

Roe

Elizabeth Joh [00:00:00] On Monday, July 13th, 2009, U.S. Capitol Police officers arrested two women for disrupting the Senate confirmation hearings of Sonia Sotomayor. At the time, Sotomayor was a federal appeals court judge in New York. President Obama had nominated her to a seat on the U.S. Supreme Court. This was a vacancy that arose when Justice David Souter had decided to retire. The Senate eventually approved the nomination with a 68-31 vote, and Justice Sotomayor joined the Supreme Court. The two women arrested at the Hart Senate Office Building that day were part of a group led by Randall Terry. He was the head of an organization dedicated to end legal abortion called Operation Rescue. When the women started shouting during the opening statement of Senator Al Franken, police officers removed them from the room. Their names were Francis Mahoney and Norma McCorvey. Norma McCorvey had been an anti-abortion activist since about 1995, when she'd become friendly with Operation Rescue protesters. And McCorvey was a woman with a colorful past. She'd been a reform school dropout, a carnival barker, a cleaning woman, and a roller-skating carhop. She'd been married young, divorced, and then had a 35-year relationship with a woman named Connie Gonzalez. Earlier in her life, she had hit one of many rough patches. In September of 1969, McCorvey was 22 years old, single, poor, and found out that she was pregnant. She told her doctor in Texas that she didn't want to continue the pregnancy. But under Texas law at the time, abortions were illegal unless they were necessary to save a woman's life. And McCorvey couldn't afford to travel to a place where abortions were legal. On March 3rd, 1970, a lawyer representing Norma filed a lawsuit in federal court. The lawsuit argued that Texas's near-total ban on abortions violated the U.S. Constitution. And in 1973, the U.S. Supreme Court agreed with Norma McCorvey. Her lawyers had persuaded the lower court judge to protect McCorvey's privacy and give her a pseudonym, Jane Roe. Her case, in an opinion written by Justice Harry Blackman, was Roe versus Wade. Given her history, McCorvey's 2009 outburst and arrest stands in dramatic contrast to her 22-year-old self. And yet it was her case that led to the Supreme Court's recognition of a constitutionally protected right to an abortion and an issue that has generated controversy ever since.

Roman Mars [00:02:37] Now, abortion is an issue in the Trump presidency because Trump has selected his second appointment to the Supreme Court.

Elizabeth Joh [00:02:45] That appointment could change the law in a number of areas, including the right Norma McCorvey sought almost 50 years ago.

Roman Mars [00:03:12] This is what Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the tweets of the 45th president of the United States and his critics and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. So, you might ask, what does the Constitution actually say about abortion?

Elizabeth Joh [00:03:47] And the answer is that it doesn't say anything. But that doesn't end the matter. The Constitution prohibits the government from depriving us of life, liberty, or property without due process of law. You can find that language in the Fifth and Fourteenth Amendments. Early in the 20th century, the Supreme Court began to recognize that the reference to liberty in the due process clauses protects certain rights, even if they aren't explicitly mentioned. So, here's the basic idea. If the Court recognizes a right in this way, the government generally can't interfere with that right, unless it has a very important reason. So, you might be familiar with a constitutionally protected right to marriage or to

custody over your children. And those rights exist because the Supreme Court has recognized them as rights protected by this idea of due process. The technical legal term here is "substantive due process." In *Roe versus Wade*, the Supreme Court decided that abortion was a similarly protected right. Justice Blackman wrote for the majority that "the right of personal privacy includes the abortion decision." Now, that conclusion doesn't mean that the government can't regulate abortion or even sometimes prohibit it entirely. In the *Roe* decision itself, the Court recognized that a state could impose some regulations even as it let women obtain legal abortions. And later on in a woman's pregnancy, a state could even ban all abortions so long as there were exceptions to save the woman's life or to protect her health. And the Texas law that prohibited Norma McCorvey from obtaining a legal abortion? The Supreme Court struck it down as unconstitutional. All similar state laws at the time were unconstitutional as well because of *Roe*. Now, the *Roe* case, of course, didn't really settle the question on abortion. Outside of the Court, anti-abortion opponents became organized and vocal, and abortion became an important issue in electoral politics. When the Supreme Court decided to hear a challenge to several parts of a Pennsylvania law regulating abortion in 1992, many people who closely follow the Court thought that this might be the case that would be an opportunity to overturn *Roe versus Wade*. It didn't. The Court certainly knew what the stakes were in the case. Lawyers for the government had asked the Supreme Court to overturn *Roe versus Wade*. Justices O'Connor, Kennedy, and Souter wrote an unusual, jointly authored opinion in the case. And that opinion begins like this: "Liberty finds no refuge in the jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still questioned. We are led to conclude this: the essential holding of *Roe versus Wade* should be retained and once again reaffirmed." In that case, called *Planned Parenthood of Southeastern Pennsylvania versus Casey*, the Supreme Court did two things. First, it emphasized that the case of *Roe* survived. And second, even though the Court affirmed that there was a constitutionally protected right to an abortion, it changed how courts should review challenges to abortion laws. In effect, states could regulate abortion even more heavily after the *Casey* decision, even if they couldn't ban all abortions outright.

