What Trump Can Teach Us About Con Law
Bong Hits for Jesus

Roman Mars [00:00:00] Okay. So, we're talking on Monday, June 28th. And what are we going to learn about con law this month?

Elizabeth Joh [00:00:06] So it's the beginning of the summer, and that usually means the end of the Supreme Court term. And that usually means that the most important and interesting cases tend to come at the very end of the term in June. So, while the Court isn't quite done as of today, I thought we could talk about a couple of noteworthy cases that the Court has just decided in the past week or so.

Roman Mars [00:00:30] Oh, that sounds great.

Elizabeth Joh [00:00:30] All right.

Roman Mars [00:00:50] This is What Trump Can Teach Us About Con Law, an ongoing series that I promise I'm going to rebrand eventually--I think I even have a name in mind--where we take the current events in the world of government and politics and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joe. And I'm your fellow perpetual student and host, Roman Mars.

Elizabeth Joh [00:01:21] The first case is the third of three cases about some really basic questions about the Affordable Care Act--or sometimes people call it Obamacare. It's kind of a long running trilogy where disaster looms in each episode--except the disaster here is the potential dismantling of the Affordable Care Act, a lot of which is pretty popular for most Americans if you look at the surveys. Nevertheless, there have been relentless Court challenges ever since President Obama signed the ACA into law. That was in 2010. So, as it was written, the ACA expands health insurance availability to Americans. There's a bit of a carrot and stick approach. The carrot is offering subsidies. That means helping to pay for the costs of health insurance for people who can't afford it--middle- and low-income Americans. And the stick is what's called “the individual mandate.” You have to get health insurance--not just if you're sick, but if you're healthy, too, even if you think you don't need it. And if you refuse to get insurance, you have to pay what was then called “the shared responsibility payment.” Now, in 2012, the Supreme Court looked at a challenge to that individual mandate, which was really a keystone of the ACA. You know, the challenge here in that 2012 case was can Congress do that? Can Congress make people buy health insurance? Do they have a constitutional power to do that? Well, in 2012, the Supreme Court said, "Well, one of the constitutional powers they were considering--the Commerce Clause--wasn't really a basis for Congress to ask every American to get health insurance." But remember, there was a stick approach here, and the individual mandate meant that if you didn't buy health insurance, you had to basically pay a fine. "And it was that fine," the Court said in 2012, "that could be justified as a tax." And Congress certainly has what's called “the taxing power.” So, the basic idea here is that the penalty for not getting health insurance could be characterized as a tax. And the Supreme Court has for a very long time interpreted Congress' taxing authority in a very expansive way. And so, the idea here is that, you know, even though a tax could be used to try and incentivize behavior or to discourage people from doing something, that's okay. Congress can even regulate with its so-called “taxing authority.” It's obviously a fine if you don't pay for health insurance. And the Supreme Court says in 2012, "Well, that's okay," so that Obamacare as of 2012 seems to survive. That's not the end of it. Part two of this trilogy. In 2015, the Supreme Court

considered another case called King versus Burwell. So, remember, the carrot of the ACA is to provide subsidies. Now, the problem here is that the ACA created these exchanges that allowed people to shop for insurance plans if they didn't have health insurance. And there was a set of options--the states could set them up themselves, or you could just let the federal government do it. And a lot of states decided they would let the federal government run these exchanges. So, if you were on this exchange as an individual consumer or customer, then you could certainly get subsidies from the federal government to pay for them. It didn't matter whether you were part of a state exchange or the federal government's exchange. But the problem here is that the actual federal law said that federal subsidies were available to people buying insurance on a, quote, "exchange established by the state." So, you can see where this argument's going. The Republican challengers said, "Oh, wait a minute. That means you don't get subsidies if the exchange is not being run in your state by the state." So that's a pretty good literal argument. Sounds like a kind of argument that you can say, "That means people don't get subsidies," which, of course, as a practical matter, is a pretty big disaster if people can't actually pay for the health insurance, they both have to get and want to get, right?

Roman Mars [00:05:35] Right.

