

## SCOTUS without RBG

**Elizabeth Joh** [00:00:00] So, Roman, in your life experience, what happens when a president loses the election?

**Roman Mars** [00:00:05] They stop being president.

**Elizabeth Joh** [00:00:08] They stop being president. And what happens in January?

**Roman Mars** [00:00:10] A new president gets inaugurated. People show up. There are people cheering. It happens. It's a thing.

**Elizabeth Joh** [00:00:16] Exactly. And the scaffolding underlying all of this is that we assume that there's going to be a peaceful transfer of power from the loser to the winner. So, the problem here is, of course, that Trump has said just this week-- He was asked at a press conference would he commit right now to a peaceful transfer of power if he were to lose.

**Newscaster #1** [00:00:39] What the president said--and this was pretty worrisome, too, because I didn't hear him specifically state that he wants to see a, quote, "peaceful transfer of power." What did you hear?

**Newscaster #2** [00:00:49] Well, the same thing. I mean, he was asked twice about it--would he commit to a peaceful transfer of power? Obviously, "transfer" implies that Joe Biden would win. And his answer was, "We're going to have to see what happens."

**Elizabeth Joh** [00:01:03] So not surprisingly, he says, "Well, we're going to have to see what happens. You know, I've been complaining very strongly about the ballots, and the ballots are a disaster." So, it's kind of remarkable, but maybe we shouldn't be surprised at this point. The president is just not willing to say right now, "Well, I will accept the results if I lose."

**Roman Mars** [00:01:26] Especially not being able to commit to the whole-- Just the concept of peace is, like, against his very nature.

**Elizabeth Joh** [00:01:32] That's right. And there's not even any ambiguity, right? The Constitution's pretty clear about it. The Constitution says that the incumbent's term ends at noon on January 20th. So, it's not as if this is one of those "Should we interpret this? Are there ambiguities?" You know, when his term is up, it's up if he loses. But the fact that all of this has been undergirded by our understanding that no one ever fights this--no one ever fights the loss at the very end and says, "I refuse to accept the results." You know, again, we shouldn't be surprised. In the coming days we might hear that President Trump was just kidding or just joking. But at this point, so close to November 3rd, it sounds a little bit scary.

**Roman Mars** [00:02:15] It does. Welcome to What Trump Can Teach Us About Con Law!

**Elizabeth Joh** [00:02:20] Exactly.

**Roman Mars** [00:02:40] This is what Trump Can Teach Us About Con Law--an ongoing monthly series of indefinite length, where we take the tweets and shenanigans of 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.

**Elizabeth Joh** [00:03:12] On September 18th, Ruth Bader Ginsburg died at 87. Her death wasn't unexpected, but it has really sent shockwaves because of the timing of her passing. So, Justice Ginsburg is a really important figure. She was just the second woman appointed to the Supreme Court. And she spent 27 years on the Supreme Court. And before even all of that, she was a trailblazer. She was a woman law professor at a time when there were very few women law professors. She was a lawyer before the Supreme Court, don't forget, a co-founder of the ACLU Women's Rights Project, and a federal appellate judge even before she joined the Supreme Court. I think one of the things she's going to be remembered most for is that she helped persuade the Supreme Court, as a litigator, that the 14th Amendment's Equal Protection Clause should extend its protections to the concept of gender, not just race. But believe it or not, this was not always the case. And she had a very important role--a key role--in helping the Supreme Court change its mind on how to interpret that part of the Constitution.

**Ruth Bader Ginsburg** [00:04:20] I did see myself as kind of a kindergarten teacher in those days because the Judges didn't think that sex discrimination existed. Well, one of the things I tried to plant in their minds was "Think about how you would like the world to be for your daughters and granddaughters."

**Elizabeth Joh** [00:04:42] Now for someone who's been on the Court for so long, she, of course, wrote many, many majority opinions. But she became really famous in the last several years because of her dissents. Her dissents received a lot of attention. A good example of this is a case from 2013 called Shelby County versus Holder. That was a case that was a challenge to the Federal Voting Rights Act. So, you know, very briefly, the Voting Rights Act requires certain jurisdictions--most of them in the South with pretty bad histories of voter suppression--to get federal approval if those places wanted to change their voting procedures. So, the idea here is that the legal term is called "pre-clearance." And a majority of the Court struck that down. They said, "Well, you know, same problem doesn't exist, and we don't really need that portion of law anymore." Now, Justice Ginsburg's dissent--quite long, pretty fiery. Her dissent said, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you were not getting wet."

