

What Roman Mars Can Learn About Con Law Ethics and Masks

Roman Mars [00:00:00] We're recording this on Thursday, April 28th. The time is 2:16 p.m., and what are we going to be talking about?

Elizabeth Joh [00:00:06] All right. Let's go back to the 2020 election again. Sorry.

Roman Mars [00:00:13] Oh no! Okay, if we must. Okay. 2020 I can handle. If we go back to 2016, then, you know, you might be talking to yourself.

Elizabeth Joh [00:00:21] Okay. Well, let's go back to 2020 this time. And then let's visit some of the most extreme, fringe theories that were coming up during that time. So, remember, throughout that election--and actually ever since--Trump and his allies kept repeating that there was voter fraud, that the election was stolen by Joe Biden, and that Trump was the winner of the election. Of course, none of that is true. Biden legitimately won the election. That's a fact. But there were several popular whispers and lies on the far right, and especially among QAnon followers. So, let's talk about QAnon for a moment. QAnon refers to a set of Internet conspiracy theories that claim that the country is run by a group of Satan-worshiping traffickers of children, and also that this secret group includes democratic leaders. None of this is true either. But QAnonners are important here because they are also pro-Trump. In the world of QAnon, Trump was recruited to be president so that he could bring the members of this conspiracy--this global conspiracy--to justice. And that means arresting people like Joe Biden and Hillary Clinton, calling them before military tribunals, and imprisoning them in Guantanamo Bay. They used the phrase "Biden crime family" a lot. And if you were deep into QAnon in 2020, then you also believed falsely that in his bid for reelection, Trump had secretly watermarked mail in ballots to track voter fraud. QAnon forums, use the phrase "Watch the water." Now, QAnon followers were also supporters of Sidney Powell--one of Trump's legal advisers during the election. Now, Powell promoted a number of false claims that Trump had won by millions of votes--he didn't--that the voting software company Dominion Voting Systems had altered the results--no evidence of that--that somehow Venezuela was involved in rigging our election--no evidence of that either. Now, Powell said she was going to provide a mountain of evidence that would change the election results, or the way she put it was "She would release the Kraken." That's the mythical sea monster from the 1981 movie Clash of the Titans. She never did.

Roman Mars [00:02:47] I'm very familiar.

Elizabeth Joh [00:02:48] Yeah. She never did release the Kraken.

Roman Mars [00:02:49] No.

Elizabeth Joh [00:02:50] So now, Roman, imagine that in November of 2020, you started receiving texts--and the text said something like this: That there were watermarked ballots in 12 key battleground states, that the Biden crime family are being arrested and detained for ballot fraud right now and will be living in barges of Gitmo to face military tribunals for sedition, that we needed to help this great president--that's Trump--stand firm and fight the greatest heist of our history. So, Roman, what would you think of that person sending these texts?

Roman Mars [00:03:28] I would think that they are deluded, not well, conspiracy-minded fools.

Elizabeth Joh [00:03:36] Well, that's certainly one way to put it. And what if I told you that the person sending those texts had direct connections to the White House? And what if I told you they were married to a current Justice of the Supreme Court? Isn't that a problem? And should there be consequences? Time to find out.

Roman Mars [00:03:57] Let's do it. This is what Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length, where we take the maelstrom of current events surrounding the Supreme Court 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 the person who has failed first semester of law school five years in a row, Roman Mars.

Roman Mars [00:04:51] As another election season ramps up, it can be tricky to sort through all the noise in the news. That's where Slate's Political Gabfest comes in. Each week, hosts John Dickerson, Emily Bazelon, and David Plotz decipher the headlines, break down the races, and tell you what issues really matter. They don't always agree--in fact, it's really fun when they don't agree--but they do always deliver thoughtful debate and have a good time doing it. Think of Political Gabfest as having after hours drinks with three journalist friends who can unpack the underlying issues and broader effects of the latest election headlines. I never miss an episode. Listen and subscribe to Slate's Political Gabfest wherever you get your podcasts.

