

## The Trump SCOTUS Term

**Roman Mars** [00:00:00] So where do you want to start today?

**Elizabeth Joh** [00:00:03] So why don't we talk a little bit about the Supreme Court term that just ended? They finished really late in July. They normally finish around the end of June or something like that. But, you know, it was a weird Supreme Court term all around. They had remote oral argument. It wasn't by Zoom; it was by telephone.

**Newscaster** [00:00:21] Today, the Supreme Court was in session, but you could hardly tell by the relative quiet outside the courthouse.

**John Roberts** [00:00:28] We'll hear an argument this morning...

**Newscaster** [00:00:29] Instead, it was the voice of Chief Justice John Roberts that kicked off today's oral arguments over the phone.

**John Roberts** [00:00:35] Case 19-46, the United States Patent and Trademark Office...

**Elizabeth Joh** [00:00:41] We were waiting around for some really big cases, so I thought we could talk today a little bit about a couple of the really big ones that were decided.

**Roman Mars** [00:00:48] Yeah, great, let's go for it. 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 had 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** [00:01:17] So let's think about it this way. There's one useful way to think about how powerful the Supreme Court is. And, you know, the Court is empowered to decide matters of all federal law. So federal law could be things like the Constitution, but also treaties, federal statutes, and how government agencies work--things like that. So, I bring this up because it's a useful way of thinking about what the final effect of a Supreme Court decision is. So sometimes the Court might be asked to interpret a word in a federal statute that Congress has passed, and the word is ambiguous. So, the Court does it all the time. But if they do that and Congress has the political will and they don't like that interpretation, they can certainly decide to introduce a new law saying, "No, no, we didn't mean that." That's one kind of thing the Court does. Another thing the Supreme Court can do is sometimes someone might complain that a federal government agency hasn't followed proper procedures. You know, they're supposed to go through certain steps, and they didn't do that. And it can be up to the Supreme Court to say, "Well, you're right. They didn't follow those steps. And you need to do it again." So, there's finality in their decision in that they can say this was wrong or this was improper, but the agency can always have a do-over. They can decide to do that again. Now, the one kind of decision that, I think, many people are familiar with, with the Supreme Court, is they often also decide matters of federal constitutional law. Like, what does the Constitution mean? So, this is the thing that we always associate with the Supreme Court. Here, they're ultra-final, right? They get to interpret the Constitution and whatever they say is, practically speaking, final. I mean, the only way that you can sort of overturn a Supreme Court decision about federal constitutional law is if we decide to amend the Constitution, which, practically speaking, is not going to happen. Usually never happens. Happens so infrequently that it's basically

meaningless. So, again, the Supreme Court does many different kinds of things. So, I thought we'd talk a little bit about a couple of different kinds of cases that the Supreme Court decided this past term, using that as a way of thinking about it. So, let's start with the case that was called "Bostock." So, Bostock is a case that involves the Federal Civil Rights Act of 1964. It's a big, sweeping, complicated set of federal laws, and it protects against discrimination in all kinds of settings in our lives, like public schools, places where people gather like restaurants and theaters. It's a huge, very, very important piece of federal legislation. It's a massive piece of federal legislation. Now, the law is broken up into a couple of different sections, and one of them is about protecting your rights in the workplace. And because these have different titles in the law, this part is called "Title VII." Or it's often referred to as "Title VII."