**Roman Mars** [00:05:50] So good.

**Elizabeth Joh** [00:05:51] So good. So later in life, she becomes this icon. She's known for wearing her jabot--that's that theatrical collar around her neck. She becomes known as the Notorious RBG. It's that combination of things--her commitment to gender equality, her dissents--she becomes an even more iconic figure than, I think, anyone would have expected. Now, of course, that's her passing. And the day after her death, Trump tweeted, "We were put in this position of power and importance to make decisions for the people who so proudly elected us, the most important of which has long been considered to be the selection of United States Supreme Court Justices. We have this obligation. Without delay." What that means is that Trump will be able to pick a third Justice for the Supreme Court after Justices Gorsuch and Kavanaugh. And that has huge consequences. It cements a conservative majority on the Supreme Court for a really long time. We'd had this block of very solid conservative Justices, plus four so-called "liberals," of which Justice Ginsburg was one. And sometimes Chief Justice Roberts had been willing to play a role of a swing vote--sometimes siding with the liberal Judges versus the conservative Justices.

That's important because, remember, it just takes five Justices on the Court to make a binding decision. So, five is the magic number. But with six conservative Justices, that becomes really not much of a challenge at all to have conservative decision making. And of course, all of this matters in the United States because in our system, we have a really powerful Supreme Court. Their interpretation of constitutional law is, for practical purposes, final; it's binding. Not every comparable democratic country has had such a strong form of judicial review, but we do. So that's why it has such a central role in our lives. Now, what's going to happen? Well, the Constitution says the Senate has a role in providing so-called "advice" and "consent" on a president's choice of a Supreme Court Justice. So, what that normally means is that the Senate holds hearings, they have witnesses both for and against a possible Supreme Court nominee, and they vote on the president's pick. In theory, the Constitution has a structure so that there is a check on the president. But what's happening now is that Mitch McConnell, the Senate majority leader, stated on the day of Justice Ginsburg's death that President Trump's nominee will receive a vote. So, practically speaking, it sounds like President Trump is going to be able to pick his third Justice, who will then be installed on the Supreme Court with what looks like a very quick confirmation, perhaps even before Election Day itself.

**Roman Mars** [00:08:42] And are hearings actually required in any way. Or is the vote even required?

**Elizabeth Joh** [00:08:49] Yeah, so that's a great question. The Constitution doesn't say anything about the procedures that the Senate has to use. They just have to provide what's advice and consent. And of course, what that has normally meant in modern times are hearings and a vote. You know, it's up to the Senate to change those procedures. And of course, the timing of when to hold a vote--even whether to hold a vote at all--those are all matters of norms. There's nothing specified in the Constitution itself. And, of course, Democrats are upset about this because it's that very act of discretion--the Senate being able to do whatever it wants, whenever it wants--they point to Judge Merrick Garland.

**Barack Obama** [00:09:28] Today, I am nominating Chief Judge Merrick Brian Garland to join the Supreme Court.

**Elizabeth Joh** [00:09:39] So remember that in March of 2016, President Obama tried to fill a vacancy on the Court after Justice Scalia died unexpectedly. And in March, he said, "I'd like Judge Merrick Garland to have that place." But then remember, Mitch McConnell's answer was, "Well, it's the Senate's right to act as a check on the president and withhold its consent." And his basic idea was, "You know, this is so close to a presidential election, let's let the people decide first." And they never even held a hearing on Judge Garland. And all of this is possible because, as you point out, the Constitution doesn't say anything about what the Senate has to do or doesn't have to do. So basically, it's just a matter of months. They can decide to hold hearings, not hold hearings, have a vote, not have a vote. But it looks like this time around, they're definitely going to have hearings. They're going to have pretty quick hearings. And they're probably going to confirm a person who hasn't even been officially named yet. The Republican senators were pretty quick to kind of fall in line. And it certainly seems right now that there are enough votes--a solid cemented number of votes--for whoever it is to be confirmed.