Roman Mars [00:07:11] So what is Trump's position on abortion?

Elizabeth Joh [00:07:14] Well, it depends on the period you're asking about. In 1989, Trump was a co-sponsor of a dinner at the Plaza Hotel in Manhattan to honor a former president of NARAL, an organization advocating for abortion rights. In October of 1999, Trump spoke to Tim Russert on NBC. He said, "I'm very pro-choice. I hate the concept of abortion. I hate it. I hate everything it stands for. I cringe when I listen to people debating the subject. I just believe in choice." But in 2015, Trump announced that he was going to run for president, and his public statements began to change. On March 30th, 2016, Chris Matthews interviewed Trump, the candidate. When Matthews asked, "Do you believe in punishment for abortion--yes or no--as a principle?" Trump replied, "The answer is that there has to be some form of punishment." When Matthews clarified, "For the woman?" Trump answered, "Yeah, there has to be some form." His campaign later clarified that Trump supported holding abortion providers responsible, not women seeking abortions. And unlike with other topics--like the border, immigration, crime, the Mueller investigation--Trump hasn't tweeted all that much about abortion. In December of 2017, Trump tweeted his support of Senate candidate Roy Moore. "Democrats' refusal to give even one vote for massive tax cuts is why we need Republican Roy Moore to win in Alabama. We need his vote on stopping crime, illegal immigration, border wall, military, pro-life, VA, judges, Second Amendment, and more. No to Jones, a Pelosi, Schumer puppet." Moore lost the Senate race. On May 22nd of this year, Trump tweeted, "For the

first time since Roe v Wade, America has a pro-life president, a pro-life vice president, a pro-life House of Representatives, and 25 Republican state capitols." But there has already been one notable abortion legal decision during the Trump administration. Late in 2017, a 17-year-old crossed the US-Mexico border illegally and was being held in a federally funded shelter in Texas. In October, she found out she was pregnant and sought an abortion. A state judge had decided that Texas law allowed the 17-year-old, referred to in court documents as "Jane Doe," to obtain a legal abortion. But federal officials--remember, they were holding her in custody--refused to let Doe go. ACLU lawyers represented Doe and sued over the refusal. A federal district court judge ordered federal officials to allow Doe to obtain an abortion. Trump administration lawyers immediately appealed, and a panel of the federal appeals court in Washington--that's a group of three judges--temporarily halted that order to let Doe obtain an abortion. Federal officials said to the court that they would release Doe if they could find a sponsor for her. But that's a process that can take some time. Doe's lawyers then asked for an emergency review from the entire group of judges on the federal appellate court in the District of Columbia. This is a request for what's called an "en banc hearing," and it's discretionary; the judges don't have to hear it. But the entire federal appeals court agreed to hear the case. And on October 24th, 2017, they ruled in favor of Jane Doe. The court order was brief, but one of the judges, Judge Patricia Millett, wrote a separate opinion. In it, she said, "Fortunately, today's decision rights a grave constitutional wrong by the government. The court today correctly recognizes that JD's unchallenged right under the due process clause affords this 17-year-old a modicum of the dignity, sense of self-worth, and control over her own destiny that life seems to have so far denied her." Jane Doe obtained her legal abortion the next day. That legal decision in a case known as Garza v Hargan was not unanimous. There were two written dissents. One of them stated that "the en banc majority has badly erred in this case." The dissent went on to say that the decision to allow Doe to obtain an abortion was inconsistent with the Supreme Court's prior cases. And this portion of the dissent is worth quoting. "It is undoubtedly the case that many Americans, including many justices and judges, disagree with one or another aspect of the Supreme Court's abortion jurisprudence. From one perspective, some disagree with cases that allow the government to impose regulations such as parental consent, informed consent, and waiting periods. From the other perspective, some disagree with cases holding that the U.S. Constitution provides a right to an abortion. As a lower court, our job is to follow the law as it is, not as we might wish it to be." That dissent was written by Judge Brett Kavanaugh on July 9th at 9:00 p.m. Eastern Standard Time. President Trump announced on live television that Kavanaugh was his pick to replace Justice Kennedy, who had announced his retirement on June 27th. Judge Kavanaugh is a former aide to President George W. Bush, worked with Kenneth Starr investigating President Clinton, and is a former clerk to Justice Kennedy. The Constitution gives the Senate a role here. And in order for Kavanaugh to join the Supreme Court, it must approve Trump's choice. Under a Republican controlled Senate, that seems quite likely. Of course, if he becomes Justice Kavanaugh, he will no longer be part of a lower court. He will be part of a Supreme Court that can--if it wants to--interpret the Constitution differently than it has so far. Most people characterize Kavanaugh as a judicial conservative. He's probably more conservative than his mentor, Justice Kennedy. Remember, Kennedy was sometimes, though not always, a swing vote to join the more liberal members of the Supreme Court. And by the way, Trump said after his announcement about Kavanaugh that he didn't ask him about abortion. Two things could happen to Roe once there is a solid five-member conservative majority on the Court. First, the Supreme Court could uphold many more kinds of restrictions on abortion that stopped short of banning abortion altogether. So common kinds of abortion restrictions now include waiting periods, requirements for counseling, requiring abortion providers to be doctors or to be done at hospitals, things like that. And keep in mind that states do pass

