

## Police, Race, and Federalism

**Roman Mars** [00:00:00] Knock, knock.

**Elizabeth Joh** [00:00:01] Who's there?

**Roman Mars** [00:00:03] Federal troops. We want to sleep in your guest bedroom.

**Elizabeth Joh** [00:00:07] No soldiers shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

**Roman Mars** [00:00:17] D'oh! This is What Trump Can Teach Us About Con Law--an ongoing monthly series of indefinite length, where we take the tweets and legal challenges to the 45th President of the United States and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow remote learning student and host, Roman Mars. So, people in my Twitter feed were delighted a couple of weeks ago when the Third Amendment was invoked because the Third Amendment is the, you know, sleepest amendment of the original Bill of Rights.

**Elizabeth Joh** [00:01:23] That's right. It's 1/10th of the Bill of Rights, but 90% of the obscurity. Really nobody talks about the third amendment.

**Roman Mars** [00:01:30] And so it's about quartering troops. So...

**Elizabeth Joh** [00:01:33] That's right. It's about quartering troops. It's one sentence. Why did it come up? Well, everybody remembers now that at the end of May, the beginning of June, and still actually people are protesting all over the United States--and in fact, all around the world--because they are upset about police brutality and particularly against African Americans. So, a lot of these protests are in major cities, including Washington, D.C., and very near the White House. So as a result, we see that the Department of Defense sends out federal law enforcement. Also, the National Guard was brought in to patrol the streets to make sure everything was safe. And then on June 1st, President Trump had a Rose Garden speech in which, instead of being conciliatory, he basically took a law-and-order stance. He said things like, "We're ending the riots and lawlessness." And he said that he is going to make sure that "we dominate the streets." So that wasn't exactly a conciliatory tone about a moment of crisis where everyone is worried about, "Wow, what is happening with policing in the United States?" People were shocked by what had happened to George Floyd. This all culminates on June 1st, in the evening, because Washington, D.C. at that time had a curfew. Lots of protesters are gathered in Lafayette Square across the street from the White House. And there are peaceful protesters--no suggestion that there was anything unlawful happening at that time. And then in a shocking display, we watched protesters being hit with tear gas. There were flash bang bombs. All of this because the president wanted to walk from the White House, basically across the street, to St John's Church, to have his picture taken, the Bible in his hand.

**Newscaster #1** [00:03:27] We're going to begin at the White House, where President Trump spoke out for the first time from the Rose Garden, vowing to send U.S. troops into the streets of American cities if local authorities don't control the protests. Those remarks came just moments after the administration asked police to clear peaceful protesters from the park across the White House so the president could stage a photo op...

**Elizabeth Joh** [00:03:47] Apparently, this was in response to his anger--frustration--about newspapers reporting that he had been hiding in an underground bunker a couple of days before because of the potential danger to him and the first family because of all these protests. This makes everybody upset--makes people upset in Washington in particular. And then a few days later, the mayor of Washington sends a formal letter to the president asking him to remove all federal law enforcement and military out of Washington that have been sent there to police the protests. Now, many of them have been just put up in hotels, right? So, everybody tweets the stuff out. They tweet out her letter. And then the reason the Third Amendment stuff comes up is because Utah Senator Mike Lee--he tweets out, you know, "This is unacceptable. They're being evicted." So, is this a Third Amendment problem? So, remember, the Third Amendment doesn't say a whole lot. It just says, "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in a time of war, but in a manner to be prescribed by law." So that's a pretty dense sentence, right? What exactly does that mean? And we don't really know because the Supreme Court has never decided a Third Amendment case. There's not really very much in the case law about what the third time means. It's an interesting provision because people love to talk about it. Like, what does it mean--soldiers living in your house? "I have to have soldiers forcibly eating my food and sleeping in my bed." This is a historical response to the British forcing colonists to house British soldiers. It's a provision that speaks to our rights against the military, whether we're in war or during peacetime. So that's kind of cool. And there's nothing really that has that kind of specificity in the Constitution. But here's the thing: It doesn't really mean much in this context because they were paying customers to these hotels. And there is no sense in which the hotels were being forced to quarter them. And, you know, the hotels were certainly not complaining, particularly during this time of economic crisis. So, it was basically a big kerfuffle over nothing, mainly because people just love trotting out, like, "What does this amendment mean?" And we're not going to likely know because of this particular controversy.