Elizabeth Joh [00:05:34] Now, the texts that I mentioned are real ones. They were sent from Virginia or "Ginni" Thomas. Ginni Thomas is a longtime conservative activist. Now, she's not a government official--but she also happens to be the wife of Clarence Thomas, who is now the longest serving and oldest member of the Supreme Court. Now, that honor--being the oldest Justice--used to go to Justice Breyer. But of course, Justice Breyer is going to retire at the end of this current Supreme Court term. He's going to be replaced by Associate Justice Designee Ketanji Brown Jackson. Justice Jackson was confirmed on April 7th, but Justice Thomas is still there. We know about these texts--21 sent by Ginni Thomas--because they were part of the thousands that were voluntarily turned over to the House January 6th Committee by Mark Meadows. And Meadows was Trump's chief of staff. Now, Ginni Thomas sent this text to Meadows in that really tense time everyone remembers between Biden's election and the formal counting of the Electoral College votes. It's possible that there are even more texts between Thomas and Meadows, but Meadows abruptly stopped cooperating with the committee. That means Meadows held some records back, and we don't know what's in those held back records. What we've seen might just be a portion of the exchanges Thomas and Meadows had, but for now, we just know about these 21.

Roman Mars [00:07:00] So what is the significance of these texts?

Elizabeth Joh [00:07:03] Well, it's a pretty big deal. First, because of the subject matter. Ginni Thomas was determined to help overturn the legitimate election of the president of the United States. You know, Thomas didn't say, "Oh, I'm so sad Trump lost," or "This is terrible that he lost." Her text went well beyond that. And Ginni Thomas has, of course, a direct line then to the White House. Not just anybody can text the president's chief of staff. And Meadows himself didn't dismiss her views. When he received these texts, he didn't say, "Well, that's crazy," or "Nobody believes that." When Ginni Thomas asked Meadows

to stop what she called "the greatest heist of our history," he texted back, "I will stand firm. We will fight until there is no fight left. Thanks for all you do." And second, these texts matter because of who she is; she's married to a sitting Supreme Court justice. The Supreme Court has already been asked to consider a number of issues regarding both the presidential election and the January 6th insurrection. So, you might remember that in January, we talked about the Supreme Court refusing to block the release of White House records that the committee was seeking. The committee wanted to know where Trump was and who he was talking to before and around January 6th. And Trump sued to stop the National Archives, which has those records in their possession, from complying with that request. So, when we last talked about that case, the Supreme Court rejected Trump's request to block the release, and that was it. The National Archives started releasing those documents. And the Supreme Court's decision to say, "No, Trump, we don't agree with you," came about in the form of a short, unsigned order. There was only one dissent--and that dissent was Clarence Thomas' dissent. Now, because this was an order and not a formal opinion, he just dissented. We don't know why Justice Thomas disagreed with the majority; he didn't say why. But now it's pretty clear that there are some important questions about that case. So, I want to be clear here that the Ginni Thomas texts were voluntarily handed over by Meadows. They weren't part of this tranche of documents sent over by the National Archives. Here's what we don't know. What did Justice Thomas know about who had his wife's texts? And how aware was Justice Thomas that his wife was asking the president's chief of staff to help overturn the results of a presidential election? We actually have no idea. Thomas has never disclosed to the public that his wife was sending all of these texts. And now that we know that these texts exist, he's never made any public comment about them. So, let's just talk for a moment about the one thing conservatives have brought up--but it's obnoxious to bring this up--that these are two adults with separate lives and that somehow, it's sexist to think otherwise. So, of course, spouses can have different beliefs. They can have different political beliefs. They can have different careers. They can have very different political positions. Maybe the Thomases do, although Justice Thomas is a very, very conservative legal thinker. But when you have a Supreme Court Justice that takes part in cases related to attempts to overturn Biden's election--including cases that might show us something about the extent of his wife's involvement in those efforts--that's an entirely different situation. Ginni Thomas already has admitted that she attended Trump's Stop the Steal rally near the White House on January 6th. So, this is not a case about the spouse of a Supreme Court Justice being politically active or having supported or voted for Trump. Ginni Thomas had direct access to the White House and lobbied to have the election overturned. So, the way to think about this is that she played a part in the legal story--a lot of which we still don't know about.