**Roman Mars** [00:04:07] Okay.

**Elizabeth Joh** [00:04:07] So in Title VII, Congress basically says, "You can't have discrimination in the workplace on the basis of race, color, religion, sex, or national origin." That's the language in the statute. So, the question is does the word "sex" in Title VII include your LGBTQ identity? So, the Supreme Court said, "Yes." The Bostock decision involves a couple of different plaintiffs. Each of them claims that they were fired because they were gay or transgender, and basically that's the reason they were fired. The problem is it's not totally clear what the federal law itself says about this. So how do you figure it out? Like, what does "on the basis of sex" mean in Title VII? That's what the Supreme Court's called on to interpret. So, when it comes to interpreting ambiguous federal laws--federal statutes--there are lots of ways to do this. So, for example, you might say, "Well, what did Congress mean when they decided to use the word "sex?" That's one approach. Another one is an approach called "textualism." So, I'm boiling down a really complicated sort of approach here. But basically, the idea behind textualism is it doesn't matter what people think when they wrote the law; we just look at what's called the "plain meaning" of the words. I'm deliberately oversimplifying things here, but it's really just focusing on the words themselves. Now, it turns out that one of the Justices on the Supreme Court, Justice Gorsuch, is a huge fan of textualism, and he writes the majority opinion in Bostock. So, Gorsuch says, "Let's take a look at the set of circumstances we see in these cases. When you are fired because you are gay or you're transgender, you're being fired because of sex, just like the language in the federal statute." So, let's illustrate this with one of the plaintiffs in the case. So, Aimee Stephens is one of the plaintiffs before the Supreme Court. She's fired, she says, because of her transgender identity. Now, Justice Gorsuch says, "Look, if her employer fired her because she was transgender but presumably wouldn't fire her had she lived as her gender assigned at birth--that is, as a man--then she was fired on the basis of sex. And that violates the law."

**Roman Mars** [00:06:26] Right. Right.

**Newscaster #2** [00:06:28] This is quite an interesting opinion as well because this is a key--a landmark--ruling for gay and transgender individuals. It was actually authored by conservative Justice Neil Gorsuch, appointed obviously to the Court by President Trump. This was written by him. This was a 6-3 decision. He was joined by the Chief Justice, John Roberts, as well as the liberal Justices here. This is a 6-3 decision...

**Roman Mars** [00:06:54] This is surprising for Gorsuch because he's known as being a conservative. But this textualism bent in his thinking and ideology runs counter to what we think of as typical conservatism.

**Elizabeth Joh** [00:07:08] That's right. And so, some of the irony here, of course, is that once the decision comes out, a lot of conservatives realized, "Oh, wait a minute. Maybe that's textualism, but we hate the result." So, the problem is that textualism is often associated with this politically conservative approach. But here, Gorsuch says, in his sort of folksy writing style, "Look, the words 'because of sex' have to mean that they encompass the situations of these members of the LGBTQ community. And they can't be fired for these reasons." So, because of the substantive result that is used to recognize the civil rights of the LGBTQ community, of course, a lot of people were upset. But, you know, Gorsuch says, "You know what? That's textualism. That's how I apply this particular methodology." And in fact, you can see this encapsulated in Trump's tweet, of course, right after the decision, in which he referred to their decision as "shotgun blast to the face of people who are proud to call themselves conservatives." Well, you know, if you really do believe that lawyers have to take certain approaches and particularly Judges have to sort of stick with an approach and not a substantive outcome, then you gotta hand it to Justice Gorsuch. He's stuck with his usual way of interpreting federal law. And he said, "Look, that's got to be the honest result."

**Roman Mars** [00:08:30] Yeah. So probably when this was written in 1964, they were not thinking about gay people or trans people. They were just thinking about whether or not probably women are discriminated against in the workplace. But he's like, "I don't, I don't care about that. I don't care what Congress intended. What I care about is these words. And these words say this."

**Elizabeth Joh** [00:08:52] Exactly right. And so, he's a committed textualist. Didn't care. It doesn't really matter for him. So, in this particular case, you know, you have an ambiguous word in a statute with sweeping protections. And in terms of an historical impact, Bostock is a very important civil rights decision. I mean, in some ways it's maybe more important than the same-sex marriage decision because of the simple fact that not everybody gets married, but almost everybody has to work at some time. And so, Bostock clearly establishes that you can't be fired because you're a member of the LGBT community.

**Roman Mars** [00:09:32] Yeah. Well, that's great. That's a good one.

**Elizabeth Joh** [00:09:34] Yeah.

**Roman Mars** [00:09:35] I'm happy with that result.

**Elizabeth Joh** [00:09:38] So a second kind of case, right? We can look at the DACA case. So, for those of you who need a refresher on this, in 2012, the Obama administration announced an immigration program that was called "Deferred Action for Childhood Arrivals," or "DACA." So, people who are eligible for DACA came to the United States illegally when they were children. And DACA was a formal program that basically said if you qualified and registered with the program, you would not be subjected to deportation, and you could also receive certain federal benefits and also receive work authorization. So, it let people live without fear who qualified for this program.