laws that severely limit the availability of legal abortions and probably violate the current legal standards of the Supreme Court. Those laws get challenged in court all the time, and judges sometimes block their enforcement. So, for example, in May, a governor of Iowa signed into law what is probably the most restrictive law in the country. It bans abortions once a fetal heartbeat is detected, which is sometimes as early as six weeks into a woman's pregnancy. With a judge more conservative than Kennedy on the Court, there may be five votes to find that these kinds of very restrictive laws are permitted, even if Roe isn't overturned. And more dramatically, a five-person majority--remember, five votes are all it takes on the Supreme Court--could overturn Roe versus Wade entirely. Because Roe is the Court's own decision--an interpretation of the Constitution--it could reverse its own decision. If Roe were to be reversed, that wouldn't mean the end of legal abortions in the United States. Some states would certainly continue to allow legal abortions, but other states could ban abortions altogether. And this is why. Because if the Court were to reverse Roe, that would mean that there would be no constitutionally protected right to a legal abortion. There would be no minimum guarantee of some legal abortions in every state. It would be up to every state to decide what to do. And there's another issue, too. Roe, of course, is a decision about the Constitution that applies to all women. But many of these cases about individual rights are essentially cases about poor people. In a post Roe world, if Roe were overturned, if you live in a state where abortion is illegal and can afford to travel to another state, you'll be able to obtain a legal abortion. If you're poor, you'd be out of work. In that sense, Roe versus Wade is also a decision about access for the poor. We usually think about these cases in terms of individual rights, and of course they are. But there are also hidden stories about poverty. That was the case for Norma McCorvey. In 1969, she was poor, she hadn't graduated from high school, she was underemployed, and she had few legal options when she wanted to end her pregnancy.

Roman Mars [00:16:16] Here's a little postscript.

Elizabeth Joh [00:16:18] Norma McCorvey died on February 18th, 2017, in Katy, Texas. She led a very complicated life. She lent her own story under a pseudonym to a case that ended in an historical ruling, whether or not you agree with it. But she appeared to have switched course in the 1990s and protested with anti-abortion activists. That's why she ended up at the confirmation hearings of Justice Sotomayor. And there's a further twist to the story. McCorvey found out that she was pregnant in September of 1969. Roe was not decided until 1973. By the time the Supreme Court struck down the Texas law banning most abortions, the baby that McCorvey had given birth to was two and a half. She'd given up the child for adoption. McCorvey learned of the decision by reading the newspaper. The one woman most associated with a constitutionally protected right to a legal abortion didn't get one. In a 1994 interview, McCorvey told a reporter, "I'm a simple woman with a ninth-grade education who wants women not to be harassed or condemned. It's no glamorous thing to go through an abortion. I never had one, but I've worked in three clinics, and I know. The anti-choice people all asked me, 'When do I think life begins?' I don't know. I'm not a rocket scientist. I just wanted the privilege of a clean clinic to get the procedure done. I don't require that much in my life. I just never had the privilege to go into an abortion clinic, lay down, and have an abortion. That's the only thing I never had."

Roman Mars [00:17:57] So we know that "Roe" was Norma McCorvey. What does the "Wade" stand for in Roe v Wade?

Elizabeth Joh [00:18:02] That's Henry Wade. He was the district attorney in the county where Roe was trying to obtain an abortion. So basically, he was the law enforcement official responsible for enforcing the laws.

Roman Mars [00:18:13] I'm a little confused as to the process by which Roe versus Wade gets overturned. What is the hypothetical procedure in which that would be overturned?