Roman Mars [00:11:05] And so what does this mean for Clarence Thomas--that this is out there or that she participated in these ways?

Elizabeth Joh [00:11:11] So the answer is that it's complicated. So, some people are calling for Justice Thomas to recuse or to withdraw himself from any case that involves the 2020 election, the January 6th insurrection, or the work of the January 6th committee. And there are almost certainly going to be more cases about all of these issues. So, here's a couple of possibilities. The Supreme Court might decide it wants to hear a case involving John Eastman--another person we've talked about before. He's the lawyer and the author of the memo that outlined a plan for forcing the Electoral College results to be in Trump's favor. Eastman is now arguing in court that the January 6th committee can't see documents he has related to January 6th. There are also lawsuits now arguing that Trump and his allies should be held legally responsible for triggering the insurrection. And then there are literally hundreds of criminal cases that have come about from the January 6th

insurrection--everything from minor property destruction to seditious conspiracy. And some of these defendants might say, "Hey, we want to see some of Trump's records about what he did or did not do."

Roman Mars [00:12:25] And so knowing that Justice Thomas is connected in this way, can we force him to not be part of any of these decisions or what?

Elizabeth Joh [00:12:37] So the short answer is we can't. But let's clear up some confusion here because there's a lot of different conversations happening about what can we do--or what can anybody do--about this kind of ethical conundrum. So, after Ginni Thomas' texts were made public, a lot of people said, "Well, Congress needs to act on Supreme Court ethics." So, first of all, are there ethical limits for the Justices? The answer is yes and no. They kind of exist already. There is a judicial code of conduct for federal judges. It's not a long list of things that judges aren't supposed to do. It's kind of the generic set of five principles, and all of them are things that almost everybody would agree with. You know, one says that federal judges should avoid impropriety and the appearance of impropriety in all activities. And the code here is just a code. It's not a binding set of laws. They're just guidelines. You can't sue a judge because they didn't abide by the code. There's a bigger problem here with Justice Thomas. This was a code that was created to apply only to the lower federal courts. And by that, I mean the appellate courts and the federal trial courts. But about ten years ago, Chief Justice Roberts gave a speech and said, "Yeah, it's true that the guidelines don't literally apply to the Supreme Court, but we consult them for guidance, and we're supposed to be ethical, so don't worry about it." So, then you might think, "Well, Congress should pass a law then about withdrawing from cases." But in fact, Congress already does have a lot about recusing or withdrawing from cases. There's already something that's called the federal disqualifications statute. And that law very specifically applies to all federal judges, including the Justices of the Supreme Court. So, Roman, this is so important, I think maybe you can read the text of what the law says.

Roman Mars [00:14:27] Okay. The federal law says that, quote, "Any justice or judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Elizabeth Joh [00:14:37] So that means that whenever there's the appearance even--you don't even need actual impropriety--a judge should try to withdraw or recuse him or herself, right? So, the way recusal or withdrawal under the statute works is that federal judges can decide to disqualify themselves just on their own. They can just decide, "I have a conflict here. I'm going to withdraw from the case." Or a party in a pending case might ask the judge to disqualify himself. So let me use an easy example. Let's say that you have a case before a federal judge and you believe that the judge should be recused or should withdraw. Let's say the judge has, for instance, stock in the company that you're suing. That's the kind of potential ethical issue where you might have a justified withdrawal or recusal for the judge. So, if you ask the judge to recuse himself or herself and the judge denies it, then you can appeal that decision to a higher court. Now, recusals of that kind happen at the Supreme Court, too. It's not that uncommon. And usually, it's because the Justices have a financial interest in one of the parties--like a company, they have stock in it--or because they had prior involvement in a case in some other capacity. So, for example, Justice Kagan once was the solicitor general--that's the government's representative before the Supreme Court--during the Obama administration. But recusals at the Supreme Court are a tricky matter. So, Roman, let's say that you have a case before the Supreme Court, and you ask that one of the Justices recuse themselves or disqualify

themselves because of some ethical issue. So, Roman, what happens if the Justice says no?