**Roman Mars** [00:10:17] These are the Dreamers, right?

**Elizabeth Joh** [00:10:18] These are the dreamers. That's right. So DACA is not a path to citizenship, and they're not permanent kind of licenses to stay in the United States. You were supposed to apply every two years for a renewal, okay? So, this is a pretty big group of people--these dreamers--about 700,000 young people who were able to benefit from

this program. Of course, that's 2012. Trump becomes president. And then in 2017, the Department of Homeland Security ends DACA.

**Barack Obama** [00:10:48] On the deferred action program that we have known as DACA that relates to Dreamers who are currently benefiting from these provisions, I will urge the president elect and the incoming administration to think long and hard before they are endangering the status of what, for all practical purposes, are American kids.

**Elizabeth Joh** [00:11:17] A number of different groups sued over the rescission or the ending of DACA, and the Supreme Court decides to take up the case. Chief Justice Roberts writes the opinion for the Court. Now, what's the legal claim here? The basic idea is that the Trump administration, when it rescinded or ended DACA, didn't follow the procedures of a federal law called the "Administrative Procedure Act." So that's a law that basically says something like, "Whenever a federal agency," and here we'd be talking about the Department of Homeland Security, "takes some kind of action like this, it can't be arbitrary or capricious." That's the legal language that you'd use. So, in other words, if the federal agency is going to change something, it has to explain what it's doing and why it's doing it in a rational sense. So, in the DACA case, the Supreme Court goes to some length as to all the problems of how this happened. I'm not going to go into it. But basically, the main point is that this is a federal agency that's supposed to explain what it's doing, and they didn't really explain why they were getting rid of DACA. So, you can chalk it up to laziness or error on their part. It doesn't matter. The important thing is that the Supreme Court is saying that the Trump administration didn't follow the proper procedures in getting rid of DACA. So, there's a little bit of inside baseball here that's interesting. Like, Justice Roberts makes his views really plain in DACA. At the very end of the opinion, he says, "We do not decide whether DACA or its rescission are sound policies. We address only whether the agency complied with the procedural requirements that it provide a reasoned explanation for its action." So as an aside, this is just quintessential Chief Justice Roberts. So, if you remember in 2012, he wrote the opinion that upheld Obamacare and the Affordable Care Act. And in that case, just very briefly, the Supreme Court said that the then individual mandate was justified by Congress's taxing power. But what did he say there in the opinion? He said, "The Court was upholding the individual mandate. Because the Constitution permits such a tax, it is not our role to forbid it or to pass upon its wisdom or fairness." That's kind of a way of him politely saying, "I don't necessarily like this. I'm just telling you what the law is." And that goes all the way back to his confirmation hearings to be Chief Justice on the Supreme Court.

**Roman Mars** [00:13:37] Calls balls and strikes.

**Elizabeth Joh** [00:13:39] Right. Famously said, "It's my job to call balls and strikes--not to pitch or bat." So, he is the same person that he's been all this time.

**John Roberts** [00:13:47] I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes and not to pitch or bat.

**Elizabeth Joh** [00:14:03] So here's a question for you. Who's the winner in this case?

**Roman Mars** [00:14:06] To me, it sounds like the Dreamers are the winner in this moment because the rescinding of the law was considered capricious and didn't follow a standard. So, yeah, that seems like the immediate action is that.

**Elizabeth Joh** [00:14:21] That's right. I mean, you put it exactly right. They're temporary winners. In the short term, they're temporary winners because this case, as important as it was--and you saw these headlines like, you know, "DACA Dreamers Can Stay"--this is really just about the Trump administration not dotting their I's and crossing their T's in getting rid of a program. Neither side disputed that the Trump administration had the power to just get rid of DACA.

**Roman Mars** [00:14:46] Because you had the right presumably to put it in place in the first place. So, getting rid of it is the same right, essentially.