**Roman Mars** [00:06:06] Right. Right. But it was a fun night, wasn't it? On Twitter?

**Elizabeth Joh** [00:06:09] It was great. It was better. We talked about something else for about 30 minutes.

**John Mulaney** [00:06:16] "Put it down in writing! 'The Army can't live in your house!'" And don't you thank God every day for that Third Amendment? The other afternoon--this was Tuesday--I was in my apartment and the buzzer rang. And it was 101st Airborne. And they said, "Permission to live in your house?" And I went, "Third Amendment." And he said, "Gentlemen, he's invoked the Third..."

**Roman Mars** [00:06:48] Okay. Well, then let's talk about some of the other stuff going on--and in particular, like, how the protests and the federal government sort of intersect because, you know, police forces are local and regional. But there's a lot of things going on that are sort of demanding a federal response. And so how does that all work?

**Elizabeth Joh** [00:07:10] What's different now is that we now live in an era where when there's an instance of police brutality, everybody has a cell phone. And we now see these cell phone videos of uses of excessive force. They get shared instantly around the world on social media. And then people demand some kind of change. And that's really what these protests have been about. People asking for a renewed emphasis on police reform in the United States--in particular, just a concern that policing has a racism problem. It has a race problem in the United States. The question is what to do about it, right? Everyone

now has heard what has happened to George Floyd. He is called out by a local convenience store where allegedly he passes a counterfeit \$20 bill. A store employee calls 911. They say, "Oh, I think this guy passed a \$20 counterfeit." So, officers respond to a report of what they called a "forgery in progress." And then what happens afterwards is really the controversy, right? He's sitting in a car. A gun is pointed at Floyd. He's told that he is going to be arrested. He's brought out of the vehicle. And according to this video, what we see is a kind of a horrific series of several minutes--according to the prosecutor's complaint, 8 minutes and 46 seconds--where four officers, and one in particular, kneels on George Floyd's neck. And you can hear Floyd saying, "I can't breathe multiple times." And they stay there until he's unresponsive. And the ambulance eventually arrives, but he dies at the hospital the same day. And the officers are later criminally charged. So, this prompts outrage all over the country. What are we going to do about policing? And this really is a moment where you think, "Well, how does that work?"

**Roman Mars** [00:08:58] Right.

**Elizabeth Joh** [00:08:59] We've talked a little bit about this before, but one of the funny things about policing in the United States is that we don't have a national police force the way that some other Western democracies do. We have lots and lots of different kinds of police forces--some at the federal level, but most police forces are local and state agencies. Something like 18,000 law enforcement agencies in the United States. But they're not under the direct control of the federal government.

**Roman Mars** [00:09:28] And we seem to like it that way, right?

**Elizabeth Joh** [00:09:30] We seem to like it that way. That's right. So, we're in this system of federalism where we have both state and the federal government. We also have local government. It's this kind of totally decentralized way of law enforcement that has some benefits because it allows for some variation. But it can have problems when you want, like, national change to happen all at once. So, what's the role of the federal government? There's actually a lot of similarity here between what we would expect out of the federal government during a pandemic and what we would expect out of the federal government in a police crisis. So, on the one hand, there's no direct control--let's say, with COVID--of the federal government over local health departments. But they have the power of money. They have lots and lots of money. The federal government has tons of money that it can spend to have a coordinated response. And although the president of the United States can't tell your local police department to change overnight in the same way that the present United States can't tell your local public health department to do something tomorrow. The president, of course, has enormous symbolic power. And people listen to what the president says--whether for bad or for good. And so, these two strains have become very evident, both with COVID and now with policing. So, what you can see with Trump is that he has struggled to respond to the nation being upset about police brutality. So, on the one hand, right after George Floyd's death, Trump tweets out he's going to ask the FBI and DOJ to investigate what happened in Floyd's case. Now, that sounds like a very expected presidential kind of behavior, right? Then the protests grow and grow. People get more and more upset. Many of these protests--most of them, in fact--are peaceful. Some turn violent. There is rioting, certainly in some of these instances. And then just a few days later, Trump tweets on May 30th that there are thugs dishonoring the memory of George Floyd. And then he says, "With any difficulty, we will assume control. But when the looting starts, the shooting starts." This is in the midst of the policing crisis. People are upset. And this is his Twitter account--which, of course, Twitter then flags as violating Twitter's rules about glorifying violence. And he continues to struggle about what

to say as the president. In Dallas on June 11th, well, he uses that metaphor that's used all the time for cops, right? "A bad apple." "So, you always have a bad apple. No matter where you go, you have bad apples. And there's not too many of them in the police departments." Well, that's kind of a problem because it sounds like there's not a systematic problem; there's just a few bad guys we have to find.

