

Justice Kennedy

Roman Mars [00:00:00] So the date is Friday, June 29th, on a very special Trump Con Law.

Elizabeth Joh [00:00:05] Emergency.

Roman Mars [00:00:06] Emergency Trump Con Law. And I'm here with Elizabeth Joh. And why don't you tell me what happened two days ago?

Elizabeth Joh [00:00:12] So on June 27th of this week, we had special news from the Supreme Court. It wasn't totally surprising. There'd been a lot of speculation about this. But it turns out that Justice Anthony Kennedy announced his retirement from the Supreme Court. It was at the conclusion of the Supreme Court's term, which begins on the first Monday of every October and ends at the end of June. So, one thing to remember is that all federal judges have what's called life tenure. So, there's three ways to lose your job. One is you get impeached. It doesn't happen that often. One is you die. Justice Scalia, for example, died in 2016. Or you retire. And that has happened a few times, certainly. And so, Kennedy chose the third option. He decided to retire at the end of the term.

Roman Mars [00:01:00] He chose not to die.

Elizabeth Joh [00:01:01] He chose not to die--not just yet. So, he is 81 years old. He's going to turn 82 next month. He was nominated by President Reagan, and he took his position on the Court in 1988. So, he's been on the Supreme Court for a really long time.

Roman Mars [00:01:17] Why does this matter right now? Because Trump is about to pick Kennedy's successor. Let's do this. This is what Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the tweets of the 45th president of the United States and his critics 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 student and host, Roman Mars. Okay. So, tell us, why does this matter? Why does this matter right now?

Elizabeth Joh [00:02:17] Okay. It matters right now because Justice Kennedy's absence because of his retirement creates a kind of special hole on the Court. So, remember, there are nine Justices on the Supreme Court. Right now, there are four you might call them "liberal" Justices, Justices Ginsburg, Breyer, Sotomayor, and Kagan. And there are four conservatives: Chief Justice Roberts, Thomas, Alito, and Gorsuch. And then there's Kennedy. And remember, on the Supreme Court, it takes a minimum of five Justices to issue a decision--a binding legal decision--at least five. You can have more, but you need five. So, Kennedy has had this special role in the Court. He's certainly a conservative a lot of the time. But sometimes he's decided to join the more liberal Justices on the Court in a number of different areas. So, when it comes to affirmative action, the death penalty, solitary confinement--issues like that--he has decided to join the liberal Justices in coming together to form an opinion. The two areas I think that he's been most recently well known for have been gay rights and abortion. So, when it comes to gay rights, he was the majority opinion author. In other words, he wrote the opinion in a case called Lawrence versus Texas. So, in Lawrence versus Texas--that was a Supreme Court case which struck down a Texas criminal law that led to the arrest of two men who were involved in consensual sexual activity. So, after Lawrence, a state cannot criminalize sex between two consenting gay or lesbian couples. So, he was also the author of the majority opinion in