**Elizabeth Joh** [00:14:53] Well, I mean, it's an enforcement action, right? So DACA is a program saying, "These people are subjected or potentially subjected to deportation because there are good reasons to allow them to stay in the U.S. and they're productive members of society. We're not going to deport them."

**Roman Mars** [00:15:08] "Yeah, we've decided to not act on that."

**Elizabeth Joh** [00:15:10] Right. It's like saying, "We have decided we're no longer going to give out speeding tickets anymore." To anybody. But you could also just turn around and say, "You know what? We're going to start giving speeding tickets to anybody that violates the law." So rescinding DACA would simply be a decision by the executive branch to say, "We're going to start enforcing the law." So, could the Trump administration end DACA again? Absolutely. And in fact, just this past week--this last week of July--the Trump administration announced that it was not going to renew existing Dreamers for the regular two-year renewal, and it would accept no new applications. Now, the problem here, I think, is that this goes a bit farther than what the Supreme Court said. You know, it's not as if the Trump administration has come up with a new set of rules and rationales about how they're ending DACA. They're like, "well, you know what? Let's just try to end this again anyway," which of course, presumably will end up in another round of lawsuits. So, the set of cases probably everybody was really kind of waiting for in July were the Trump finance cases. So very briefly, like, remember what happened there? One case is about a bunch of subpoenas from the Democrats in the House. Congress generally has the power to investigate. That's a part of the power they have long had in order to decide whether and how to legislate. And part of their power to investigate, everybody's always assumed, includes the power to subpoena. So, none of this is in dispute. Congress has these broad powers to pass laws, to investigate as a part of that, and to issue subpoenas as a part of that power of investigation. So, one of the questions, though, is how far can Congress go when it comes to ordering records from the president? So here House Democrats in 2019 are trying to get to the financial records of President Trump. And the funny thing is, the records aren't even in Trump's possession. They're with his accounting firm and lenders. So, he strongly objects to this, you know, does all he can to make sure that Congress cannot get these records. The other case is also about records but in a very different context. So local prosecutors in Manhattan are working with a grand jury. This is about a criminal case. They're seeking financial records about Trump, his family, and the Trump businesses. So, this is a state case about state criminal law. It's basically an investigation as to whether New York's criminal laws have been broken. But here, too, Trump doesn't have the records. His accounting firm does. So, there are some similarities, but some big differences in these two cases. The similarity is, in both cases, Trump doesn't want anybody looking at his finances. So, let's start with the congressional case. So Chief Justice Roberts writes the majority opinion. This is squarely a constitutional law case. Does Congress have the authority to order these kinds of records from the president? So, the answer is a kind of complicated one because Chief Justice Roberts notes, in his

opinion for the Supreme Court, "This is the first time the Supreme Court has ever been asked to figure out whether or not Congress can do something like this." Well, it's not because there haven't been disputes between Congress and a sitting president before. But Roberts notes, and I dare say with a note of irritation, "Well, usually this is done without the courts. You guys figure it out through a process of negotiation." So, on the one hand, the House Democrats were saying, "Look, we have this broad power to investigate and subpoena. And as long as we have a valid legislative purpose, which could be almost anything, they should be able to access the president's records." Now, the president had a very different view of the matter and said, "Look, when it comes to my particular records, there should be a heightened standard here. You shouldn't be able to get this kind of information." So, the Court doesn't really take either side's arguments; they don't accept them wholly as the basis for their decision. And instead, they say that "There's a third way we're going to approach this." They set forth a kind of multipart set of factors, and they kick it back down to the lower court to see if the information meets this standard. So, in other words, if it meets the standard, presumably the House can have it. If it doesn't meet the standard and Trump litigate on this, then the House is not going to get it. So, let's briefly get to the criminal case. The New York State case--Chief Justice Roberts also writes the majority opinion. He's firmly in charge here. So, again, this is also a squarely constitutional decision. Is a grand jury working in a state criminal investigation? Can they access presence records in a criminal case? Well, Trump's view is "You cannot have my financial records, period, at least while I am a sitting president."

