

The Socially Distanced SCOTUS

Roman Mars & Elizabeth Joh [00:00:00] One, two, three... Clap.

Elizabeth Joh [00:00:05] Want to do it again?

Roman Mars [00:00:24] This is What Trump Can Teach Us About Con Law--an ongoing monthly series of indefinite length, where we take the tweets and legal challenges to the 45th President of the United States and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow remote learning student and host, Roman Mars. How are you doing?

Elizabeth Joh [00:00:57] I'm good. Still in a state of more or less lockdown. Although, depending on where you are in the United States, you may be more or less under lockdown. But definitely life is still different. Everyone is still adjusting, I think, to this new lifestyle.

Roman Mars [00:01:13] And so I guess our purview is how places like the Supreme Court are adjusting to this lifestyle and the pandemic. So, what is happening right now in terms of the Supreme Court in the pandemic?

Elizabeth Joh [00:01:24] Yeah. So usually, the Supreme Court for its term holds live "oral arguments." That's what you call them. The Supreme Court hears arguments from both sides of a case. The lawyers on both sides--they see them live in-person. They come to the Supreme Court in Washington. And the Justices get a chance to raise questions and hear the legal arguments that the parties are going to present. Now, if you're not familiar with the Supreme Court of the United States, most of the Justices are on the old side. They are really in the high-risk group for COVID. So exactly the group of people you don't want mingling with anybody else or even each other. So, they initially postponed some of their cases that had been scheduled and rescheduled them. Everyone was kind of eager to find out what was going to happen. And the Court announced that they would have the arguments, but they went straight into the future--to the 1980s--and decided they would have telephonic conferences. Telephone conferences, right? So, we wouldn't see them. But what's amazing is that for the first time, any member of the public could just listen in live on the internet as the questioning was happening.

John Roberts [00:02:41] We'll hear argument this morning in case 19-46, the United States Patent and Trademark Office versus booking.com...

Elizabeth Joh [00:02:52] The reason why this is so amazing is that the Supreme Court has been famously resistant to any kind of video or audio live streaming--not because it's not technologically possible, of course. And in fact, lots of state and federal courts do this on a regular basis. You can hear them, watch them, whatever. And in fact, some of the courts have been really up to date. So, the Texas Supreme Court has decided to hold Zoom arguments, so they're right up to the minute. But not the United States Supreme Court. The United States Supreme Court has decided the most they're going to do is hold live arguments but by telephone. So, what that has meant for actually listening in is that the Chief Justice, John Roberts, is sort of in charge of the show. Everyone on the Court--each Justice--goes by turns, in order of seniority, of course. And they get called upon by the Chief Justice. And he says, for example, you know, "Justice Alito, do you have any questions?" And he asks a question.

John Roberts [00:03:58] Thank you. Justice Ginsburg?

Ruth Bader Ginsburg [00:04:02] Two questions. First question is if you're right that dotcom doesn't make a generic term...

Elizabeth Joh [00:04:13] So that's really different, right? I don't know if I ever listened to an argument on tape of anything.

Roman Mars [00:04:19] They kind of jump in, as far as I know.

Elizabeth Joh [00:04:21] That's right. It's usually a total free-for-all. So, it could be that a lawyer begins before the Supreme Court. He starts to say, "May it please the Court..." And he starts a very well-prepared speech, and he gets cut off immediately, right? The Justices just jump all over them. But that free-for-all is actually very useful. Number one, not only does it kind of sharpen the points that the different sides are making, but one of the things people may not realize is that questions aren't always questions. So sometimes the Supreme Court and their Justices use oral argument as a way of persuading one another of a point or trying to persuade one another. Or sometimes they might see a kind of weak response on the part of one of the lawyers in the case. And they try to sharpen that point by asking a question which seemingly sounds like just another question, but as a way of maybe perhaps aiding that lawyer in particular and saying, "Well, don't you really mean dah, dah, dah?" And it kind of has, like, a performance aspect to it because all the other Justices are also listening. And they might think, "Huh. Well, that lawyer's answer--it wasn't so great. But now I see that my colleague has posed it in a slightly different way." So that free-for-all--which seems like, "Well, that's kind of crazy"--it actually is a really good purpose. But that purpose has been eliminated in a everybody-takes-their-turn kind of way. When you have Justices who haven't done this before, even though it would seem to be pretty standard stuff for most people, they've taken some time to get used to it. So, for example, you've seen some of the problems that people have encountered with Zoom, right? So, on May 4th, I think, there was an argument in a case and, of course, Chief Justice Roberts would call every Justice's name. He asked Justice Sotomayor... There's nothing. Silence.