Roman Mars [00:16:19] It doesn't seem like there's a higher body to appeal to.

Elizabeth Joh [00:16:21] Yeah, that's exactly the problem. With a lower court judge, you can appeal that decision. You can say, "Hey, that Judge made an error. They should have withdrawn, and they didn't." But with the Supreme Court, there's no one to appeal to. You can't appeal to anybody. You can't even ask the other Justices of the court to consider this issue. And even if Congress decided to create a special court to hear recusal issues from the Supreme Court, that opens up an entirely different problem because if another court could review the decisions of the Supreme Court, then the Supreme Court wouldn't be Supreme. So that would seem to raise a pretty serious constitutional problem. And then there's the strategic issue. If you ask a Supreme Court Justice to recuse and then they don't, you now have an important case where one of the Justices, at the very least, is potentially offended or mad at you because you thought that they had an ethical dilemma, and they didn't disqualify themselves on their own. So, here's another way that recusal at the Supreme Court is pretty complicated, too. It's very practical. When there's a federal appeals court judge or a federal trial court judge who's recused, you can just swap in another judge as a substitute for the one who's been withdrawn, right? Not so with the Supreme Court. We don't have Supreme Court relief pitchers or anything like that.

Roman Mars [00:17:44] Or alternates that just sit there on the side.

Elizabeth Joh [00:17:46] Exactly. It doesn't work that way at all. And that also means that in an especially controversial case, where there might be a very divided Court, you might end up with a 4-4 split among the Justices. And that would mean the Court could not create any binding Supreme Court law, which leaves that particular legal question unresolved. So that's why recusals at the Supreme Court are a very difficult problem. It's really up to the individual Justices to decide for themselves whether or not they have an ethical obligation to remove themselves from considering a case. And the truth is that the only real check for a Supreme Court Justice is the constitutional remedy of impeachment. But that never happens. So, the case for Justice Thomas recusing himself, I think, as far as the subject matter goes--because of his wife's texts--is a very, very strong one. It's one that's supported not just by Democrats but also some Republicans. And certainly, almost every legal ethics expert has said this is a case where he has to recuse himself. Because keep in mind that that federal disqualification law targets even the appearance of impropriety. You don't need to have proven partisanship or actual conflict. If there's just an appearance of an ethical conflict, a Judge is supposed to recuse himself. So, you know, the flip side of the story, of course, is, well, why don't we have a system where recusals are really easy? It's not clear that that's a good solution either. It's not obvious that we'd want a legal system where recusals were really, really easy to obtain because if it were easy to obtain, then everybody wants their judge to recuse themselves. And if that happened a lot, then the public might think, "Well, there must be a reason that so many people ask their judges to withdraw all the time." And then maybe you end up with this public perception: "Well, the whole system is rigged, right? That's why people ask for all these ethical things to be challenged."

Roman Mars [00:19:43] Well, one could argue that it's both extremes. That's the problem. If there's no recusal, then everything is rigged. There's constant recusal. Then everything is rigged. You need to find kind of a happy medium.

Elizabeth Joh [00:19:54] That's exactly right. And probably the best thing we can do for that is not the law at all. Maybe the system entirely depends on judges who have strong commitments to ethical norms. That's probably the real problem.