**Roman Mars** [00:20:04] And his lawyers argued that he can't even be investigated as a sitting president.

**Elizabeth Joh** [00:20:08] Well, not quite. So, I would go back and say this: So, Trump didn't dispute that a criminal investigation could take place while he was in office and indeed for criminal charges for when he left office. But his argument was pretty narrow. "I'm a sitting president, and I'm absolutely immune right now from having to respond to a subpoena." So, it was pretty narrow, but he said, "Oh, this violates all sorts of different aspects of my constitutional authority." So, the bottom line? Chief Justice Roberts, again, writing for the Supreme Court, says, "The president is neither absolutely immune from state criminal subpoenas nor entitled to a heightened standard of need." So, here's my question for you: In these financial records cases, who won?

**Roman Mars** [00:20:55] Well, it seems to me that the New York State--the Cy Vance one--was a little bit more definitive on the side of the prosecution looking for those records because there's a definitive statement that investigating the president is allowable under the Constitution. The other one--it's affirming that Congress does have the power but needs to also, kind of like the other one, procedurally dot the I's and cross the T's to make sure that it holds up to a certain standard and needs to go back to Congress to achieve that. So that's my take on those two decisions.

**Elizabeth Joh** [00:21:33] Yeah. That's the same take I have. It is the very law school answer of "Well, it depends." It depends who you want to call a "winner." So, if you start with a subpoena--the congressional subpoena case--you could say, "Well, Trump lost," because it's not like they said there was no way that Congress could get those records. He wanted this very heightened standard that would make it virtually impossible for Congress to get these records from his lenders and his accounting firm. Instead, the Court kicks the case back down to lower court. And the Supreme Court says, "Think about these factors when you decide whether or not his lenders and the accounting firm have to hand over the financial records." Well, guess what? Those factors are basically a road map for Trump's

lawyers to say, "And this doesn't meet this factor. And this subpoena doesn't meet this factor." They're certainly going to rely on that decision as a way of literally sketching out their arguments as to why Congress can't get these. And Congress is also a loser here because even though the Court didn't say you can't ever have these records from a sitting president, well, previously we kind of discussed Congress's subpoena power here as almost being unlimited and never really tested the boundaries. And now there seems to be a limit. So, Congress emerges as a bit of a loser, too. Now, in the criminal case, well, it kind of sounds like Trump loses because they say you're not totally immune. Trump has said basically, "You can't do this, period. Cy Vance, the Manhattan DA, cannot go after my records in this way." Well, it turns out that there's a little bit of a poison pill in the actual Supreme Court decision because, in the opinion, the Supreme Court basically says, "Look, the president isn't totally immune. But when this case goes back to the lower court, Trump can, like any other ordinary person, make non constitutional law objections to a subpoena, such as saying that the subpoena was issued in bad faith or it's overly broad--asked for too many things." So, what happens in this last week of July? They literally take those arguments. Trump files a new lawsuit in New York and says, "You can't have these records." Why? You just go back to the opinion in the Supreme Court case. "They're overly broad, and these subpoenas were issued in bad faith." In other words, they're taken directly from Chief Justice Roberts' majority opinion. So, Trump looks like a bit of a loser if you just kind of want a quick, you know, hashtag or headline in the Cy Vance case--but not really because in each of these cases, both the criminal case from New York State and the congressional subpoena case, we basically have the result that we, as the public, are just not going to see his records.

**Roman Mars** [00:24:23] Yeah, it seems that both of the decisions are to put the brakes on any type of activity and to throw it to lower courts, which makes it last longer and therefore is more likely to never see the light of day just through time and energy. And, you know, the way court cases take forever, even if Trump gets another term, it may never get settled because these things take years, you know, when it doesn't involve someone like Trump.

**Elizabeth Joh** [00:24:53] Right. And then as with so many really important Supreme Court decisions like this, there isn't necessarily an immediate effect. There is a kind of new set of factors or a new set of decisions that lower courts in the future have to consider. But there was never any moment in these cases that makes one think, "Oh, and this is the constitutional crisis that people have been anticipating where Trump refuses to do X." So, in that way, if there is a big winner here, it's Chief Justice Roberts and the Supreme Court. He emerges having really looked much more independent than people might have thought. The Court comes away not in an obvious win for either the president or Congress. It comes in as a win for itself.