John Roberts [00:06:12] Justice Sotomayor...? Justice Sotomayor?

Sonia Sotomayor [00:06:22] I'm sorry, Chief.

Elizabeth Joh [00:06:23] And then the very next day, there's a different case. And then Chief Justice Roberts calls on Justice Sotomayor again, calls her name twice, and then she goes, "I'm sorry, Chief. Did it again." So, it's sort of like these Zoom meetings where people say, "You're on mute. You're on mute." So, you see all of this happening live. It's particularly amusing because it's the Supreme Court. There's also already been a bathroom flush in the background of one of the oral arguments. Just really things you don't want to have preserved for the rest of time. But there it is.

Roman Martinez [00:06:55] Going to be saying, "Hey, call your congressman, and change these laws that apply to banks." And what the FCC has said is that when the subject matter of the call ranges to the topics, then the call is transformed. And it's a call that's been allowed and it's no longer allowed.

Elizabeth Joh [00:07:10] Things have been different. But people for the first time have been able to listen live, as I did. And today I thought we'd talk a little bit about a couple of really important cases that were heard on May 12th. This was, I think, the fifth set of cases that were done by conference calls--more than three hours of argument. And the reason they are important is that they involve Trump--Trump the president, Trump the private citizen. So let me give you a couple of background points about cases we mentioned before--you and I--but maybe it's a good time to have a little refresher. So, presidents have always had lots of disputes, and some of them have gone up to the Supreme Court. And two of the most famous recent historically recent cases involving presidents are cases involving Richard Nixon and Bill Clinton. In the United States versus Nixon--that's the case that's central to Watergate--the special prosecutor wants to get tapes that were from the White House. Nixon doesn't want to hand them over. At the time he claims they are protected by what's called "executive privilege." The Supreme Court ultimately ruled against Nixon. Remember, he didn't want to participate; he didn't want to turn those tapes over. He says, "No, you have to disclose those tapes." And why they were relevant in a criminal trial against Nixon's high-level advisors. But it's the turning over of the tapes and the divulging of what's inside that is, like, sort of a straight line to Nixon's resignation. So that's a result of the 1974 case. The other time that people may know of where a recent president has had a Supreme Court level dispute is Clinton. So, in 1997, the Supreme Court takes up a case in which a woman named Paula Jones sues President Clinton for alleged sexual harassment--but not while he's president. This happens while allegedly he is the governor of Arkansas. Now, he said, you know, "I want you to either dismiss the case or just hold it until I'm not president anymore because I can't really do this while I'm president." The Supreme Court in 1997 says, "Nope, it's not fair for a variety of reasons. The case has to proceed. You have to answer to this civil private case." So, he participates. No big deal, right? He has to provide a deposition. But of course, that leads to a straight line to Kenneth Starr, the Starr report, and ultimately Clinton's impeachment. So, the two recent times where you've had this big battle about "Do presidents have to sort of participate in legal processes?"--although they're very different kinds--they both lost. In fact, they lost unanimously. There's not even a dissenting voice in those cases. So that's the background on which presidents have not had a particularly good track record of saying, "Look, I'm really busy. I'm president. And I don't have to do this."

Roman Mars [00:10:06] Okay, so where are we with this in regards to Trump?