Roman Mars [00:20:06] I think giving everyone probably more than the benefit of the doubt that they deserve. You could argue that this first case of the request for documents that were the whereabouts and communications of the orbit around Donald Trump on January 6th--you wouldn't necessarily assume that Ginni Thomas had texts in there. And maybe Clarence Thomas didn't know that and ruled, you know, in a way where he didn't know--nobody knew--when they were, you know, just discovered. And therefore, the first instance is not the moment to recuse. You know, maybe he didn't know to recuse himself. But then subsequent ones are clearly our problem. I mean, do you think that there's a difference between this first decision and how pure or tainted it might seem versus future ones? That one is excusable--the first one that led to the discovery--and that subsequent ones would somehow be more of an ethical challenge.

Elizabeth Joh [00:21:07] Sure. I mean, there's absolutely a case to be made that, look, maybe it's, again, as you say, giving Justice Thomas the benefit of the doubt. Maybe he had no idea. Maybe he and his wife never talk about who she texts--I guess that's possible--and he didn't know. So, we give that to Justice Thomas. But now that he knows--simply by being a person alive in the world and knowing about the news--how can he not recuse himself is the real question. And you can have a situation where a justice would say, I'm not going to take part in this case or these cases. So, a good example is Justice Jackson. There is going to be a case where the Supreme Court will look at Harvard University's admissions policy. Now, what Justice Jackson had been involved in before being a Justice was being part of the governing body at Harvard University. She's already said that she's probably going to recuse herself. No one is suggesting that she is doing anything improper, but there is the appearance of impropriety were she to take part in a decision as a Supreme Court Justice in a capacity where she probably had a lot of inside knowledge and was making decisions. So, he could have done that as soon as the story broke, but of course, he hasn't said a word.

Roman Mars [00:22:20] And has there been another case that would possibly involve her or something that has come up yet? I mean, is there still a chance for the, you know, ethical, better angels of our nature--

Elizabeth Joh [00:22:33] Well, you know, there could be a number of these cases that I mentioned before that might come up soon, like the Eastman case. Or there certainly looks like there may be disputes with the January 6th committee. And in any of those cases--you know, if there's some chance that there's some discussion about her texts, then that seems like a prime opportunity for, really, Justice Thomas to take that effort. And you don't need a party to ask Justice Thomas. Justice Thomas can just say, "You know what? I'm going to withdraw myself from this case."

Roman Mars [00:23:01] We could still hold out hope that when that moment really comes and a decision has to be made, rather than in the abstract, that he maybe--

Elizabeth Joh [00:23:08] I will light a candle for that.

Roman Mars [00:23:16] So say we all.

Elizabeth Joh [00:23:23] All right. So now Justice Thomas has a connection to the other topic I think we should cover today. In the few months right after Trump lost the election and before Biden took office--that's that lame duck session--the Senate continued to confirm Trump judges. And one of them was Kathryn Mizelle, a former law clerk to Justice Thomas. Now, Justice Thomas certainly has a lot of law clerks--former law clerks--who are now in important positions, including being federal judges. But Mizelle stands out. She was one of the very last Trump judges confirmed after Trump lost and as he continued to claim that the election was stolen. And she was also, at the time of her confirmation, 33 years old. That is a very young age to be a federal judge for a lifetime appointment. And the American Bar Association, which usually provides an opinion about a federal judicial nominee, called Mizelle "unqualified." Why? Because of Mizelle's small amount of practical experience. And what the ABA said was her, quote, "lack of meaningful trial experience." Remember, she was nominated to be a federal trial court judge, and the ABA said she didn't have enough under her belt yet. But it's thanks to Judge Mizelle that we no longer have a federal mask mandate. On April 18th, Mizelle issued a ruling in favor of a group of plaintiffs that sued to end the federal mask mandate. She decided that the national mandate was unlawful. And I don't know if you remember, but things happened so fast that day that some airplane passengers were told mid-flight that they didn't have to wear masks anymore. The effect happened right away. Now, this goes all back to when President Biden assumed office at the beginning, he directed the CDC--the Centers for Disease Control and Prevention--to come up with a mask rule. And on February 3rd, 2021, the CDC issued a rule that required masks in airplanes, buses, trains, and also in transportation hubs like airports. And the CDC relied on the authority that Congress had given it under the federal law, called the Public Health Services Act of 1944. So, in theory, there are civil or criminal penalties if you refuse to comply with the mask mandate or at a minimum, you were going to be removed from the place where the masks were required. And actually, this did result in literally thousands of airline passengers who were put on no-fly list because they refused to wear masks. Now, in the lawsuit, the parties sued over the mandate, and they said that the CDC didn't have the legal authority under this federal law to require masks in places of public transportation. And Judge Mizelle agreed. Now, one of the reasons she agreed with the plaintiffs and struck down the mask mandate was that the CDC didn't go through its usual procedural rulemaking procedures. But I just want to focus on the most surprising part of the judge's decision. Judge Mizelle focused on whether the federal law that gives the CDC the power to act also includes the power to require masks. So, interpreting a federal law is something judges do all the time. It's pretty ordinary stuff. But the conclusion that this judge reached is really surprising. So, here's what the federal law says: The CDC is allowed to make regulations that are, quote, "necessary to prevent the introduction, transmission, or spread of communicable diseases." And by way of example, the law goes on to say that this means doing things like having rules for, quote, "inspection, fumigation, disinfection, and sanitation." So, Roman, do you think it's reasonable to think that making people wear a mask falls within the concept of sanitation?