**Roman Mars** [00:12:25] That's not the point of the metaphor.

**Elizabeth Joh** [00:12:28] But also if you have one bad apple, it actually rots the whole barrel.

**Roman Mars** [00:12:31] It spoils the barrel. That's the whole point. There's not an answer.

**Elizabeth Joh** [00:12:35] It's not an answer, and it's actually a metaphor fail.

**Roman Mars** [00:12:38] Yeah, exactly. Okay.

**Elizabeth Joh** [00:12:41] So you remember the Tulsa rally? Not as many people showed up as he expected.

**Newscaster #2** [00:12:48] What the Trump campaign hyped would be a raucous return to the campaign trail for President Trump turned out to be a major disappointment for the campaign. While the Trump reelection effort boasted it would fill the Bank of Oklahoma Center that seats more than 19,000 people, the Tulsa fire marshal tells NBC News that 6,200 supporters ultimately filled the general election section of the enclosed arena. According to the Times, some users of social media said on Saturday night that teenagers helped keep attendance at the rally down by seeking tickets they did not intend to use.

**Elizabeth Joh** [00:13:28] While he tweets right before this, "Any protesters, anarchists, agitators, looters, or lowlifes who are going to Oklahoma, please understand you will not be treated like you've been in New York, Seattle, or Minneapolis." Boy, that sounds like he is threatening violence against the first group of people who are peaceful protesters. That sounds like a problem. That's kind of the issue here, right? You know, for a president, I think kind of a standard response whenever there's a crisis is this idea of being a national unifier. Even if they say these platitudes don't ultimately get you any results, people really look to the president of the United States when there's a crisis, like a pandemic or a police brutality crisis. People want the president to say, "We are going to do something. We have to come together." And in fact, he's done kind of the opposite. I mean, sometimes to be sure, he's expressed sympathy for what's happened. But he's equally just making the problem worse in a lot of ways. And so that's the president. And what about Congress? So, with Congress--of course--Congress has the power of the purse. Congress can spend money. And so, this is interesting, too. Of course, putting aside the problem of how much Congress will get done because of politics, what's interesting with congressional responses to the protests around George Floyd is that you can look at a bill like the one that's been proposed by the Democratic senators. So, there's the Justice in Policing Act that's been proposed. All of it is not likely to become law. But there you see the kinds of issues that they have to grapple with when it comes to how are you going to reform policing at a national level? So, there are some things that Congress can do directly. So, in that proposed bill, they suggest having an anti-lynching federal crime bill. Congress can pass a federal law that makes it a crime for lynching. They can do things directly like say, "Let's have studies." They can convene task forces. These are all things that Congress can do directly. But remember, Congress can't tell local police departments, "You're going

to do X overnight." What they can do is offer money. And police departments all around the country get federal grants all the time. And so, what's happening here in this bill--again, using that as an example--is that Congress could spend millions of dollars in grants and then condition the grants on local police departments, saying they're going to make steps towards training their officers better or having more diversity in their workplaces or keep a database. Or they can incentivize things like bans on chokeholds. But that is really a good example of the limit of what Congress can do. All of this is related to Congress's spending authority--their so-called "spending authority." So, as you can see, it can be used across the board for all kinds of subjects--pandemics, policing, transportation, things that Congress can't tell the states or local governments directly, "You have to do it," but they can strongly, strongly encourage it.

**Roman Mars** [00:16:34] Do they have to be careful that the law isn't a gun to the head?

**Elizabeth Joh** [00:16:40] Exactly. Going back to this idea of "We can't be too coercive." Congress can't really force the states. "If you don't do this, or else"--they can't make that kind of threat. All they can do is incentivize nicely, asking, "If you'd like this money, you'll have to change your behavior." So, is there any institution that can do anything at a national level? Well, it's the Supreme Court, right? Strangely enough, one of the funny things about the Supreme Court is that even though it seems so esoteric and it's about constitutional law, the things that the Supreme Court decides when it comes to parts of the Constitution, like the Fourth Amendment and the Fifth Amendment--they directly affect and directly regulate what ordinary cops do. So, if the Supreme Court decides, from now on, the police cannot do X thing that they were doing already, that's a command. Essentially, all the police in the United States have to listen to that and change their behavior.

