

What Roman Mars Can Learn About Con Law Lies, George Santos, and the 1st Amendment

Roman Mars [00:00:00] It is Friday, February 24th at about 11:30 a.m. And what are we going to be talking about today?

Elizabeth Joh [00:00:05] New York's 3rd congressional district covers parts of Queens in New York City and parts of Nassau County in Long Island. And in November of 2022, they elected a little-known newcomer as their freshman congressman--a man named George Santos. So, who exactly was he? He attended the elite New York City private high school Horace Mann. He graduated from Baruch College in the top 1% of his class. He earned an MBA from NYU. He worked at Goldman Sachs and Citigroup. He helped produce a Spider-Man rock musical. He funded a charitable organization to help animals. He had a family fortune in real estate. And his mother tragically died in the September 11th attacks. His grandparents survived the Holocaust. He was Jewish. And he definitely never, ever participated in a drag pageant under the name Katara. None of these things appear to be true--at all. In fact, Santos may not always have been Santos. He used to go by the name Anthony Devolder. Of course, politicians exaggerate all the time; they embellish their resumes, they brag about their accomplishments, they exaggerate about the faults of their opponents, and sometimes they just flat out lie. But in modern politics, I don't think we've seen someone lying to the degree that George Santos has lied. Many of the people who have voted for him are upset, although some are not. You probably couldn't write a fictional character better than George Santos. He seems to have made up an entire life in order to be elected to Congress. And not only are there the lies, there are also questions about his mysterious finances. In 2015, a landlord in New York filed an eviction case against him for more than \$2,000 in unpaid rent. And in 2020, Santos reported earning just \$50,000 a year. But he was also able to lend \$700,000 to his own campaign. But where did that money come from? He has a company called Devolder Organization, and he claims it's worth more than \$1,000,000. But no one can find any clients for the company. His campaign also paid thousands to a cleaning company listed at an apartment where Santos himself had been living. Now he's been exposed, and he may be in some trouble. But what does the Constitution say about lies and punishing lies and punishing Santos? Time to find out.

Roman Mars [00:02:45] Let's do it. This is What Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length, where we look at the lies, damn lies, and damn, damn lies of certain members of Congress 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.

Man Enough [00:03:36] Man Enough is a Webby nominated audio and video podcast, which investigates how traditional structures and attitudes towards masculinity affect men, women, and humanity as a whole. Pivotal themes include privilege and race, success, failure, mental and physical health. It's hosted by filmmaker, actor and author Justin Baldoni, author and journalist Liz Plank, and Grammy winning music producer and Wayfarer Studios president himself, Jamey Heath. The show invites a wide range of perspectives--including celebrities and thought leaders--to discuss these important topics, including your boy, Christopher Rivas, Jay Shetty, Rainn Wilson, Matthew McConaughey, Lil Rel Howery and Shawn Mendes. The Man Enough Podcast is one of the most followed and shared podcasts for a reason. You're going to laugh, learn, and be reminded that you

are most certainly enough. Listen to the Man Enough Podcast for free wherever you enjoy podcasts or at manenough.com/podcast.

Roman Mars [00:04:39] So what kind of legal trouble is Santos specifically facing?

Elizabeth Joh [00:04:43] Potentially a lot. There are now multiple investigations about Santos. Local prosecutors are investigating him. The Justice Department told the Federal Election Commission to stop investigating him because they have begun their own investigation. The Securities and Exchange Commission also appears to be interested in Santos's role in an investment firm that was shut down in 2021, but also happened to be described as a Ponzi scheme. The FBI is investigating Santos for a GoFundMe set up to pay for the surgery of a disabled Navy veteran service dog. Well, what happened? None of the money that was raised ever made it to the vet or his dog; it's a terrible story. Brazilian prosecutors are looking into check fraud charges against Santos from when he was 19 and living in Brazil. So, I think based on what's been reported, Santos almost certainly runs the risk of being charged with violating federal campaign finance law. If there's any real evidence that he used campaign funds for himself, let's say, or tried to hide the fact that he did, then he's in some real criminal trouble. And the same is true if he made false statements on his financial disclosure forms that he knew were false. The GoFundMe inquiry could be a potential wire fraud investigation. So, there's quite a lot so far that could get him into some serious problems.