Roman Mars [00:27:14] Huh. I would say yes, I'm inclined to believe that. Although those words, you know, do not necessarily evoke masks to me. You know, like, if this was a Rorschach test or, like, a word association test, if you were to say those words, none of those would evoke masks.

Elizabeth Joh [00:27:34] It's not literally something that's directly connected to masks, but I think sanitation could encompass that term, right? Preserving people's health.

Roman Mars [00:27:41] No, of course.

Elizabeth Joh [00:27:42] And that's what the federal government said in this lawsuit. They argued that sanitation covers things like making people wear masks. So did the public health community. They said this public health concept of sanitation includes things like making people wear masks. But "not so," said Judge Mizelle. So, the judge consulted dictionaries--dictionaries that were around at the time that the Public Health Services Act became law. Now, it's not that crazy. There are many different tools that judges can use to interpret federal statutes, and some actually do look at dictionaries as a source. But here's where things get really bizarre. The judge said, well, the word sanitation in the early 20th century could mean active cleaning, you know, scrubbing things. Or it could mean preserving health. Both meanings were understood in these dictionaries around that time. But according to the judge, the better meaning is to actively clean something. And if you wear a mask, you're not actively cleaning anything. Therefore, the CDC doesn't have the power to make you wear a mask. So, for the judge, the power to issue rules about sanitation means what she called "measures that clean something," not ones that keep something clean. So, for her, "Wearing a mask," she said, "means at most something that traps virus droplets, and it cleans nothing." Some pretty strange and very narrow logic there. So, if you read the entire 59-page opinion, it reads very much like shoving a predetermined conclusion into an analysis. It's perfectly reasonable, given, you know, all of the evidence out there to interpret the CDC's power to issue sanitation rules as including the ability to make people wear masks, at least in this kind of situation--this pandemic that we're living in. And then there's the historical context, too. You know, the Public Services Health Act of 1944 is passed at a time where we'd already had experience as a country with highly contagious airborne diseases, like tuberculosis and the 1918 influenza pandemic, which we addressed by wearing masks, right? So, then there's another problem with the mask mandate decision. If her conclusion's right, then the CDC has powers to address not just this pandemic but any pandemic that's going to come along. The CDC's powers are really limited. Now, remember that when it comes to public health, it's primarily the responsibility of state and local governments. But the federal government really does have an important role here because some things the states can't really do, like regulate interstate commerce. And what is transportation? Interstate commerce. And that's why the problem isn't just about this mask mandate, which was already going to expire on April 18th, and that had been extended to May by the CDC. The real problem with this decision is that it's a judicial opinion about crippling the authority of our National Public Health Agency to address this pandemic and the next one. And this very, very narrow reading of federal law--it echoes things that we've talked about before. So, remember that the Supreme Court said in January that you can't require vaccines in the workplace because it wasn't under a federal agency's authority to address workplace hazards. It was a hazard you faced everywhere, so it wasn't a workplace hazard. So, it's very similar to the kind of thinking that we see with the mask mandate. And the opinion about the mask mandate also reminds me of a Republican argument that was made in a very different context. Judge Mizelle, the author of the opinion for the mask mandate, says, "Look, if the CDC can make you wear a mask, what's the stopping point? Maybe they'll force businesses to have air filtration systems. Maybe they'll make you take vitamins." So, you know one recurring Republican argument that was made against the Affordable Care Act. Do you remember what it was?