Obergefell versus Hodges, which recognized a constitutionally protected right to a gay marriage. That was really a groundbreaking case to for the first time recognize this right. There's certainly been a constitutionally recognized right to marriage, but there hadn't until Obergefell really been a decision talking about does that same right also protect same sex marriage? And Kennedy wrote the opinion that recognized it. You know what's interesting here? I'll quote the first line from Obergefell. Kennedy says, "The Constitution promises liberty to all within its reach--a liberty that includes certain specific rights that allow persons within a lawful realm to define and express their identity." He is also associated with the Court's decision to recognize a constitutionally protected right to an abortion. So here--this is where the popular conception of abortion rights and what actually has happened in the Court is a little bit different. So, everybody talks about Roe versus Wade--a decision from 1973. But actually, the reason why there is today a constitutionally protected right to an abortion--that stems from a 1992 case called Planned Parenthood versus Casey. And in that case, that was a decision where before the Supreme Court issued its opinion, people thought Casey would be the decision where the Supreme Court actually reversed itself and would reverse Roe versus Wade. But in that Planned Parenthood case, Kennedy--joined by Justices O'Connor and Souter--they issued an unusual joint opinion. In other words, they spoke as one voice in recognizing, "You know what? We understand this is a really divisive issue, and we know that everybody's watching this. And today we are reaffirming that there is such a constitutionally protected right to an abortion." So, it's actually the Casey decision in which Kennedy played a crucial part that's responsible for having this constitutionally protected right today. On the other hand, you know, Kennedy is not a flaming liberal. He is not, you know, a card carrying progressive. He's joined the conservative Justices in a number of cases. He joined the majority in a case called Citizens United--you might be familiar with that--that allows unlimited spending in campaigns by corporations and unions. He was in the majority in Bush versus Gore, which of course, gave the 2000 presidential election essentially to George Bush. And his very last opinion on the Court right before he announced his retirement was joining the conservative majority in upholding Trump's travel ban. So, he hasn't been a flaming liberal. So why does this matter, though? So go back to this idea that you need five Justices to make an opinion--to make law--on the Court. So, what that means is when there have been closely divided cases where Kennedy has been that critical fifth vote, in some of these hotly contested issues, one Justice changing his or her mind can make all the difference. It could be a radical change in the law. That has a lot to do with our American system. So, in American law, we have what you might think of as a really strong form of judicial review. In other words, courts getting to review legal challenges. So, for the Supreme Court, that means with matters of constitutional law, what the Court decides is final and binding unless and until they change their mind. So, you could imagine a different system--and this exists in other countries--where a high court, like a Supreme Court, could issue a decision, but maybe the legislature could overturn it, or the executive could overturn it. But in the American system, what the Court does is final, essentially.

Roman Mars [00:07:35] Well, can the legislature rewrite the law so it would be interpreted differently or...?

Elizabeth Joh [00:07:39] In matters of constitutional law.

Roman Mars [00:07:41] Which doesn't get changed.

Elizabeth Joh [00:07:42] Doesn't get changed unless we change the constitution.

Roman Mars [00:07:43] Which is nearly impossible.

Elizabeth Joh [00:07:45] Doesn't happen, right? So that really places a lot of focus on the Court itself and who is actually serving on the Court, okay? So, what happens in terms of Kennedy's leaving the Court? Well, who is going to pick his replacement?

Roman Mars [00:08:00] Well, Donald Trump.

Elizabeth Joh [00:08:00] Donald Trump, of course. This will be his second pick on the Court. His first was Neil Gorsuch. But it's important to realize that this is not just... Well, it's just his second pick on the Court, which by itself would be an important topic. Remember that Gorsuch took the spot of Justice Scalia, who died. But essentially, Scalia was a pretty conservative Justice, with some exceptions. And Gorsuch really replaced that spot. But here, in Kennedy's case, it's pretty unlikely that President Trump is going to pick someone who is going to be more or less like Kennedy. He's very likely to pick someone who is much more conservative than Kennedy. So that means that in a number of those cases or those areas of law--like abortion, gay rights, affirmative action, death penalty--that "critical swing vote," as it's sometimes called, might disappear. And in fact, it might be the case that some of those cases might be subject to being overturned--that would be the most radical change--or more likely chipped away radically, narrowing and narrowing the effect of those prior decisions so that the rights recognized in those decisions have sort of less power.

Roman Mars [00:09:13] When the news was announced, it was treated like a bomb had gone off and all the liberals were very, very upset. It did feel similar to when Trump got elected because it does feel like it has a cataclysmic effect on everything hereafter.