Elizabeth Joh [00:18:25] One way it might happen is that there might be some law that is absolutely nearly, like, getting rid of all abortions in one particular state, right? And so presumably some organization or person would bring a lawsuit asking a judge to find that law unconstitutional. Now, on the other side, the state's lawyers might say, "Actually, you know what? This is an opportunity not just to defend the legality of this draconian law, but we're going to ask the Supreme Court. We're going to make a bet here that the time is right to ask the Supreme Court to say, 'You know what? Admit that you've made a mistake--that Roe versus Wade should never have been decided--and use this case as a vehicle.'" So, the Court could say not just that this law is constitutional, it's consistent with Roe--that's one way to do it--but they could say, "You know what? Now that we're looking at this law, it turns out that our legal framework--the way we decide these cases--was wrong. We've made a mistake. And there is no constitutionally protected right to an abortion." And they'll use that case as a vehicle. That's what would happen. And this is what you're going to see, presuming that Judge Kavanaugh will become Justice Kavanaugh, if there is a five-Justice conservative majority--a solid one--now that Justice Kennedy is gone. You know, we're just talking about one legal area, but there are a number of legal areas where different kinds of legal challenges will be raised because people who care passionately about these areas of law will feel that the time is right to bring a challenge.

Roman Mars [00:19:54] So there's kind of two ways in which the effectiveness of the decision of Roe v Wade is undermined. One is that the Supreme Court holds Roe versus Wade as precedent. But then when things come up that challenge it, they think, "Oh, this doesn't really violate the decision we made in 1973." And so that's one way. And then you just kind of erode a lot of the rights from that way. And the other way is to bring some case, and then some very bold lawyer goes, "You know what? We want you to take a look at that decision and then overturn it directly. "Then Roe v Wade basically doesn't exist as a concept.

Elizabeth Joh [00:20:34] And so, you know, in theory, the sort of thing that we, the law professors, talk to law students about is we live in the system of stare decisis. Stare decisis simply means that, you know, courts refer to prior precedents and rely upon them. So, we don't just overturn cases for no reason whatsoever. And the Court is going to be acutely aware that any time it has to reverse course and overturn a case, it's not supposed to do so lightly. It's got to say that there is some really good reason to do that. Now, having said that, the Court does reverse itself from time to time. It's not an unheard-of thing. So, what would happen? What would a five-person majority say about Roe? Simply that it was always wrong from the moment we decided it? Something's changed? That would be hard to say. But there is this sense of institutional legitimacy that the Court--and at a minimum, Chief Justice Roberts--would certainly be aware of because let's say in this hypothetical world that a five-Justice majority overturns Roe versus Wade. That wouldn't be the end of the abortion debate either. It would simply galvanize the other side. And so, since it's already become a part of constitutional law, in one sense or another, it's sort of part of this fabric of what the Court has done. It's sort of already stepped into it, so...

Roman Mars [00:21:51] So it has to deal with it.

Elizabeth Joh [00:21:54] Yeah, it has to deal with it in one way or another. That having been said, no one can really predict what's going to happen. I mean, it may be that Roe versus Wade is overturned. But it also seems just as likely that Roe versus Wade as a case stands. But the Court is much more willing to say, "You know, a whole lot of these restrictions in theory allow someone to get an abortion at some point. And therefore, it's not an evisceration of that case."

Roman Mars [00:22:20] I mean, that seems to me the more likely scenario.

Elizabeth Joh [00:22:24] A law can stand in theory but then can be hollowed out in practice. Some right can exist, but it turns out that courts--and the Supreme Court in particular--allow increasing amounts of government interference with their right so that the right doesn't feel super meaningful anymore.

Roman Mars [00:22:41] And like you said, the real person most affected by a right being eroded is a person without the means to overcome it--who are poor, who can't go to the next county, who can't go to the next state.

Elizabeth Joh [00:22:53] Exactly. Can't take the time off work. Can't have other children. Can't afford the childcare. And that's the poignant aspect of Roe versus Wade itself. I mean, that was Norma McCorvey story. She was in kind of dire straits at the time and didn't feel like she had many choices.

Roman Mars [00:23:10] So when asked, what do you think Kavanaugh is going to say about Roe versus Wade?

Elizabeth Joh [00:23:17] I don't know, of course. But keep in mind that when Justice Thomas had his confirmation hearings, he was asked about his opinion, and he said he really couldn't comment on it because it's very likely a case that's going to come up before the Court. Because there are always abortion law cases, I would expect him to say very little. Or he will say something like, "Well, if there's binding precedent," he would have to recognize that fact. And then if he later joins a majority of Justices who overturns Roe versus Wade, people will say they are disappointed, given what he said, which might be nothing--likely to be nothing--during the confirmation hearings.

Roman Mars [00:23:56] Is there a way to ask that question so that you actually get a straightforward answer?

Elizabeth Joh [00:24:01] Nope.

Roman Mars [00:24:01] Yeah. Yeah. This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com and on Facebook and Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out all about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.