Elizabeth Joh [00:10:09] Okay, so let's get to Trump. A little bit of background here. So, when Congress passes laws, everybody agrees that that's a totally normal part of what Congress can do. The Supreme Court has said multiple times that inherent to Congress's ability to pass laws is that they can conduct investigations. So even though the Constitution doesn't explicitly say, "And Congress can conduct investigations," that's a necessary aspect of what Congress should be allowed to do because how can you pass laws without knowing anything? So, they get to run investigations as a part of their legislative authority. Now, as a part of their investigative authority, they also get to do things like issue subpoenas, which are orders to either get people to turn over documents or get people to testify. That's an important power because that means that they have to turn those documents over even if they don't want to or they have to show up to testify even if they don't want to. So, generally speaking, this is a very broad power. Congress gets to do all kinds of things. And of course, most people have heard at one point or another about a Congress, at any time in modern history, running some kind of investigation into something. Both parties--they do it all the time.

Roman Mars [00:11:21] Of course. Totally.

Elizabeth Joh [00:11:23] So there's nothing unusual about our committee in Congress issuing a subpoena to anybody--private company or private person. That's just kind of the general business of being in Congress. So, the question here is, "Well, how far can Congress go in wielding this power when part of what they want to know about is information regarding the current president of the United States?" So, remember, Trump, unlike his predecessors, has not released his financial records--has not released his tax returns. And you know, the reason why--it kind of changes. Like, sometimes he's like, "I'm under audit. I've been told not to do so. I don't have to do it." You know, it doesn't really matter why, he just hasn't done it. So, it's a big break with all the post-Nixon presidents. We just don't know anything about his personal financial doings. And that's all the more remarkable because he continues to be involved in his private businesses while he's president of the United States. He's golfing at Trump Resorts and eating in Trump restaurants and things like that. So, the first set of cases--the House Oversight Committee sought Trump's financial records. It comes out of the hush money payments to Stormy Daniels right before the 2016 election. So, some irregularity about how he reported this information as well as some other stuff. That particular committee says, "You know, we're not doing this to investigate the president per se. But, you know, this would be a good case study to see if maybe we should reform the financial disclosure laws. If the law doesn't adequately address this kind of problem that we see, then this would be a good thing to do." The other issue or the other case that is involved in this is there's two other committees--the House Committee on Financial Services and the Intelligence Committee in the House. They decide they also would like to know some financial records about Trump--both before being president and a little bit about being president--to find out whether or not it would be useful to reform laws regarding foreign influence on U.S. campaigns. So, if we know something--that there's been undue influence on the part of Trump becoming president--maybe we should change the laws about U.S. elections.

Roman Mars [00:13:37] It's almost like they're presupposing there is a problem to use it as a benchmark to fix the problem, though. Or is it not? I don't know if I fully understand.

Elizabeth Joh [00:13:48] Well, maybe the best way to think about it is there have been indications before this that there were problems. There have been reports, different agencies within the federal government, some connection of some dots about, "Well, maybe Trump wasn't totally forthcoming about the payments he'd made before he became president during the 2016 election." And we have certainly had things, such as in the Mueller report, about foreign influence in U.S. campaigns. But in order to really get a detailed picture, we ought to really figure out something about the finances of the person at the center of this picture. And that's Donald Trump, right?

Roman Mars [00:14:26] Got it. Yeah.

Elizabeth Joh [00:14:27] So normally this starts to sound like a situation where you have a head-to-head battle between Congress and the president. And this brings up a kind of, you know, basic civics concept of separation of powers. Two co-equal branches in the federal government--congress and the president--they're equal, right? One is not supposed to be more powerful than the other. But when you have this kind of conflict, what are you supposed to do about it? Trump says, "I don't have to do this." And Congress says, "Well, this is part of our essential constitutional duty. If we're going to fully make informed decisions about reforming or issuing new legislation, we have to know the facts. We can't just, you know, fly blind here." But here's the kicker. There's two interesting points here. Number one, here is a case where the committees were not asking Trump for the