Elizabeth Joh [00:09:32] Right. There's two reasons. One is that it has to do with the structure of how we appoint Justices on the Court. Part of that has to do with life tenure. So why should the decision of one 81-year-old man make everyone upset in the United States or many parts of the United States? Well, that has to do with the fact that we have life tenure. I mean, why life tenure? Why not have, you know, 20-year terms or 30-year terms? We don't have that system. So, a lot depends on the decision of one particular person on the Court to decide to retire. The other thing, too, of course, is that President Trump gets to pick this person with the advice and consent of the Senate. That's built into the structure of the Constitution. And we're now in a position where the Republicans control both the presidency and Congress. So, it's quite likely that whoever President Trump nominates will be confirmed by the Senate--the Republican controlled Senate. Senator Leader Mitch McConnell, of course, said, "We want the president's nominee to be announced to be treated fairly." There's no small irony there. And of course, Merrick Garland, nominated by President Obama, didn't even get a hearing before the Senate. But apparently it doesn't matter. What will happen? Well, the Democrats could try to sway a few members of the Senate to not vote for a particular nominee. Remember, right now the Republicans have 51 senators on their side. If they lose one vote, that's okay because Vice President Pence, as the leader of the Senate, would be the tiebreaker. But they can't lose two. They can't lose two votes. So, there's some speculation, for example, that if Senators Collins or Murkowski are persuaded by the Democrats, maybe a nominee wouldn't be confirmed. But again, these are kind of... I don't know how likely those scenarios are.

Roman Mars [00:11:25] And, you know, historically, Supreme Court nominees get confirmed because the people brought up for confirmation are qualified to do so. And it

was sort of for a while considered out of bounds to take their political leanings into account when senators were making the decision to put them on the Supreme Court?

Elizabeth Joh [00:11:44] Sure. I mean, there's this idea that, you know, all we care about are judicial qualifications. Do they seem like the kind of person who can make well-reasoned opinions? And that's an understandable sort of cutoff point. But for a lot of these issues that we've talked about--like abortion, campaign finance, the death penalty, and gay rights--again, because of Kennedy's particular role, I think people will be even more interested in whoever President Trump nominates. And he's announced that he's about to interview people and they'll have some decision to make by July 9th.

Roman Mars [00:12:17] Do you think it's fair or important to get the political biases of these potential judges out there to the public and to the senators?

Elizabeth Joh [00:12:29] I think it does matter that at least we know about them. I mean, whether or not it's right to pick someone based on those, it's really up to the Senate. But the Senate represents the people. And the people do deserve to know. You know, if they are not in favor of a nominee, they should know what those person's views are. And with that in mind, they can decide either to urge their senator to vote yes or no. So, it does matter. I mean, one of the things that is funny about the judicial process is that we want the judges and Justices on the Supreme Court to be apolitical. But the confirmation process is essentially a very political act. It is extremely political. And so, in that sense, you know, it's uncomfortable for lawyers to think about it that way. But, you know, the truth is, we do want to know what these people think before they are appointed as a Supreme Court Justice. And this is a very different kind of appointment. The reason why you and I have had these conversations all this time is because of President Trump. So, whoever Trump picks, think about all of these open questions that we've been talking about. When does a president violate the Emoluments Clause? When does a president, if ever, obstruct justice? Is it okay for the president to pardon himself? It's very plausible that one of these questions will go up before the United States Supreme Court. What does it mean for President Trump to then hand pick a key person on that Court to perhaps be a decisive vote in one of those matters? And we know that he is a person who is very much interested in personal loyalty. Is it that out of bounds to think that President Trump might, in some interview, ask a potential nominee, "Would you be loyal to me?" It's not the way we think about the presidency and Supreme Court nominees, but this, again, has been a very unusual presidency. And if that's the case, that makes it all the more urgent that we know something about what this nominee's views are.

Roman Mars [00:14:31] If you were a senator in the confirmation committee, would you ask questions specifically related to Trump?

Elizabeth Joh [00:14:37] Sure. I mean, I think the problem is, you know, what kind of answer do we want? I mean, what kind of answer would be a satisfying answer? And I think the convention now is the nominees are coached to say very little. They would say something like, "Well, I haven't considered that matter. So, I don't know."