Roman Mars [00:06:07] But, like, I think most people object to the idea that he lied and then got elected. Is that actually against the law?

Elizabeth Joh [00:06:15] So, yeah, that's right. That's probably what people are most interested in, right? He lied to everybody, and maybe some people actually voted for him based on what he said. The answer is: Probably not. So first, there doesn't seem to be a federal criminal law that covers his plain old lying. You can certainly be charged with defrauding people under the federal mail and wire fraud statutes. But if you look at these laws, they typically target people who swindle others out of their money or property. You know, votes aren't money and they're not really property either. There are some federal laws that punish people for defrauding their victims for a thing of value--that's what they say--but it's not really clear that votes would count. There are some state criminal laws that try to punish this kind of fraudulent scheme, too. But New York doesn't have those kinds of laws. So, the short answer is there isn't a law right now that clearly seems to criminally punish Santos just for telling lies. But I think the more interesting issue is that even if Congress decided tomorrow to pass a law--let's call it the "Santos law"--that would punish this kind of lying, political lying, it's probably unconstitutional. It would probably violate the First Amendment.

Roman Mars [00:07:30] Wow. Okay. So why would it do that?

Elizabeth Joh [00:07:33] Well, I say that because of a case the Supreme Court decided in 2012 called *United States versus Alvarez*. It's about another outrageous liar. So, in 2007, Xavier Alvarez was elected to sit on the Three Valleys Water Board District board of directors. It's a public agency in Southern California. And he'd already been elected. But at his first public meeting, Alvarez said, "I'm a retired Marine of 25 years. I retired in the year 2001. Back in '87, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." None of this was true. He was never a marine, and he certainly never won the Congressional Medal of Honor.

Roman Mars [00:08:17] Wow.

Elizabeth Joh [00:08:17] Now, the FBI got a hold of the recording of the Water Board meeting, and eventually prosecutors charged him with violating 18 U.S.C. 704 (b) and (c). It's also known as the Stolen Valor Act.

Roman Mars [00:08:32] Oh, I'm familiar with the concept of stolen valor, but could you explain it fully so I can get a full picture?

Elizabeth Joh [00:08:37] Yeah, sure. So, this is a federal law that actually makes it a crime to specifically claim that you received the Congressional Medal of Honor when you actually did it. Now, Alvarez was the very first person ever convicted under the act, but he argued that the law itself violated his free speech rights under the First Amendment. So, it's important to remember that the act at that time punished people for just saying that they received the Congressional Medal of Honor, period--not because you received any benefit, like money or property, for lying, but just saying it. And so, First Amendment experts would call that "content regulation of speech." It's the government saying, "You can't say this, and we're going to punish you for it." And in 2012, the Supreme Court agreed with Alvarez and reversed his conviction. And they said that the law unconstitutionally punished protected First Amendment speech. Now, the federal government argued to the Court that lies, as a category, were beyond First Amendment protection. And the Supreme Court clearly rejected that argument. But what we can take away from Alvarez is a little less clear. A majority of the Justices on the Court agreed that the Stolen Valor Act was unconstitutional. But there wasn't really a majority reasoning on why that was so. But Justice Kennedy wrote an opinion for four of the Justices that does state some interesting principles that are also repeated in other Supreme Court cases. So maybe we can talk about that.

Roman Mars [00:10:07] Yes, let's.