Roman Mars [00:31:49] I don't. Was it related to vitamins?

Elizabeth Joh [00:31:51] It is! Originally, there was an individual requirement that almost everybody needed to have health insurance. That was the individual mandate, right? You need everybody to participate to make the health insurance system work. So, there was

one argument that conservative lawyers and pundits pushed over and over again. "If you can make people buy health insurance, can't the government make you buy broccoli?" So, the broccoli argument became such a popular talking point on the right that when the Supreme Court decided to uphold the Affordable Care Act in 2012, the opinions actually have 12 references to broccoli. But you know what? No one in Congress since then has ever seriously suggested that we be forced to buy broccoli nor that we be forced to take vitamins. But it does make sense for public health experts to require us to wear masks when, in their opinion, the situation requires it.

Roman Mars [00:32:50] Yeah. Can you explain to me the pattern of facts that led this one judge--that the ABA says is unqualified--to making this decision that affects everyone across the country? For example, why did it land in her court? Was it because someone sought her out and brought it to her court? Is it because the actual thing being litigated was under her jurisdiction in her district in some way? Like, how does this happen--that it is her making this decision and, I don't know, a California judge would make a different decision? I don't know. You know.

Elizabeth Joh [00:33:27] Yeah. So, it's a couple of different things here. I mean, sometimes it's just the vagaries of where a party decides to file a lawsuit. And if you're thinking about politics, definitely there are political leanings depending on the appellate circuit that encompasses where those federal trial courts are. So, when her case is appealed--and the Biden administration is going to appeal the case--it's going to go to the 11th Circuit. And the 11th Circuit is sort of notoriously a politically conservative one--or the majority of the justices are. So, if you want a case where you think you want judges who are friendlier to curbing agency decision-making power, that's a good circuit for your lawsuit. You also raise a really good point, which we'll have to save for another recording, I think. And that is how is it that one judge can make national policy? This is actually a pretty controversial idea--and that is this idea of nationwide injunctions, or in this case, it's a slightly different procedural mechanism. But we do see these cases where someone brings up a lawsuit, and they say, "Well, this law or this agency decision is unlawful." The judge says, "Yes!" And then suddenly everything falls away all around the country all at once. A lot of people don't like that and think that judges shouldn't have that power. And then also as a public health matter, it seems kind of bizarre and silly that, you know, if we're going to make a decision about a mask mandate, there should be some kind of deliberative process other than just one judge saying, "Nope. Otherwise, we'll have to take vitamins."

[00:35:02] The 1944 Merriam-Webster. Yeah. They need some kind of expertise besides a library card.

Elizabeth Joh [00:35:09] And then the third response to your question is that, you know, it really has been a big part--not just of Trump but of the Republican agenda--to fill the federal judiciary with judges who are friendly to these kinds of arguments. It's very much something that was part of the Trump administration but was going on long before Trump took office.

Roman Mars [00:35:34] Well, it's fascinating stuff. Well, thank you again so much for talking with us.

Elizabeth Joh [00:35:37] Thanks, Roman.

Roman Mars [00:35:45] This show is produced by Elizabeth Joh, Jeyca Maldonado-Medina, and me, Roman Mars. You can find us online at learnconlaw.com. All the music in What Roman Mars Can Learn About Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are part of the Stitcher and SiriusXM podcast family.