Roman Mars [00:14:54] "You'd have to come up in front of me as the actual case."

Elizabeth Joh [00:14:56] Pretty implausible, but that's what they'll say.

Roman Mars [00:14:58] Yeah.

Elizabeth Joh [00:14:59] But that's what's at stake. It's not just the stability of the cases that the Supreme Court's already decided. It's all of these great unknowns that Trump himself has brought up. And imagine that the Supreme Court in some, you know, next term, for example, has to decide, "Can the president pardon himself? It comes up somehow. Well, you know, it's not going to be a unanimous Court. I would highly doubt that. It's going to be a split Court. And if it's close to a 5-4 decision--five Justices on one side and four on the other--it's who is going to be that swing vote. That's what's going to matter in this kind of case.

Roman Mars [00:15:36] Is there anything in the structure of the Court or the Roberts Court in particular that is a check on this just being an incredibly conservative Court that makes incredibly conservative decisions?

Elizabeth Joh [00:15:50] Well, you know, there is some sense that the Court itself, as an institution, wants always to at least have the appearance of being insulated from day-to-day politics. I think the Chief Justice, like his predecessors, is likely to want to make sure that the body itself remains as an institution that people think of as legitimate. It's not going to be seen as legitimate if the decisions seem purely political. So sometimes that's enough to put enough pressure on at least some number of Justices to say, "I don't like these prior cases." But boy, we can't just, you know, stick our finger in the wind and decide we're going to overturn that case. The Supreme Court doesn't overturn its own decisions lightly. I mean, it makes a big show of when it does so, saying, "We really made a huge mistake here." Would it be willing to do so in a variety of ways? I don't know. But it's certainly a risk now that President Trump is going to nominate someone who is very likely going to be much more conservative than Justice Kennedy was.

Roman Mars [00:16:50] Right. So, it wouldn't be like, "We're overturning Casey." It would be like, "We're going to allow states to put a... Like, you have to go to counseling, and you have to have three days of waiting and all that sort of stuff." That would be the way you would chip away at those rights.

Elizabeth Joh [00:17:04] Right. And that's already been happening in a lot of subsequent cases to Casey. But you could see even more of that. And, you know, again, you'd say, "Well, we wouldn't overturn Roe, or the Court wouldn't overturn Roe and Casey." Well, I'm not so sure that's that clear. I mean, again, abortion and gay rights are really controversial issues. And we will have to talk about this in another show, I think. But they both address parts of the Constitution called substantive due process. And that area of the law really refers to the Supreme Court deciding that there are certain unwritten rates that we have based on the Constitution. So, unlike the Second Amendment, we can all disagree what the Second Amendment means. But there's no question that it refers to arms, right? But there's no word "abortion" or "marriage" in the Constitution. So those are even more particularly controversial. And the kinds of areas where conservative judges and Justices have been highly critical of these decisions. So, I think particularly vulnerable to chipping away at those rights or even possibly overturning them. So, it doesn't happen overnight. But then again, President Trump said at a rally on Wednesday after Kennedy announced his retirement, "I want to make sure we pick someone who's going to be there for the next 40, 45 years." And 40 to 45 years is plenty of time to make a lot of changes in law.

Roman Mars [00:18:31] Wow. If you were to change one thing about the structure of the Supreme Court, what would you change?

Elizabeth Joh [00:18:36] You know, I used to feel that it was silly to talk about abolishing life tenure, but it seems to me like maybe that's a good thing. Maybe in a democratic country like ours, we don't want one person's--one 180-year-old man's--retirement to throw us into turmoil about what the future of particular rights might be. You know, if every president got a chance to pick one or two Justices, maybe that would be a better system. So, I think that's, you know, certainly one idea to kick around. I mean, should it really be this way that we have spent nothing but the past couple of days, you know, thinking about, "Wow, what does this Kennedy retirement mean? And could it be the end of abortion rights? Could it be chipping away at gay rights? Could it mean, you know, no more progress on affirmative action or things like that?" Well, you know, maybe that's not a good thing--that all of it hinges on the retirement decision of one person.