**Roman Mars** [00:10:57] Because there's no codified procedure in the Constitution, there's really no way to stop this, right?

**Elizabeth Joh** [00:11:05] That's right. There's nothing that can be done at this point unless there is such a thing as political pressure that would get the Senate to hold back or to wait or to change the rules. But, you know, all of this right now seems like it's not happening. It used to be that there were procedures in place for virtually unlimited debate on a Supreme Court nominee. But as of April 2017, the Senate changed its rules; that was the so-called "nuclear option." And so, the Senate can just end a debate by a vote of a bare majority. 51 senators can say, "Okay, let's wrap it up. Let's vote on this person right now."

**Roman Mars** [00:11:42] So if it's all norms, why does the vote even matter? Like, is that just Senate rules? Why does the executive have to adhere to the Senate rules?

**Elizabeth Joh** [00:11:52] Oh, sure. I mean, you're getting into really, you know, out-there territory. But of course, I mean, I suppose in a different world a president could say, "Look, I got their advice and a bunch of them gave me their consent. So, this person is now on the Supreme Court." We haven't gone that far afield yet, but the idea is we're still sticking to some rules. And so far, the entire Senate is proceeding as if the process we followed thus far of having some hearings-- You know, the FBI has to do a background check. I presume there'll be some opposing witnesses that will be put up to provide both sides. But that's right. It's kind of a weird in-between place where the Constitution doesn't tell Congress exactly what to do and Senate exactly what to do, but we're assuming that this is what they're going to do. And there's also the speed of it, right? There's nothing that says that the Senate has to have a certain number of days during which to have a confirmation process. And it's especially likely that this is going to happen very quickly because Trump has begun to tie a very quick Supreme Court confirmation process as essential to his reelection. So just this week, he said, "We need nine Justices. We need that." And then he starts talking about ballot hoaxes, a scam. And he says, "We're going to have a victory on November 3rd. Now we're counting on the federal court system to make it so that we can actually have an evening where we know who wins." So, he's tying up a lot of things together in that statement: The idea that there must be certainty on November 3rd--you know, keep in mind, the election has already started, people have already started voting by mail or voting in early polling places--that we will know for certain on that evening, and that the federal courts definitely have a role. And I assume that he also means the Supreme Court. So, if that's the case, that puts all the more pressure on the Senate or the majority in the Senate to quickly confirm the president's choice.

**Roman Mars** [00:13:56] It all looks hopeless for Democrats, but what could they possibly do at this point?

**Elizabeth Joh** [00:14:01] So Democrats can't stop President Trump from nominating a new Justice. They don't have the votes to stop the confirmation of a new Justice. So, what are their options to respond? I guess we could talk about things that go from within the realm of possibility to totally out there.

**Roman Mars** [00:14:18] Okay. Let's start with the realistic and go to the more fantastical.

**Elizabeth Joh** [00:14:24] All right. Well, this is still in the realm of somewhat fantastical, but there's the idea of threatening to pack the Supreme Court. Yeah. So, what's the idea of Court packing? This is the idea of adding more Supreme Court Justices beyond the nine that we've had in modern times. And that's possible because the Constitution says just that there shall be a Supreme Court. It doesn't actually say anything about how many Justices there have to be. That's actually up to Congress. So why would the Democrats favor this? The idea is that in a Biden presidency--should he win- that Biden would appoint more

Justices who in theory would be more ideologically aligned with him. So right now, if there were a President Biden, he couldn't do that because Congress has set the total number at nine. That means you'd have to wait for another Justice to retire or to pass away. Now, that doesn't seem super crazy if you think about it because we haven't always had nine. The very first federal law that sets the number was at six. There was supposed to be one Chief Justice and five Associate Justices, so six total. And then there was another law after that, setting it at seven. Then we got to eight. Then we got to nine. In 1863, there were ten. And then by 1869, Congress fixed the number at nine, and it's been that number ever since. So, it's really just a matter of Congress passing a new law and having the president sign it, to say, "Well, why don't we have ten or 11 or 12?" Now, this used to be within the realm of "That is just really crazy, and why would anybody ever do that?" It seemed really outlandish, right? Are we going to have 50 Judges on the Supreme Court? But it's being taken somewhat more seriously now because, again, the idea is, you know, that's a settled expectation of nine, but there's no reason not to change it by one or two more. There's always a danger, of course, that that can backfire because once you have a president of the other side, then that means that, you know, they actually control a much larger Court there, too. So, everything like this as a possibility has some drawbacks, potentially serious drawbacks, too.