information. In the first case, the House Oversight Committee is asking Trump's accounting firm Mazars for the information. And in the other set of cases, the two other committees are asking Trump's major lender, Deutsche Bank, as well as Capital One--another lender to Trump. So, it's not quite a direct head-to-head battle. The other aspect of these cases that is interesting and a little bit different than other head-to-head battles between the president and Congress is that in previous cases, a president says, "Look, this is part of what I am doing as president. You cannot see this." But here, a lot of what these committees are seeking have to do with Trump the private citizen. In other words, financial records having to do with the time before he was president. So, it is a little bit different. Number one, this is about a citizen who happens to be the president of the United States, not a president of the United States who also happens to be a citizen. So, we reverse the presumption here. Second of all, no one's asking Donald Trump to do anything in these cases. But nevertheless, in each of these cases, Trump has gone to court trying to stop the enforcement of these subpoenas. So, it's not a case in which the president's accounting firm or his major lenders have said, "Oh, no, no. We're not going to comply." They got the subpoenas, and they were pretty much like, "Okay, sure, we'll turn them over." And Trump was like, "No, no, no. You're not going to be turning them over. I'm going to sue to stop this enforcement." So, the problem then is he starts in the normal way at the district court level, in federal court, and he loses these cases. He loses these cases. Two different appellate courts say, "No, these are subpoenas, and they ought to comply with them." And there's not enough of a convincing argument on Trump's side to say that he's allowed to stop them. So, for example, in the banking case--the Deutsche Bank case--the appellate opinion there said, "Well, one of the problems here is that there's nothing here seeking any actions taken by Donald J. Trump acting in his official capacity as president." No one's trying to figure out anything about him making important presidential decisions. A lot of this, as I just said, is stuff that happened before he was president. So that seems a little bit different. Nevertheless, because it seems so important--and in a way, you can't help but avoid the fact that this is about a sitting president of the United States, and ultimately, it really is about the House trying to look at the finances of a sitting president-- the United States Supreme Court agrees to hear the case. So, they say, "Fine, we'll combine these two cases into the same set of oral arguments." So that's the first case. Let's call that the "House cases."

Roman Mars [00:18:10] So they combine these two House cases, and they presented oral arguments. And so, what happens there?

Elizabeth Joh [00:18:14] Okay. So, we have the telephone oral argument in its sort of awkward way--every Justice taking turns. As a legal matter, one of the main arguments here that the parties are contesting is that, remember, we already said before that Congress indisputably has the authority to investigate in order to legislate. They get to find facts in order to do their basic constitutional duties. So, President Trump's lawyers make this argument, "Well, is this really a legitimate legislative reason? Is that why you're really seeking the subpoenas? Do you really need these in particular, or are you just trying to harass him?" And, of course, the House's lawyers say, "Yeah, we need to know this because if we're going to fully reform things, like laws regarding foreign influence in American elections, or we're going to change things about financial disclosure laws, we kind of need to know everything." So, a lot of the oral argument went back and forth about, "Well, how much do we have to delve into the mind of the House, if you like." That's kind of a weird way to think about it. But like, do they have a real reason or is this, like, a fake reason? And a lot of the Justices were like, "Have you ever really done that before? Do we ever ask, like, 'What's your real reason, not your sort of purported reason?'" And that's pretty hard to do. Like, how would you figure that out? And Trump's lawyers have focused

repeatedly during the oral argument on this idea of, "Well, what you're really trying to do is harass the president."

Patrick Strawbridge [00:19:44] Before these cases, no court had ever upheld the use of Congress's subpoena power to demand the personal records of a sitting president. And no committee of Congress had even tried to compel production of such a broad swath of the president's personal papers, let alone for the stated purpose of considering potential legislation.