Elizabeth Joh [00:05:36] So the Supreme Court says, "Let's not be that literal. What really matters is the context here. And surely the context couldn't have meant that Congress wanted total chaos just because the federal government ran some of the exchanges in some states and some states had their own state-run exchanges." So, subsidies meant subsidies for everyone. So that's part two. Now, remember, going back to the carrot and stick approach, the penalty, of course, is the stick. So, fast-forward to 2017. The Republican controlled Congress takes that individual mandates penalty, the shared responsibility payment. Now you have to pay if you don't get health insurance. They set the amount to zero. That's part of the Tax Cuts and Jobs Act of 2017; this becomes effective in 2019. And basically, the IRS--they clarify that what this means is that under federal law, you don't have to tell us whether or not you have health insurance because there's no penalty. So, the federal law says, "Yeah, everybody needs to get health insurance. But if you don't get it, you don't have to pay the penalty either." That's the result of the change in the law. So, Texas and a number of other states--they come up with this great idea. They file a lawsuit against the federal government. They're joined by two individuals. They say, "Look, remember that original ACA case where you said that the entire individual mandate is constitutional because it is Congress using its taxing authority? Well, it can't be a taxing authority power if there's no tax because without the penalty," they say, "you can't possibly justify this use of federal power as a taxing authority situation." So, this lawsuit goes forward. And usually when you have a suit against the federal government, the Justice Department gets involved to defend it. But this is the Trump administration. So, the Trump administration does an unusual thing. They take the side of Texas. They don't defend the federal law like the Justice Department usually does. So, somebody's got to defend the act, right? So, California--our state--steps in with 15 other states to defend the ACA. So, what's going to happen? Is it a tax, or is it not a tax? And does it matter? Well, a lot of this is really important because if the Supreme Court's going to come back and say that this is not a tax anymore, then maybe the whole thing--the entire ACA--falls apart. Now, the lower court before the Supreme Court that took up the case did buy that argument--that maybe the ACA was unconstitutional for this reason. So that's a potential disaster. But just this month, in June, the Supreme Court said, "Well, we don't know about that, but we don't have to decide," because of a funny concept in constitutional law called "standing." So, what does standing mean? The Constitution says that federal courts can only decide what are called "cases and controversies." They

only can decide real disputes between real live entities, persons, or organizations. And so that's kind of an easy concept to understand. You can't sue just because, you know, you want to know the answer to something. And federal courts can't render what are called "advisory opinions." You can't just go to a federal court and say, "I think this law is unconstitutional. What do you think?" The federal courts are actually not allowed to do that because of the Constitution. And the Supreme Court's come up with a set of doctrines that tell lower federal courts how to decide whether something is sort of a real-life case. And part of that is whether parties have standing. The law is getting back to this idea. You can't just be mad and sue. You actually have to have some kind of injury. And the basic idea behind standing doctrine is that you have to say that there's some injuries you've suffered--it doesn't have to be, like, a literal physical injury. And in theory, there's a link between your injury and what the defendant in your case did--like there's some theoretical connection here. So, standing can be a really difficult and thorny area of the law, but some cases are kind of easy. And if you look at the ACA case, remember, there were these states that sued and two individuals that sued. Let's go back to the premise of the ACA. Now, you don't have to pay anything if you don't get health insurance. The two individuals in this case say, "Look, we're injured because we had to pay for health insurance." But that's a funny idea. How are they injured? Why is it that the federal government has done something to them if there's literally nothing the federal government can do to them, whether or not they buy health insurance? And the Supreme Court agrees with this idea. They say, "There's no possible government action that causes them to buy the health insurance as of today. They didn't have to buy it. They wanted to. So, if there's any injury, it's not the federal government's fault. No standing." So, what about the states like Texas? They're also parties to this suit. Now, their argument is a little bit different. They didn't buy health insurance, of course. But they say, "Look, it's costing us more when people in our state decided they want health insurance and they enroll in programs where the states help pay for some of the costs, like Medicaid." So, they say, "That's costly to us. So, we're being injured here." So, the Supreme Court--same case--says, "How does an unenforceable requirement harm you? There's no penalty if these people don't enroll in your state programs. There's nothing that we can really do. They don't have to buy health insurance anymore. They just wanted to buy health insurance. So, there's nothing that the federal government has done that we can really say has any connection to what these individuals in your states are doing when they buy health insurance." Now, if you think about it, people come to courts because they want the court to do something. In other words, stop the government from doing something they think is illegal or unconstitutional, right? Here, there's nothing the federal government is doing that the Court could force it to stop. Now, Justice Gorsuch seemed sort of confused about the premise of this lawsuit. And during the oral argument, he says, "I guess I'm a little unclear who exactly they want me to enjoin and what exactly do they want me to enjoin them from doing?" And so that is the basic idea wrapped up in how the Court actually decided by not deciding this particular ACA case. So, it's the third of the three, and maybe it will be the last of these kind of ultimate power cases when it comes to the ACA. As Justice Alito said in his dissent, "This is the third installment in our epic Affordable Care Act trilogy."

Roman Mars [00:12:43] But it sounds like in a dissent, he actually wouldn't mind if that trilogy continued on.

Elizabeth Joh [00:12:49] It's true. It's true. But it does have this sort of ring of finality. The law itself is no longer a newish law at all. We've kind of learned to live with it. And many parts of it are extremely popular. And it's just hard to see, you know, where you go forward in terms of challenging whether or not the government can have such a program. But, you know, never say "never."

Roman Mars [00:13:10] Yeah. What were some of the other decisions that were made this month?