**Roman Mars** [00:16:32] Yeah.

**Elizabeth Joh** [00:16:33] Second possibility: Make Washington, D.C. a state. So right now, the residents of Washington, D.C.--and there are more residents there than the states of Wyoming or in Vermont--they can vote for president, but they don't have formal representation in Congress. Now, how does that happen? How would that work? The Constitution has what's called an "admissions clause." And guess what? That also leaves it up to Congress to decide whether or not to admit a new state. Even though the Constitution doesn't specify the process that Congress has to use to decide whether or not to admit a new state, historically, what's usually been done is that they pass a law and then the president signs it. Now, why is this coming up now? Because in June, the House--controlled by the Democrats--voted on party lines to recognize D.C. as a state. So, it's the very first time that a chamber of Congress has done that for the District of Washington, D.C. So, in a new administration, if there was a Democratically controlled Congress and White House, then it's possible that Washington, D.C. could become a state, which, of course, would favor the Democrats. Now, again, this too, would backfire or could backfire. You could have a Republican White House and a Republican Congress retaliate later. If you want to get into the realm of crazy, you could say, "Look, you could get a reliably Republican state like South Dakota." And tell South Dakota, "Wouldn't you like to be five states instead of one?" And then the Constitution's admissions clause says that you can't break up a state without their consent. But, you know, you tell them, "Look, you could be five South Dakotas." And then you have five new Republican states instead of one. You know, all of this is, like, very hypothetical, and it's really addressing the next election not this one.

**Roman Mars** [00:18:29] It's closing the barn door after the horse is already out.

**Elizabeth Joh** [00:18:32] Right. But that's another thing that's being discussed now. Third one, in terms of, like, really out there at this point: There's also been some talk of using impeachment as a delay tactic for confirmation hearings. Remember, we did go through an impeachment trial already?

**Roman Mars** [00:18:50] Yeah, we did.

**Elizabeth Joh** [00:18:51] So it could happen again, right? We could have new impeachment charges from the House that would be considered by the Senate. But the problem here is that it's very likely that Republicans in the Senate would just dismiss the charges. They didn't do that last time, even though they could have. For political reasons, most of them wanted the vindication of an acquittal for President Trump, which they got. But very likely, I think, the Senate Republicans would just have no patience for this, and it wouldn't work. All right. So, what is really going to happen right now because Justice Ginsburg has died? There is an immediate effect on the Supreme Court, which begins its new term on October 5th. Every year they start on the first Monday of October. Of course, there will be lots of cases like there are every term. But there's one case I wanted to talk about in particular because maybe folks aren't aware of it. There is a case involving the Affordable Care Act--or Obamacare--that is supposed to be argued on November 10th. The case is called California versus Texas. So originally, the Affordable Care Act involved requiring what's called an "individual mandate." The basic idea is you can't have an insurance plan if only the very six people sign up. You need everybody to sign it. So that's a requirement--that everyone has to have health insurance or pay what's called a "shared responsibility payment." Those are your two options. It's that payment that was key to the Supreme Court upholding the ACA in 2012. The Supreme Court said that the payment was "an appropriate use of Congress's taxing authority." That was a tax. So, the ACA survived a constitutional challenge. Now, maybe the thing that everyone doesn't realize is that in 2017, after Trump became president, Congress passed a law that reduced that penalty to nothing--to zero. What's the big deal? Well, according to the Supreme Court, Congress has a lot of power under its taxing authority. But a tax is only a tax if it raises some revenue--any revenue. In other words, it has to be more than zero. So, you can see the appeal of the legal argument that's coming. Republicans challenged the ACA, saying, "This is no longer a tax." So, a group of states led by 18 Republican attorneys general sue. They say, "Look, you can't say that the ACA is a lawful exercise of Congress's taxing authority if the individual responsibility payment is not a tax. It doesn't raise any revenue."