Elizabeth Joh [00:10:08] Okay. So first, the Supreme Court has been clear that there are some kinds of speech that just don't receive First Amendment protection, including things like what the Court has called "true threats" and "incitement." And there are also some kinds of lies that fall into that category, too. So, the government can punish lies that damage people's reputations; we call those "defamatory lies." The government can certainly punish you for lies you tell to obtain money or property; that's fraud. And the government can also punish you for lies that interfere with the criminal justice system. Let's say you lie to investigators or you lie on the witness stand. Those are lies that can be punished. But in Alvarez's case, Justice Kennedy said there is no question that the government can certainly punish lies that you tell when you get some kind of material advantage. But remember, the Stolen Valor Act punished people just for lying, period. And that's one of the big questions in the case. Is there a place in a democratic society for unpunished lies? And the answer, surprisingly, is yes. And that's not because the lie itself is valuable but because punishing lies alone would give the government a kind of power that we should all be nervous about. That's what the Court's really messaging to us. "That," as Kennedy said, "would allow government authority to compile a list of subjects about which false statements are punishable. And that governmental power has no clear limiting principle." And of course, there's the inevitable reference to George Orwell's dystopian novel, 1984. We don't want a ministry of truth, right? So that's the idea here. And actually, the appeals court that considered Alvarez's challenge said something similar. The appeals court said, "If the Stolen Valor Act is constitutional, then there'd be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status

on match.com or Facebook--or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the highway."

Roman Mars [00:12:18] Fair enough. Yeah.

Elizabeth Joh [00:12:19] Yeah. And then there would be the consequences of allowing the crime of just plain lying. What would people do, right? I mean, most people don't like to go to prison, and many of us would then be cautious in what we'd say because we'd be afraid that we'd be stepping over that line into criminalized lying. So that basic idea is, like, we'd censor ourselves, right?

Roman Mars [00:12:39] That all makes sense to me. And even sort of this adversarial judicial system is built upon the fact that everyone is lying for their own interest, I mean, beyond perjury. But you're not telling the whole truth.

Elizabeth Joh [00:12:49] You may be exaggerating or shading things, but the question is, you know, should the government have a role in regulating that? And so, Justice Kennedy in the Alvarez case said that the solution for a problem like Xavier Alvarez is not criminalization. The solution is more speech. He says, "Counterspeech can overcome the lie." And so, after the Supreme Court decided the Stolen Valor case, some courts relied on that case to strike down laws that were similar to the Stolen Valor Act--laws that just broadly punished lying for lying's sake. So, for instance, in 2015, the state Supreme Court in Massachusetts struck down a state law that had criminalized making false statements about political candidates. So, like, it's a little bit closer to Santos. And that court decided that the law violated free speech principles. The person charged in that case had published a brochure saying that a candidate chose convicted felons over the safety of our families. It's kind of extreme, right? But the state court said that that same law could be used to punish a candidate who exaggerated their own record or resumé. And the court said, "You know, that's just not for the government to police. The solution is more counterspeech." So, if Congress were to pass a law tomorrow that criminalized political lying, like George Santos' lying, and just lies, I think the law would certainly be challenged in Court and it would run a pretty high risk of being considered unconstitutional punishment of free speech. So, while the Alvarez case is not exactly the same as the George Santos problem, it does strongly hint that the Supreme Court wouldn't look kindly on such a law.

Roman Mars [00:14:34] Is there a way that you could couch it that he got a material benefit--that it is just another version of fraud, though?

Elizabeth Joh [00:14:41] I suppose so, but that would be a little bit of a stretch, you know, to have to say that a vote would somehow be the thing of value. And then you'd have to somehow-- How would you prove that all of those voters actually, you know, were swindled in that specific way? It just doesn't really feel exactly like traditional fraud.

Roman Mars [00:14:57] Yeah. Yeah. Interesting. So, if state or federal law can't really punish him for lying, can the House actually just punish him for lying?

Elizabeth Joh [00:15:05] Well, yes, it's complicated. There's, like, the theoretical versus the practical, right? So, remember when the House voted 15 times to elect Kevin McCarthy as speaker.