Roman Mars [00:19:30] Right. Or that the next person chosen will be the most powerful person in the United States?

Elizabeth Joh [00:19:37] That's right. And, you know, one of the things that is interesting here is, you know, this has been a whole series of conversations about President Trump. And the truth is that even if he makes it, let's say, the end of his second term, it's still a finite amount of time and it's a relatively short period of time. But Trump's legacy is much larger than that. He will have appointed at least two--if not more, eventually--Supreme Court Justices. Under his administration, he has appointed a large number of appellate justices. They, too, have life tenure. And they will issue decisions that have far reaching consequences because if you think about it, not that many cases get to the Supreme Court. It's far more likely that a federal appellate judge will have more influence over more areas of law than the Supreme Court. So, his legacy is you might think, "Well, he can't make these deals." Well, deals do matter, but the shadow of the law here is really, really long--certainly as long as our professional lives are going to go. Just to cheer you up.

Roman Mars [00:20:49] Oh my Goodness.

Elizabeth Joh [00:20:50] And also, there's another thing to think about. Why nine Justices?

Roman Mars [00:20:54] Well, yeah, that's this thing that came up with Roosevelt where he was trying to pack the Court to do things.

Elizabeth Joh [00:20:58] Now, that's not something I'm advocating. I'm not saying we should have 20 judges or 30 judges or anything.

Roman Mars [00:21:02] Why not?

Elizabeth Joh [00:21:03] There's a difference between the Court and Congress.

Roman Mars [00:21:07] So lifelong tenure seems basically un-American. It seems contrary to how we think of ourselves to me personally.

Elizabeth Joh [00:21:16] I understand what you're saying. I mean, we have to think about some alternative that seems obviously better. So, if you think about state court judges who run for election every time and they have relatively short terms. Well, that doesn't always lead to good results either.

Roman Mars [00:21:31] I mean, I get why you don't want to have popular elections of judges. I think it's pretty ridiculous. But what is the basis for having lifelong tenure in the Supreme Court at all?

Elizabeth Joh [00:21:42] Well, I think the idea is that over time, the judges kind of gain, you know, a considerable amount of expertise--much more so than they had previously because these are usually people who have been judges before--about how the law should change, how the law should stay the same, and what areas of the law need sort of changing or more decision making. And that comes with a long time on the bench. I think the key thing here is that, you know, we can have a stable legal culture without life tenure, possibly, if that's one of the ideas that we can throw out. I mean, so much depended on Justice Kennedy's whim. He decided today was going to be the day or last Wednesday was going to be the day. And we're sort of in this mode of chaos right now, right? So why should it be up to him? Why couldn't it be a kind of, you know, thought out decision that your 20-year term is coming up or whatever it might be? And then we could all expect it and know what would happen next.

Roman Mars [00:22:42] And can make political decisions and votes based on that.

Elizabeth Joh [00:22:45] Exactly. And I think that the key thing here is that no matter who it is that ends up replacing Justice Kennedy, understand that this will be a kind of signal for a number of interest groups to aggressively pursue litigation. That will be kind of like the Bat-Signal for people to say, "You know, this is our chance to try and overturn this case and that case and that case." That's really the main thing here. It's not simply the change in the composition of the Court. You're going to see a lot of aggressive litigation.

Roman Mars [00:23:16] Just like when Kennedy hinted that there might be a basis for political gerrymandering to be unconstitutional caused a bunch of people to look for the right evidence to convince them, and they did not.

Elizabeth Joh [00:23:31] I mean, because he was a swing vote, some of these briefs were sort of direct personal letters to Justice Kennedy.

Roman Mars [00:23:38] Right. This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com and on Facebook and Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out all about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.