**Newscaster #3** [00:21:28] The fate of the health care law--often referred to as Obamacare--will be on the line again as the COVID pandemic plays out. Last night, the Trump administration sought to strike it down.

**Elizabeth Joh** [00:21:40] The Trump administration also supports the lawsuit, and in fact, they've said the entire ACA should be struck down. That's in their filings. The argument here is that the whole ACA should be declared unconstitutional because you can't just cut off the problematic part--the individual responsibility payment. What that would mean is that declaring the ACA unconstitutional would include the parts that are very, very popular with most Americans, like protecting the insurance of those with preexisting conditions and things like that. So of course, nobody knows exactly what's going to happen. But here are a couple of different scenarios for the Supreme Court without a Justice Ginsburg that range from, let's say, okay to very, very bad for the ACA. So first: It could be the case that a majority of the Justices, whether there are eight or nine, say, "Yes, the mandate here is unconstitutional because it's no longer a tax. But we can also cut it off from the rest of the ACA, which lets the Affordable Care Act stay alive. So legally, we'd say that this problematic part of the law is severable." Practically speaking, the result would be no different than how the ACA works now. Everybody goes along as if everything's fine. Second (this seems increasingly less likely because of what's happening with the confirmation process): Imagine that President Trump's Supreme Court pick doesn't make it to the Supreme Court by then. There could be a 4-4 tie about the law. When the Supreme Court has a tie vote, that means the decision of the court below it stands. So, the

complication here is that the federal appellate court that decided the case that's coming up to the Supreme Court for argument in November--it didn't really resolve what to do about the ACA, and it had originally sent the case back down to the federal trial court. So practically speaking, what does that mean? Just a lot of uncertainty because we just have to let this whole legal process play out. Not great. Finally, the worst outcome: the Supreme Court hears oral argument in November, they say the mandate--the individual responsibility payment--is unconstitutional because it doesn't raise any revenue, and the whole ACA also has to be struck down as a result. But that is really complicated because the ACA has been a part of American life for years now. It's not one thing; it touches everything from, you know, really popular parts of the program, like keeping on adults until they're 26 with their family's insurance, the part about preexisting conditions, Medicaid funding, Medicare drug prices, and of course, add to that the fact that we're in a pandemic and many people have lost their jobs and they really, really need health care.

**Roman Mars** [00:24:20] You know, we already went through sort of a political fight with this with John McCain's dramatic vote. You know, that sort of was beginning to strike this down, at least in Congress. This seems incredibly unpopular--to attack this. Why are they doing it?

**Elizabeth Joh** [00:24:38] Because they have been attempting to do something to the ACA for a really long time. And this finally seems like the one possible argument that might bring the whole thing down because ideologically they're opposed to it--Republicans are opposed to it. So, all is not dire. You could have a situation with a new President Biden and a Democratically controlled Congress that could do something about the case that is pending. Number one: They could pass a law so that the issue before the Supreme Court--remember, this is about whether or not the shared responsibility payment, the individual mandate's tax, let's say, which no longer seems like a tax--so that it would no longer exist. And if it no longer existed, then the Court would have nothing to resolve. Remember, they hear argument in November, but they don't actually issue a decision usually until months later. And the more complicated or controversial the issue, they tend to wait until the very last months of the term, let's say June or July. So, Congress could say, "Look, let's have a penalty, but make it a buck."