**Roman Mars** [00:17:35] If they say, for example, that you have to read someone their rights...

**Elizabeth Joh** [00:17:38] Exactly. Miranda, of course, is a constitutional law decision by the Supreme Court. It wasn't enacted by Congress and certainly nothing that any president did. So, there's that one institution. You might think, "Well, maybe the Supreme Court can really do something about racism or racial discrimination and policing." So, the answer is it's complicated. Yes, they can do that. And they've had many opportunities to do that. But let me give you kind of one famous or maybe infamous example that's discussed all the time in policing. So, one night, in 1993, some police officers in Washington, D.C.--they were patrolling a high crime area in southeast Washington. They noticed this car. It stays at a stop sign, which they say is a stop that lasts for more than 20 seconds. So that strikes them as unusual. They see from their car that the driver--a guy named James Brown--looks into the lap of his passenger, a man, we discover later, whose name is Michael Whren. And when the police turn their car so as to follow this car that they've noticed, the car drives off at what they later say is "an unreasonable speed." So, I'm saying all these words directly because they later use these words, "stop for a really long time" and "you drove off at an unreasonable speed," to justify why they decided to force the car to pull over. They force the car to pull over. They notice that while they're approaching the car, the driver has this plastic bag, which they think is filled with drugs--looks like it has cocaine in it. They notice that the driver and the passenger together are about to hide the bag somewhere in the car. So, they're immediately arrested. They searched the car; the police searched the car. And there are drugs inside the car. They were right. But as a legal matter, why did they stop the car? Well, the officers say, "You weren't fully paying attention to your driving, you turned without signaling, and you drove off at an unreasonable speed." Now, those things all in isolation seem like, "Yeah, you're not supposed to do that." But the

question is: Is that really why they were stopped? Whren and Brown--the two guys in the car--they're eventually convicted on federal drug charges. They're both Black. And they say, "Sure, we engaged in these traffic violations, but that's not really why you stopped us." So, there's a tension here. There's no question that even under the Fourth Amendment, as a matter of constitutional law, the police anywhere have the right to stop you if they think that you've engaged in a traffic violation, right? That's the law. And if you break the law, they can stop you. In other words, in the language of the Fourth Amendment, we'd say that the police have what's called "probable cause" to stop you. So, "You failed to signal," "You speed"--all of those are good reasons that the police have stopped millions of Americans every day for all kinds of reasons. But Whren and Brown--the two guys in the car--they say, "Look, if you can just stop anybody because of a traffic violation (and we don't think that's the real reason you did it), then that's no limitation on government power at all. When there's no limitation at all, maybe police can abuse those powers." And so, in their brief before the United States Supreme Court, they say, "Look, all the evidence indicates that not everybody gets the same odds. Just because they could have stopped Whren wasn't enough. You allow not just powerful policing, but you're also implicitly allowing racial discrimination in policing." So, the question is: Did it matter that these two people were African American? Did it matter that the police weren't really interested in issuing traffic citations? They really wanted to see whether these two African American men were holding drugs in their car. What's the Supreme Court supposed to do about this? Well, in 1996, the Supreme Court issues the decision in a case called Whren versus the United States. What does the Court say? They say, "Look, we get what the petitioners--the defendants here, Whren and Brown--are saying." But essentially the Supreme Court's explanation here is it's just too hard to look inside the mind of an individual police officer. In fact, at the suppression hearing at the trial court--this is a preliminary hearing very early on in the case--the officers were asked, under oath, did they make the stop because the defendants were black. And they said no. And the trial court said that was credible. And, of course, that's kind of the problem. If you ask a police officer, "Did you stop this person because of their race?" I can't think of an officer who would say, "Yes, that's why I did it."

**Roman Mars** [00:22:20] They'll never admit to that. Right.

**Elizabeth Joh** [00:22:21] Yeah. That's just not something that happens in real life. So, the Supreme Court in this case says, "It's really hard to figure that kind of thing out." And so, what's a better way to think about this? Does the law provide a reason for the officers to make this stop--this traffic stop? Yes. They, in fact, failed to signal. They, in fact, drove off at an unreasonable speed. And Whren is a case in which the United States Supreme Court, in a unanimous opinion, says, "If that's true, as long as the officers could have stopped them--and there's no question that they could have--then that's all there is. That is the only thing that we care about." So, race doesn't play much of a role at all in the decision, even though the defendants in this case said in their legal briefs before the Supreme Court, "Look, you allow this, and you're going to allow racial discrimination in policing." In fact, the only real line in the opinion that the Court gives to any discussion about race at all is they basically say, "Well, of course, the Constitution doesn't allow the police to engage in racial discrimination." That's about it. Yeah. What's interesting is you can see how much they downplay race, even though race is, like, the big elephant in the room here in this case. The opening lines of the opinion start out with the description of the two people in the car that were stopped that night in Washington. And they say, "The police noticed a dark Pathfinder," that's the truck, Nissan Pathfinder, "with temporary license plates and youthful occupants waiting at the stop sign." No mention of their race. By contrast, Whren's lawyers said in their brief the same facts in a very different way. They said, "This case arises because the sight of two young Black men in a Nissan Pathfinder