Elizabeth Joh [00:20:03] So what's interesting here is that, of course, Trump has repeatedly tweeted out just the words "presidential harassment" a number of times. There's a line connecting Trump tweeting about presidential harassment and then him going to court, saying, "You can't make my bankers and accountants comply with these subpoenas because that's presidential harassment. And that distracts me from what I want to do," on days when he is tweeting dozens of times a day.

Roman Mars [00:20:32] Right. So, it's already a distraction to the president. The presidential harassment in question is already occupying a great deal of his brain, it seems like.

Elizabeth Joh [00:20:40] It's keeping him from tweeting, or... not really.

Roman Mars [00:20:43] Well, no. It's keeping him tweeting.

Elizabeth Joh [00:20:45] And the Justices are pretty skeptical about this. Like, some of them say, "Well, Trump literally has to do nothing for these subpoenas to get enforced. You realize that. He literally has nothing to do." And the banks and the accounting firm have said, "We will comply if we're told to comply." So that part of it is a little bit odd. But nevertheless, even though these are records mainly or mostly about Trump the private citizen--this is not to Trump himself--the Justices certainly recognize that this is really ultimately a separation of powers issue because how much can Congress have in terms of power to dig through a president's past? So, the Justices were kind of concerned, like, "If we let this go forward, well, do we let Congress do whatever it wants to get through records of any president in the future?" And then this is, of course, a reminder that this is ultimately about the Supreme Court. And they're worried that whatever they decide becomes the law for a very long time. So, it's not just a case about Trump. If they decide in favor of Congress and against Trump, what will that mean for a future president? So, for example, Justice Breyer said at oral argument, "Well, the fact that what I hold today will also apply to a future McCarthy asking about a future Franklin Roosevelt or Harry Truman," I guess the more likable presidents--that troubled him. He's like, "Well, maybe I'd side with Congress this time, but that's not the way you decide cases. You decide cases thinking about the future." What the Justices will do ultimately, of course, we don't know. But it's a big issue because what they decide really will put a thumb on the weight in favor of Congress in this separation of powers battle or the president. And it's never just about Trump. It's about what this relationship looks like for the foreseeable future. So, it's a potentially huge case.

Roman Mars [00:22:48] And so what was the other case from May 12?

Elizabeth Joh [00:22:53] So the second case from May 12 is another case about financial records. So, you might think up another boring case, but actually this is equally exciting from a very different perspective. So, this is a case involving local prosecutors in

Manhattan, and they are working with a grand jury. We don't know exactly what their investigation is about--that hasn't totally been made public--but they want some financial records from Trump and the Trump Organization. So, this is definitely a criminal investigation. This is about local state prosecutors. So, they're looking for several years of business and personal tax records--here we go again--with regards to hush money payment. So, they want to figure out, "Well, how was this information recorded? Because possibly it involved violations of state law, not federal law." So normally it's totally fine for grand juries to do things like issue subpoenas in conjunction with what local prosecutors are doing. But this time, of course, the subpoenas regard the financial records of a sitting president. But here they want to find out what is going on in this case. Did the money come from the Trump Organization when these payments were made? Did they come from Trump himself? Was the money used as a business deduction for the Trump Organization? Now, again, like, sounds like pretty dry stuff but could be a potential criminal law violation. So, what do they do? They decide they will seek this information. But again, just like with the House case, they don't ask Trump himself. They ask his accounting firm, Mazars, "We'd like you to hand over the records." So, what does Trump do? The same thing he does in the House case. He goes to federal court and tries to stop this from happening. This time, the argument's a little bit different. He doesn't say, "Oh, you can't do this because you're harassing me." He says, "Well, we don't dispute the fact that this kind of investigation might be able to happen at some point when I'm no longer president, but not right now."

Roman Mars [00:25:07] Right.