**Roman Mars** [00:25:43] Yeah, exactly. That's what I was thinking.

**Elizabeth Joh** [00:25:45] Or they remove the individual mandate altogether, and that's okay. And that's called "mooting the case." That means that they make the case go away; they could basically just remove it from the Court. They can just start from scratch and try to create new healthcare legislation. There's some possibilities here. But in the interim, there's just a lot of uncertainty about what's going to happen with the ACA as it exists right now. So that's one issue before the Court. Then there are lots of other issues. For example, there's the issue of *Roe versus Wade*, the case that recognizes a constitutionally protected right to a legal abortion. Now, there had already been a majority on the Supreme Court in favor of cutting back the *Roe* right. And with a very solid conservative majority, that's likely to embolden anti-abortion activists to try and bring a case that would squarely present the question about whether *Roe versus Wade* should survive. And Justice Ginsburg had a prominent role here, too. In a 2007 Supreme Court decision called *Gonzales versus Carhart*--that was a case that involved a challenge to a particular abortion technique and made it unavailable to women, even if it was necessary to protect the health of a woman. Now, Justice Ginsburg was not in the majority there; she was a dissenter. But in her dissent, she recognized what was going on. She wrote, "The Court's defense of it cannot be understood as anything other than an effort to chip away at a right

declared again and again by this Court and with increasing comprehension of its centrality to women's lives." In other words, Justice Ginsburg understood perfectly well this wasn't just one case. This was one case in a series of cases in which--as far as the case itself--Roe stood. But it seemed as if the extensions of that right or the contours of that right were slowly being whittled away by subsequent Supreme Court decisions.

**Roman Mars** [00:27:46] Yeah. I mean, she kind of wrote the playbook on that kind of incrementalism--but in the other direction of expanding the notion of the 14th Amendment. So, she knows what she's talking about.

**Elizabeth Joh** [00:27:59] Exactly right. And I think it seems as if we're entering a very different era for the Supreme Court. And then, of course, the last part of this--because we're approaching November--is there's the prospect of an election fight that might make its way up to the Supreme Court. Might. So, remember, the election has already started. People have already begun to vote by mail, absentee ballots, or in early voting in some states. And there are already literally dozens of lawsuits about the methods states are using--about how to distribute ballots, how to count ballots, who gets to vote, how they get to vote. Any of these could end up before the Supreme Court. But at this point in late September, as each day passes, it becomes probably less likely that a case could change the rules because of the Supreme Court's decision in a particular case because we're just running out of time. But the problem here is that it means that these rules, as they stand--if we let the status quo happen--they're generally in favor of Republicans because the lawsuits have mostly been about challenging changes to make it easier to go, not harder to vote. So, to keep things as they are means keeping it hard to vote for some people in many places. And could we have another Bush versus Gore? So, you might remember that when we first had election night, the news organizations or many of them initially said that Vice President Al Gore had won. And then a few hours later, they said, "Well, actually, never mind. It's George W. Bush." And remember that the results of the 2000 presidential election hinged on just, like, several hundred votes in Florida. And the Florida state Supreme Court had ordered a recount. And a conservative majority on the Supreme Court put an end to the recounting. Is that likely to happen again? So, a lot of election law experts say, "You know, there might be a lot of crazy things that happen, but it's unlikely to come to that again." The thought here is that we'd need an election that close to have that kind of scenario play out again. But all of this shows us how just immensely important the Supreme Court is in our system. So, let's think for a moment, like, what happens in a case where Biden wins the presidency, and a Democratic Senate takes over. Anything that such a unified government would want to pass--a public option, Medicare for All, a Green New Deal--you can bet that any piece of legislation like that would be challenged in Court. And who would decide whether any of these pieces of legislation of a Democratic legislative agenda would stand or fall? It's the Supreme Court. It's the Supreme Court. And that's why it's so important.

**Roman Mars** [00:30:49] Yeah. And that's why it probably has to be a reaction to this current moment, right? I mean, in terms of expanding the Court or adding more senators or whatever it is-- I mean, adding more senators doesn't really change anything immediately.

**Elizabeth Joh** [00:31:04] There are very simple things that, you know, ordinary people can do. They can make sure that they're registered to vote. They can make sure that they vote as early as possible. They can help others that they know--their family and friends--make sure that they're registered and make sure that their votes are counted. I mean, it's not a situation where average Americans have nothing that they can do. There's a lot we can



do. You know, a lot of these scenarios that people are wringing their hands about come about in the case of an extremely close election. When there's a very wide margin between the two candidates, that kind of scenario doesn't happen.

**Roman Mars** [00:31:51] 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.