Roman Mars [00:15:15] Yeah, that was a great day.

Elizabeth Joh [00:15:16] Yeah. I mean, part of the reason this was so important is because the House couldn't function without a speaker. And part of the functioning of a new Congress is that the newly elected members are sworn in. Santos was sworn in. But I guess the question could have been: Could the House have said, "No, we're not going to seat you, you've lied too much, you can't be here"? The very clear answer to that is no. And that's because the Supreme Court has said so in a case involving another member of congress. That was Adam Clayton Powell Jr. Powell was this really larger-than-life, 12 term, democratic congressman. He was active in promoting civil rights and he was the first Black member of the House from New York. Powell was first elected in 1944, but by the 1960s, he'd gotten himself into some political scandals--accused of financial mismanagement. And so, the House decided they're kind of sick of him, and they decided to investigate him for some of these financial wrongdoings. And while they were doing this, they actually refused to seat him, even though Powell had won reelection. And so, Powell sued. And the Supreme Court ultimately decided in his favor. They said, "Look, the Constitution only requires three qualifications to be a member of the House--age, citizenship, and residency. And those are the only reasons that the House could refuse to seat a member of Congress." So, a refusal to seat Santos wouldn't even have been constitutional.

Roman Mars [00:16:43] But what can they do beyond that now that they've seated him? Could they actually punish him?

Elizabeth Joh [00:16:47] They could. They could actually expel him.

Roman Mars [00:16:52] So they can seat him and then expel him?

Elizabeth Joh [00:16:54] That's exactly right. So, they're limited in swearing in someone who's been voted in. But the Constitution actually specifically gives the House the power to expel one of its members so long as two thirds of the House votes for it. Now, expulsion is different than impeachment, which is a, you know, more trial-like process for officials in the executive branch and judges. Expulsion is just two thirds of the House wants you to leave. So, when it comes to expulsion, the House actually has a lot of theoretical power because the Constitution doesn't limit their power to specific instances of wrongdoing. In other words, there's not like a specific list of things that means, you know, if you pass that line, you're expelled. You could, in theory, be expelled for actually having been convicted of committing a crime, breaking internal congressional rules, or even doing something like discrediting the institution. So that's all in theory. But the practical problem is that expulsion has hardly ever been used. Only five members of the House have ever been expelled, and three of those happened during the Civil War for people who were disloyal to the United States. And the other two involved members of the House who were actually convicted of crimes. And of course, at this point, we haven't seen any charges filed against Santos by any federal or local prosecutors. And then there's just the plain GOP reality. And the Republicans have a very narrow majority in the House. Any lost seat would put the party in a much more tenuous position. And McCarthy--he's already been asked about this--he's already said he's standing by Santos because his constituents voted for him.

Roman Mars [00:18:36] Wow. Of course.

Elizabeth Joh [00:18:37] Yeah. And so, the politics of it make it very unlikely, at least from what we know now, I think, that Santos would be expelled because don't forget that when Democrats controlled the House, which they did until just recently, they didn't expel any

House member who seemed to have played some role in trying to aid the attempted coup on January 6th. They certainly had that power, and they did it. And so, if taking part in interfering with one of our most fundamental democratic processes--it wasn't enough to expel someone--I just don't think being a compulsive liar is going to meet that bar either.

Roman Mars [00:19:12] That's amazing, though.

Elizabeth Joh [00:19:13] I mean, things could get worse if Santos is criminally charged. But it's not obvious what would happen. The Constitution doesn't bar people who have been indicted or even convicted even of a felony from serving in the House. The House would actually have to decide and vote on expelling that person. And so, if Santos were to be indicted or even convicted, I think in theory, the shame of it all might force him to resign. But we're talking about someone who's a serial liar, so it doesn't seem like...

Roman Mars [00:19:48] Shameless. Yeah. Why would he? What's the benefit to that? He seems to have skated through life with these lies for a very long time. Why would it be any different now? Getting elected to Congress, doesn't all of a sudden, like, you know, improve your character probably.