Elizabeth Joh [00:25:08] So Trump's position here in this case--let's call it the "New York case"--is that he's completely immune from even just investigation, criminal investigation, while he's the president of the United States. And the reason why is because "Otherwise, local prosecutors are going to harass me." They're going to harass a sitting president of the United States. So, let's think about this for a second because, again, this is a legal case. So, he's trying to propose a rule. And Trump is saying, "Look, I am a sitting president of the United States. You can't let any old local DA decide that my records would be useful in their criminal investigation--presumably of him and others, but they haven't said--so you can't do it. You just have to wait until I am no longer president." So, it's kind of an extreme rule. So, think about one of the most famous things he said on the campaign trail; Trump said, "I could stand in the middle of Fifth Avenue and shoot somebody, and I wouldn't lose voters." Remember that?

Roman Mars [00:26:07] Right, right, right, right. "I could shoot someone on Fifth Avenue, and I would still get elected."

Elizabeth Joh [00:26:11] Exactly. So, at the appeals court oral argument, one of the judges asked, "Well, what about that Fifth Avenue claim? Local authorities couldn't investigate? They couldn't do anything about it? Nothing could be done? Is that your position?" And Trump's lawyer said, "That is correct."

Roman Mars [00:26:30] Wow.

Elizabeth Joh [00:26:31] So think about that. The lawyers are saying as a formal matter before the judges at the appeals court, "You're right. The president could shoot someone dead on Fifth Avenue. And nope, prosecutors could not do anything about it." Pretty extreme, right? But that's the position that they were going to stick with. This is not about President Trump acting as president. In fact, a lot of these records are about before he

becomes president. And again, these are not records that are coming from Trump himself. They're coming from his accounting firm--again, Mazars--and they've said they'll comply if it's a lawful subpoena and they're ordered to do so. And the appeals court decision here--the lower court opinion here--made it clear that, "Look, there's a lot of things we're not deciding. We are not deciding whether the president of the United States, while he's president, could be arrested or charged. There's nothing like that here. It's only about whether prosecutors in this very preliminary part of the investigation can get records from his accounting firm." The subpoena isn't directed at the president at all. So, all of those kinds of things that feel like smoke and mirrors where people say, "oh, you can't arrest a president. You can't indict a president." No one's talking about that here.

Roman Mars [00:27:46] Right.

Elizabeth Joh [00:27:47] So, again, given the nature of the case and who's involved--Cyrus Vance, Manhattan DA, president of the United States--it's a pretty significant set of challenges here. The Supreme Court decides that they will take up this case. On the same day, May 12th, they hear oral argument in this case. Jay Sekulow--if you remember him--he was one of the president's lawyers during the impeachment trial.

Roman Mars [00:28:10] Okay. Yeah.

Elizabeth Joh [00:28:11] He was known for yelling a lot at the impeachment trial. He yelled a lot also during the oral argument. A lot of yelling. That's his sort of style of argument.

Jay Sekulow [00:28:20] No county district attorney in our nation's history has issued criminal process against the sitting president of the United States, and for good reason--the Constitution does not allow it. Temporary presidential immunity is constitutionally required.

Elizabeth Joh [00:28:35] So what happens here? Here is a case where essentially the president is saying--or his lawyers are saying--"You know, you just can't subject the president to this. Period. Maybe you can wait. Maybe you can wait until he's no longer president. But not right now." And that's an amazing position to take. And the Justices at the Supreme Court were pretty skeptical about this set of arguments. So, for example, Justice Ginsburg said, "Well, we've said that when it comes to grand juries, the public has the right to what's called 'every man's evidence.' Doesn't that include the president of the United States? And the president's lawyer said, "The president is not to be treated as an ordinary citizen." Really? So that immunity argument--immunity means not being subjected to process here--raised a lot of concerns among the Justices. And so, then let's return to the cases I mentioned earlier--Nixon and Clinton--those two cases. The uphill battle that President Trump faces is... Think about a case like Clinton versus Jones. In Clinton versus Jones, you had a civil case--a civil case where the stakes were lower. And the Supreme Court said, "Yep, that case can proceed because it doesn't really matter that the person who's the defendant here is the president of the United States. It can go forward. He has to participate." And if that's true in a civil case, how could it be that in a criminal investigation the president doesn't have to participate if he doesn't want to? Presumably, the stakes are much higher. And this doesn't involve his official conduct as president of the United States. So, the Justices said in oral argument, for example, "What about the Nixon case? There we were talking about things he did officially; he was secretly taping conversations in the White House. That was a pretty big burden, and we made him turn

over the tapes anyway." So, you can see that the weight of the case law is sort of not really necessarily in Trump's favor.

