which was absurd--that Republican front runner could get a tiny portion of the vote of the electorate and be ushered into office because of really just bad procedure, honestly, more than anything. Bad math or bad policy--I don't even know.

**Elizabeth Joh** [00:22:05] Yeah, exactly right. And it's even worse than that. And then this is sort of the connection back to what the Eastman memo and claims of fraud. The leading GOP candidate in the recall in California was Larry Elder. He did, of course, concede defeat. You're right that Newsom won by a pretty big margin, but not before it was reported that Elder's campaign website invited voters to demand the investigation of the twisted results of the 2021 recall election. The problem was at the time you went to that link, the election hadn't even been held yet. The results were not final.

**Roman Mars** [00:22:43] Oh, my gosh.

**Elizabeth Joh** [00:22:45] So it's, you know, more than Eastman. That's the point.

**Roman Mars** [00:22:48] Do you think that we're fighting deluded true believers or cynical bad actors?

**Elizabeth Joh** [00:22:57] Well, it's lots of things, right? I mean, there are those who do truly believe, but there are also just cynical ploys for just keeping power at whatever cost--even if they're at the cost of our institutions, our procedures. And I think there's an exploitation of the understandable exhaustion and fatigue the public feels; they just don't want to think about this anymore. You know, a couple of the things we just talked about--the electoral count act--nobody ever thinks about that. Nobody cares about it that much. But because there are some ambiguities there, right? Like, what does it mean to have the vice president's role in the counting of the Electoral College votes? Shouldn't we be more clear there? Or should it be so easy that you just need one member of the Senate and one representative to make an objection? Shouldn't we make it harder, so we don't have a huge problem the next time? It's really hard to get people exercised about reform of those procedures once an election is over. They just don't care. They want to move on. But that's the problem. You know, one of the things that we've seen here is that we have assumed so far, I think, before this era that just relying on the Constitution and some laws as they existed and as we've long interpreted them isn't enough. So, ambiguities, loopholes, gaps are going to be exploited. And our institutions turn out to be much more vulnerable than we realized, I think.

**Roman Mars** [00:24:21] Yeah. I mean, that's been the ongoing theme of this entire series.

**Elizabeth Joh** [00:24:26] Exactly right.

**Roman Mars** [00:24:28] That we're held together by norms and decency, and those things are in shorter supply.

**Elizabeth Joh** [00:24:37] All right. I also have one update for you. Remember when we last spoke, we were talking about Texas's new law, SB 8. And that particular law banned all abortions after six weeks. That's not the unusual part--there have been other similar laws. The unusual part is the enforcement mechanism. Unlike other abortion restrictions of this kind, the state of Texas is not responsible for enforcing the law. Private individuals are. And they can sue people who they claim are violating the abortion ban, even if the people who are being sued didn't perform the abortion but, for example, helped the woman obtain the abortion in some way--financially, etc. And winning a civil case like this is actually lucrative; you get \$10,000 minimum if you're successful. Now, since you and I last talked about the law, the Justice Department itself filed a lawsuit against the state of Texas on September 9th to try and block the enforcement of the law. And there is about to be an

emergency hearing in federal court. There's a lot going on in this case, but I couldn't resist pointing out one thing. Now, the Justice Department has to convince the federal court that it has the legal ability to bring the case--that it has legal standing. Now, in its legal complaint, the Justice Department points to previous Supreme Court cases that allowed the federal government to sue in instances like this because the federal government has a responsibility to make sure that interstate commerce is not disruptive.

**Roman Mars** [00:26:09] So what does interstate commerce have to do with this?

**Elizabeth Joh** [00:26:12] Well, first, it doesn't seem like much, right? But the idea that the Justice Department is trying to press forward is that allowing Texas law to be enforced would actually burden interstate commerce. So, they point out that out-of-state abortion providers are being overwhelmed by requests from women from Texas who want to go to these other states in order to have legal abortions. These providers are being overwhelmed. The Justice Department is also claiming that because SB 8 can make you liable for even facilitating an abortion, that might implicate things that banks, insurance companies, medical companies do with respect to abortions. And so maybe they don't want to face liability, and thus they would avoid interstate commerce. Now, Texas filed a legal response just the other day. And what did they say? Quite the contrary. "The act doesn't interfere with state commerce." By forcing women to cross state lines to obtain a constitutionally protected right to an abortion, Texas actually says that SB 8 is, quote, "stimulating interstate travel."

**Roman Mars** [00:27:24] Oh my God.

**Elizabeth Joh** [00:27:25] And yes, that's as crazy as it seems with.

**Roman Mars** [00:27:28] With a straight face? How can you do that? Oh my God. Okay. Well, thank you so much. This is super fascinating.

**Elizabeth Joh** [00:27:35] Thanks, Roman.

**Roman Mars** [00:27:46] The show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at [trumpconlaw.com](http://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](http://doomtree.net). We are part of the Stitcher and SiriusXM Podcast Family.