**Roman Mars** [00:25:39] Yeah. So, is that good? Is the sober result always going to be a kind of impasse that throws it to the lower court? Should we be thinking of that, as citizens, as a good result? Or should we be disappointed when the Supreme Court doesn't make definitive cases like Obergefell to change things immediately when the need of society seems to demand it?

**Elizabeth Joh** [00:26:06] Well, you know, the answer is complicated. I think that the Court always has to be careful. In areas of civil liberties like Bostock or Obergefell, you know, the Court is often not far out of step with the way larger societal trends are moving. And so, of course, nobody is ever completely happy. The public isn't 100% happy with any sort of civil liberties decision, but it's not totally out of step. The bigger problem is when you get to fights between the political branches or the possibility of making the chief executive do

something that the chief executive doesn't want to do. Remember, we've talked about this before. The Court really has no other power than its legitimacy. And presumably it's going to be really, really reluctant to do something where there's a possibility that the ruling doesn't have the effect that we would want it to have. And that would really be terrible for democracy, period, if we believe in the Supreme Court being this kind of neutral, third party in all of this.

**Roman Mars** [00:27:05] Yeah, I think that's definitely one way to interpret it. But the other way to interpret it is to say, "Okay, so if the Supreme Court is also negotiating for its existence and legitimacy by not making hard decisions about the balance of powers and the other two branches, is it really independent at all? Or is it actually dependent in this weird, circular way?" So, everyone comes to a head--all the parties come to a head--and they say, "This is a constitutional crisis about the balance of powers." And they all kind of agree on it. Everyone's talking about it. And then all it takes is the Supreme Court to go, "It's not a constitutional crisis if we don't say it is. We're going to settle it this way. Everyone's going to take more time." They're just kind of, like, pushing it all down the road because presumably you're going to have some lower court decision that's going to, again, bubble up to the Supreme Court. And then again, are they just going to say, "Well... Take it back again." Or, like, are they going to finally be forced to make a decision? I don't know. Is it cowardly or something to not sort of weigh in?

**Elizabeth Joh** [00:28:14] Well, I don't know that I'd say it's cowardly. I would say that, you know, what you're describing isn't uniformly the case. You know, we do have some major cases, even involving American presidents, where they've been forced to do something immediate. You know, take the case of Nixon, for example. You know, his demise--part of what's responsible there is a Supreme Court decision. And so, the Supreme Court sometimes steps in to do that. And maybe we shouldn't be disappointed because that kind of incremental change or slowing things down--particularly in a really divisive time--kind of actually makes sense. We don't want the judicial branch to be in the kind of, you know, bare knuckle brawl of it all in the way that the political branches are.

**Roman Mars** [00:29:05] I think what people seem to be craving out of the Supreme Court, because the legislative branch doesn't really function as it once did, is action to thwart a norm breaking executive. And they definitely didn't get it with these Trump financial cases. You know, in the case of Nixon, there was a demand to hand over the evidence. And then the pressure of that evidence caused him to resign, rather than the actual case itself causing him to resign. They drew up the articles, but they did not vote on them. You know, it takes shame for that to happen.

**Elizabeth Joh** [00:29:50] I think that's right. And I think one of the things to remember is that it's completely understandable why the public wants some actor in the national government to do something quickly about all of these norms issues that we're seeing. But remember, even in the congressional subpoena case, there were many non-frivolous arguments for the president's side--not for Trump personally, but for the office of the presidency. And there is a perfectly serious sober case to make that Congress shouldn't have this kind of complete freedom to decide. We could just switch the parties in our future Congress and future president to say, "Do we really want a Congress to be able to just go through the president's financial records just because they feel like it and just because they say so?" Oh, you know, maybe at this moment in 2020, it feels like, "Well, yeah, because we can't get it any other way." But we might regret such a drastic decision by the Court saying that such a thing is always allowed. And of course, that's part of the legal



system that we're in--that the Court understands that whatever it says in 2020 is going to be the law, at least for a good long time.