aroused suspicion of the police." So, in a lot of ways, this 30-year-old decision, even though it's not a case about police brutality at all--there's no charge of excessive force here--that this case is a nice illustration of the difficulty of how can the Supreme Court deal with matters so sensitive and so important, like race, in a way that makes sense, that has any real impact. In *Whren*, which is really an infamous case as I said--it's been widely criticized for letting the police just kind of use traffic stops to target people that they want just because the law allows you to be stopped because you went 57 miles an hour in a 55 zone, or you didn't stop quite long enough at a stop sign. Basically, to use that as an excuse--or we call it a "pretext" in the law--to look for evidence of other criminal activity, and also to target people of color in ways that are really difficult to challenge in court.

**Roman Mars** [00:25:16] The subtext or maybe super texts of our discussions the past three and a half years have been the limitations of the Constitution to deal with somebody like Trump who pushes on all these things that aren't really rules in the Constitution. They're just norms that everyone generally adheres to. And it seems like racism and Trump have something in common in this scenario--that the Constitution is ill equipped to deal with racism.

**Elizabeth Joh** [00:25:42] I mean, the norms question is a good way to think about it. And maybe what the Constitution's good at--since we're kind of trashing it at the moment--is sort of setting the outer limits. No, you can't discriminate on the basis of race. You cannot decide not to hire people on the basis of their gender or sexual orientation. You can't do those things. The Supreme Court, in its decisions about the Constitution and how we understand the Constitution as a result, is a good way of thinking about "These are the minimums that we have in terms of our rights and obligations." The difficulties are always in how to implement those things. There's no question that the Supreme Court stance is "You can't use racism in policing. The police can't be racist." But the difficulty is never that statement. It's how do you rid the police of those kinds of issues or how do you make sure that people can make valid claims that "I think racial discrimination played a big role in why I was stopped or why I was investigated or why I was arrested and somebody else wasn't"? Those are the implementation questions that are always really, really hard.

**Roman Mars** [00:26:55] The limitations of the executive and the Congress and SCOTUS is one thing, but the cultural change seems to be the only thing that actually has any efficacy whatsoever in an issue like this. It's moving really quickly. You know, like, at least the attitudes in the polling and if you ask people about the support for Black Lives Matter--that stuff has moved more in the past couple of weeks than they did in the past several years.

**Elizabeth Joh** [00:27:32] It has been remarkable to watch such a large percentage of the public embrace these core ideas that this is a serious problem and that something has to be done about it. And I think we're now moving into the "Well, now what?" stage of it. What are we going to do about it now? And that's where it really matters. The protests and the public calls by celebrities--these are all important in drawing attention to this problem, one that's existed for a really long time. But for this to fade away without change would be the ultimate tragedy because we've seen this kind of problem, as I've said, numerous times before, where there's some kind of legislative zeal and then it fades away when attention goes to something else.

**Roman Mars** [00:28:17] So next time on What Trump Can Teach Us About Con Law, we're going to review all the cases and the decisions, right? That's the idea?

**Elizabeth Joh** [00:28:25] Yeah. We're going to try and talk about what exactly happened to the Supreme Court term--October 2019 term--ending in July, I guess, since the Supreme Court hasn't decided that we're done. There's a lot of big decisions out there. Trump's financial records. Abortion. There's just a ton of things that we are kind of waiting for. We've been waiting every couple of days when the Supreme Court decides what they're going to let us know. Be curious to see what he says when the financial records cases come out. And in the meantime, there's plenty of other issues that we're going to be watching, including, well, what happens with things like the Trump family suing over this new book that's coming out, congressional testimony about the firing of Berman, U.S. attorney. All sorts of things.

**Roman Mars** [00:29:17] We never run out of subjects here on Trump Con Law. Okay. Well, thank you so much.

**Elizabeth Joh** [00:29:23] Thanks. Stay safe.

**Roman Mars** [00:29:25] You, too. This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at [trumpconlaw.com](http://trumpconlaw.com). All 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 a proud member of Radiotopia from PRX, supported by listeners just like you.