Roman Mars [00:30:45] Totally. Totally.

Elizabeth Joh [00:30:47] So we shall see in a month or two who wins, who loses, and what the public gets to find out or not?

Roman Mars [00:31:00] So let's follow up on some of the other things we've talked about.

Elizabeth Joh [00:31:03] Okay. So, Trump is really the Twitter president, right? And so, he generates all kinds of disputes with Twitter. People might have heard recently that Trump is pretty upset about Twitter fact-checking him because he put out some pretty misleading information about voter fraud and mail-in ballots. He is saying any kind of mail-in voting is fraudulent, which for a variety of reasons is silly. And he's accusing various states of engaging in illegal activities. So, he's done stuff like this before, but it's kind of come to a fever pitch more recently. So, he tweets back and says he's going to be doing something terrible to Twitter and they're going to pay--something like that, right? And so various people pointed out that that doesn't make a lot of sense because this isn't a First Amendment problem. Well, what I wanted to clarify here is that people can easily get confused by all this, as all of this whole era is really confusing because you and I have talked a bit about the First Amendment lawsuit that President Trump was involved in. And so, you might think, "Well, I don't get it. How could there be a First Amendment problem on the one hand and not a First Amendment problem on the other?" So, here's a really quick clarification. So, you might remember last year there was a lawsuit brought by people who are blocked from Trump's Twitter account. And they said, "Well, that's a First Amendment problem. I want to see the president's tweets, and he's not letting me. It doesn't matter if you can find it through different ways. It's just that you're blocked from actually following him." So, an appeals court agreed with these plaintiffs. And basically, the gist of it is, let's imagine that in real life, if the government opens up what's called a "public forum," it's a public space. They can't decide, "Well, I don't like what you're going to say, so you can't come in the room, but everybody else can." They're not allowed to engage in what's called "viewpoint discrimination." So very quickly, the appellate court in that case said, "Well, this is kind of like a virtual room where Trump opens up a virtual space with replies and retweets. And if he blocks you because he doesn't like what you're saying, he's not allowed to do that. So that's a First Amendment issue." Now, you can disagree with whether or not the appeals court got it wrong or right, but the analysis itself--that's pretty standard stuff. Okay? On the other hand, what Twitter the company does--they're a private company--so the First Amendment doesn't apply to them. In other words, there's this thing called the "state action doctrine," where we presume that if we're talking about First Amendment problems, we're talking about the government doing something about your speech. But a private company doing something about the president's speech is not a First Amendment problem at all. And on top of that, Twitter, as a private company, also has its own free speech rights. So, they can append commentary to the president's tweets if they want. That's their free speech rights as well. So, it's perfectly acceptable to live in a world in which you could say, "Well, Trump poses a First Amendment problem by blocking people on Twitter. But Twitter itself doesn't pose any First Amendment problems at all by just putting a fact-check on his tweets."

Roman Mars [00:34:03] Yeah. Or blocking him altogether. I mean, they could kick him off the service.

Elizabeth Joh [00:34:06] They could totally deplatform him and that would be perfectly constitutional. They're not going to do it.

Roman Mars [00:34:13] Yeah. Yeah. Cool. All right. Well, thank you so much.

Elizabeth Joh [00:34:15] Yeah. Take care.

Roman Mars [00:34:16] Talk to you later.

Elizabeth Joh [00:34:17] Bye.

Roman Mars [00:34:27] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. We hope you are staying safe and strong in Minneapolis, my friends. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.