**Roman Mars** [00:31:01] Let's talk a little bit about Portland because this is kind of amazing what's happening there.

**Elizabeth Joh** [00:31:06] There's a lot of ambiguity and stuff we don't know. And some stuff we can say with some certainty. So, everyone's seen pictures of protesters in Portland. And they're outside a federal courthouse. And we know that the Department of Homeland Security has sent federal law enforcement officials to Portland with the purported reason of protecting the courthouse complex downtown in Portland. There's also the local police, of course, but the main actors that people have been upset about in recent days have been federal law enforcement officials who appear to be doing things like lobbing non-lethal munitions and tear gas against protesters. Some of them engaged in acts of violence. But many, many, many of them peacefully protesting. And so, people are rightfully concerned about what is going on here. So why are there federal law enforcement officials there? Well, they claim that they're there to protect federal property, which is what a federal courthouse is. And, of course, the federal government absolutely can protect its own property. But I guess the real question is, "Well, can these same officials go just into the streets and lob tear gas and pepper spray people? Because when they do that, it starts to look like ordinary police." And that's not something that federal agents have the power to do. The federal government doesn't have this kind of general police force. They have a much narrower set of powers and thus responsibilities about what they're allowed to do and not do. Now, part of the problem, too, is that we've seen these viral videos where it appears that federal law enforcement officials seem to be taking some people, who aren't doing anything obvious in the moment, in unmarked vehicles. And they're not identifying themselves. And they seem to be whisking them away.

**Newscaster #3** [00:33:01] Since their arrival, federal agents wearing military style gear and sometimes driving unmarked vans have unleashed tear gas into crowds, rounded up and detained protesters, and even shot one man in the head with a non-lethal round, causing serious injury.

**Elizabeth Joh** [00:33:16] So people have been very upset by this. So, what does this secret whisking off of the street mean? And should people jump to the conclusion that this is clearly unlawful? Well, the answer is again, it kind of depends, right? So, in general, if any law enforcement official--local police officer or federal law enforcement official--has what's called "probable cause," the Constitution allows them to arrest someone. And this is clearly an arrest. It doesn't matter whether a police officer says the words, "You're under arrest." If they whisk you away forcibly from one place to another, that's an arrest under the Fourth Amendment. It would be a different story altogether if one of these law enforcement officials just walked up to someone and started talking to them. That might be considered consensual. This is clearly an arrest. Now, do they have probable cause? It's not really clear what the crime would be. I mean, if they're being investigated for perhaps damaging federal property, that could be probable cause. The basis for such an arrest, we don't know. But let's assume for a moment that they have probable cause. Yes, they can be arrested. Now, the interesting thing here that people are upset about is they say, "Look, how could it be that in the United States, you have federal law enforcement officials, who wear no identification, come up in an unmarked vehicle, don't even tell you why they're arresting you, and whisk you away?" Well, I have some bad news. The Constitution doesn't obviously make that illegal. In fact, it's perfectly okay. The Constitution doesn't require--we're talking about the Fourth Amendment--the police to identify themselves.

They don't need to tell you what the reason is that they're arresting you for. Being in an unmarked van doesn't violate the Constitution. Guess what it comes down to? People are upset about norms. People are upset about the fact that we usually have expectations about how police treat citizens in a democratic society. So, there's no constitutional rule that a law enforcement official has to have an identification badge. There's no constitutional rule that you have to be arrested by an officer coming from a marked vehicle. There's no constitutional rule saying, "And here's why I'm arresting you." I mean, part of this is, culturally, we expect this from watching TV and stuff like that. We see it in our ordinary local police departments. But it's not constitutionally required. In fact, there's no federal statute requiring federal law enforcement officials to identify themselves. So, people are upset by norms. They're upset by the crumbling, again, of norms where we usually expect people to be treated differently. And, of course, to make matters worse, this is all happening in the context of mostly very peaceful protests. So, people feel quite upset about this altogether. But Portland and these viral videos--they're just a really good illustration of the fact that the Constitution takes you only so far. But the rest of our set of societal assumptions are really about conventions and norms of behavior, particularly when it comes to how police officers should treat us in a democratic society. So, in a way, this show is really always about what Trump can teach about norms, not what Trump can teach you about con law. If we want change, change can happen. And certainly, people can demand that when it comes to the federal government--the federal law enforcement officials--that we have to have a federal law that says everybody has to identify themselves. Or you can have state laws that require every police officer to identify themselves. Now, to be fair, there are some local police departments that are subjected to either departmental or local rules about identifying themselves. But, you know, the flipside is there's no constitutional protection for "I have a right to be arrested by a person whose name I know, who's wearing a police officer's uniform, and who jumps out of a squad car." There's no such rule like that.