Elizabeth Joh [00:20:02] Yeah. I mean, I think for voters who are upset about the lie--people who voted for Santos because of some of the things he said about his resume, he sounded so accomplished--they're understandably upset. And there's very little they can do at this point because there isn't a kind of recall provision for members of Congress. And in many states, you can recall executive officials and elected officials based on a kind of state recall, right? And we've seen this in California, too. But there's nothing the same for members of Congress. But voters can kick Santos out the old-fashioned way with their votes.

Roman Mars [00:20:38] Yeah, which for a member of the House of Representatives is only two years. So, like, it's going to be pretty fast.

Elizabeth Joh [00:20:45] Or it could seem really long.

Roman Mars [00:20:47] Yeah. Yeah. I've had two years that have felt pretty long.

Elizabeth Joh [00:20:56] I think that George Santos' probably protected right to lie for the sake of lying also shows us why we have such a hard time punishing fake news or the deliberate spread of disinformation. So that's everything from Trump's big lie that the presidential election was stolen from him, and then there was all of that--and there still is--COVID-19 misinformation about the safety of vaccines and lots of things about the pandemic. Now, several countries have made it a crime actually to spread lies about COVID-19 vaccines. But in the United States, we probably can't. So, in the Alvarez case, there are definitely five Justices who agreed with the idea that the First Amendment probably protects the right to lie about matters of public concern, like broad ideas about philosophy, religion, history, social science, and probably the physical sciences, too. And the problem isn't that we couldn't tell what is fake and what is real, but the problem goes back to should the government be entrusted with that power? And I think several of the Justices just think it's too dangerous to give the government the power to be what they call "the arbiter of truth." And I think the real issue, of course, is that the Court's solution for all of this--counterspeech--whether that is really a practical response from all of us...

Roman Mars [00:22:24] Counterspeech is complicated.

Elizabeth Joh [00:22:26] Sure. I mean, I think that model absolutely makes sense in a world where we're all standing in the public square trying to convince one another of what is right. But it's so much more complicated when people get their information online, usually on platforms where the most outrageous and usually deceptive videos get promoted over some dry, sober explanations about the truth.

Roman Mars [00:22:47] Totally. Totally. Or even something simpler, which is, like, the lies on that brochure. Printing another brochure takes money to counter those lies. And that's not two people shouting a debate over ideas. It is not an even playing field.

Elizabeth Joh [00:23:02] That's right. And so ultimately, what all of this means--the place that we're in because of the Court's views on speech and lies--it probably means that laws that many folks would think are good for policy reasons--laws that try to promote public health or even improve the democratic process by saying, "You can't say these things that you know are not true"--they run into the Supreme Court's view that some lies just have to be let alone. They can't be punished by the government. And that's why Xavier Alvarez's conviction was reversed. That wasn't the end for him, though. In 2009, Alvarez was convicted in state court of insurance fraud, stealing public funds, and grand theft--all related to when he was on the Water Board District, and he tried to sign up his ex-wife for health benefits by claiming they were still married. And that kind of lie is definitely not protected. He was sentenced to five years in state prison.

Roman Mars [00:24:00] I guess that's kind of a thing when it comes to liars, is that if they're lying about one thing, they're probably lying about multiple things. And eventually one of them will tread into territory in which they could be convicted of it.

Elizabeth Joh [00:24:09] That's right. I don't think that Santos is going to be able to rely on the First Amendment for everything that he's done or said. It's going to cover some of what he's done, but certainly the more traditional suspect and maybe criminal activity is just going to be plain old punished.

Roman Mars [00:24:24] Wow, that's really fascinating stuff. Well, thank you so much. This was cool.

Elizabeth Joh [00:24:27] Thanks, Roman.

Roman Mars [00:24:35] This show is produced by Elizabeth Joh 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 a Stitcher and SiriusXM Podcast Family.