**Roman Mars** [00:37:09] It's surprising to me that there's nothing in the Constitution that prevents any of this stuff from happening. But still, how far can they go in terms of their ability to arrest and hold people? Is there ever a point where you hit the Constitution and have to do something that adheres to the Constitution?

**Elizabeth Joh** [00:37:29] Well, I mean, as far as arresting people for violations of federal law--even if they seem minor, like, you know, destroying property in a minor way but on federal property, they do actually have the ability to arrest people. So, there's no kind of seriousness floor that they hit. You know, if they're allowed to arrest you for violation of federal law, they can do that. And believe me, there's tons of federal criminal laws out there that potentially might apply to a situation like that. But again, the real question is: Why are they roaming the streets of Portland if they're not exactly on federal property? I suppose one of the justifications that you've heard from the Department of Homeland Security is, well, they have the right to investigate to see which people actually committed those crimes, and they have a right to find them. But that starts to look like what's called the "slippery slope," right? If they can do that, well, can they roam anywhere? And that starts to make people really nervous. And again, the problem is, most of the time, we do not have federal law enforcement officials roaming American cities because that's not the division of authority that we expect, right? It's not the division of authority we think about with law enforcement. And from a, let's say, traditional conservative, politically conservative point of view, that's the appropriate one--that local police departments know their communities; they are responsible primarily. And the federal government has a really tiny, limited role. They're not supposed to be playing local police in these areas. And you can see a lot of this worsening the relationships between the communities, like in Portland,

and how they feel about law enforcement in general. And that also is a terrible consequence of what's been happening. This has morphed from peaceful protests about police violence, from the George Floyd killing, to a more general upset about the federal government getting overly involved in local policing matters.

**Roman Mars** [00:39:26] So if there was a remedy for this--the most immediate remedy--would it be the state of Oregon saying, "You know what? If you're a federal agency operating inside of the state of Oregon, you have to be in a marked car, you have to have ID, you have to have some kind of..." Like, is that the simplest remedy for stopping this type of activity? Or what do you think is the shortest distance between getting the norms in our head to match the law?

**Elizabeth Joh** [00:39:58] Well, I don't know that there's a short set of answers. I mean, I think that the easiest way to do this on a nationwide basis is to convince Congress--and there is a pending bill, a proposed bill, out there--by saying all federal law enforcement officials should identify themselves, you know, in non-emergency situations. And that makes a lot of sense and, I think, would be a solution. I think the shocking thing to people is why have we never had such a set of expectations, like that, that are formalized in law?

**Roman Mars** [00:40:27] Never needed it.

**Elizabeth Joh** [00:40:27] Yeah. Maybe we never needed it before, but we don't normally have the situation where an American president is sending in or saying it's necessary to send in federal law enforcement officials into American cities--particularly in Democratically controlled cities--that he happens not to like.

**Roman Mars** [00:40:44] Yeah. Yeah. I mean, there isn't a rule in the NBA that says a dog can't play basketball, so I guess it means that Air Bud is okay.

**Elizabeth Joh** [00:40:54] Exactly. Exactly.

**Roman Mars** [00:40:58] Okay. Well, thank you so much. This has been great.

**Elizabeth Joh** [00:41:02] Okay. Thanks. Be well.

**Roman Mars** [00:41:20] 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. Intro music is from Sims' More Than Ever, which is a modern classic. And the outro music is from Lazerbeak's forthcoming solo record, Penelope. I have a preview copy. It is so good. You're going to love it. 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.