Elizabeth Joh [00:13:13] Yeah. So, another fun one is a First Amendment one. So, the First Amendment applies to the government's regulation of speech. Now, in the context of kids, the government actually can be in public schools. So, when it comes to public schools and kids in public schools, the First Amendment does apply to them. Do kids have exactly the same rights as adults? The Supreme Court has made it clear: not exactly. But they do have rights. And a big case here is a case called Tinker versus Des Moines Independent Community School District from 1969. John and Marybeth Tinker and a third kid named Christopher Eckhardt--they're all high school students in Des Moines. They decided at Christopher's house in 1965 that they were going to have a protest against the Vietnam War. Now, this protest was pretty mild; they were going to wear black armbands and fast between December 16th and New Year's Eve. Nothing violent--just a peaceful, silent protest. Now, the principal of the school finds out about this, and then they decide that any student wearing an armband would be suspended if they wouldn't take it off. So, all three kids wear their armbands to school. They're sent home. They refuse to take them off until their planned protest is over. Now, of course, they've been punished because they have been sent home. They decide to sue. So, is this speech? This goes up to the Supreme Court. The Supreme Court says, "This is absolutely speech. Even though it's silent and passive, it's absolutely speech. They are engaging in a political protest against the war." They didn't really disrupt anybody. You know, they made the principal upset, and they certainly made some people upset, but the Supreme Court makes clear in the Tinker case, it can hardly be argued that either students or teachers shed their constitutional rights at the schoolhouse gate. So why was this a problem in the schools where Marybeth Tinker and John Tinker attended? Well, these kids were singled out for wearing black armbands. The rule wasn't directed at any other kind of disruptive conduct. No other kind of symbol wearing, t-shirt wearing, anything else was banned. So that in particular is troublesome. This particular form of speech was singled out by the school. Not only that, the school didn't show that there was any real disruptive effect by their wearing black armbands to school. They didn't intrude on anybody else's rights, no one claimed they were being hurt, there wasn't really anything to show that there was a huge disciplinary problem at the school because of wearing black armbands. So, the Court in the Tinker case says, "In our system, state operated schools--those are public high schools--may not be enclaves of totalitarianism. This isn't about conformity. This is about making sure even kids have free speech rights in school." So, Tinker is a really famous case about delineating what kinds of free speech rights kids have in public schools. Well, what about schools regulating speech that doesn't exactly take place at the school but might have an effect on the school? The Supreme Court has looked at cases where the disputed conduct/speech didn't happen at the school but was part of a school sanctioned field trip or some other kind of activity. Now, in 2002, there was a group of kids who were allowed to leave high school in Juneau, Alaska, because they were allowed to watch the Olympic torch relay as it passed through Juneau on its way to the Salt Lake City Winter Games. So, this was an official school event. Joseph Frederick was a senior. He is one of the kids who attends the event. But as the torch bearers and TV cameras passed by, he and his friends unroll a 14-foot banner that says, "Bong Hits 4 Jesus." And the principal says, "Take it down." And everybody but Frederick decides that they'll take it down. So, the principal suspends him for ten days. So, this is encouraging drug use, which is clearly against school rules. Its very clear policy cannot advocate drug use. So, he sues. So, the Supreme Court takes up the case of Morse versus Frederick. And in 2007, they start out with this observation: The message on Frederick's banner is cryptic. It was? I don't know.

But it was reasonable for the principal to think that this was advocating drug use. And whenever the Supreme Court discusses drugs and kids, they always have a moment of like, "You know, will someone please think of the children?" So, they say, "There's something about schools where, you know, number one, they're sort of taking the place of the parents." They have disciplinary concerns. And the special characteristics of the school--sort of being a controlled environment like that--means that they have to be able to restrict some kinds of speech. It didn't take place at the school, but it was certainly a school official event. So, because of that, it was okay. It was okay; it was an official policy. You're not allowed to advocate for illegal drug use. This kid--Bong Hits 4 Jesus--can be disciplined. So, there's kind of a balance here. We know from Tinker and from the Morris case, you can definitely sometimes have restrictions on students' speech at public schools, although kids certainly have free speech rights. So that's all kind of school related.

Roman Mars [00:18:58] But what if I use my bong for tobacco use only as suggested by the head shop that I bought it at?

Elizabeth Joh [00:19:04] Right. And what if your message is really about Jesus and less about the bong hits?

Roman Mars [00:19:10] That's true.

Elizabeth Joh [00:19:10] That's true, but it wasn't argued that way. Okay. So, there's another kind of question that's not answered by Tinker or Morse, and that is what about kids who engage in speech, but the speech doesn't actually take place either at school or at some school sanctioned event? Now, in 2021, that's a big deal because of the internet and cell phones--and especially after the pandemic, what is "off campus" anyway when everybody's not physically at school. So, in 2017, Brandi Levy is a freshman at Mahanoy Area High School. She didn't get on varsity cheer or on the softball position she wanted--only got on JV cheer. And I can speak from personal experience, and I think you can, too, Roman--teenagers can say intemperate things that they later really, really regret. So, Brandi posts on Snapchat two pictures as part of her Snapchat story. One is a picture of her and a friend at a convenience store called the Cocoa Hut. They're holding up their middle fingers, and the text on the snap says, "Fuck school. Fuck softball. Fuck cheer. Fuck everything." So that Snapchat story is visible for just 24 hours to her 250 Snapchat followers. But some of her Snapchat friends were on the cheerleading squad. And even though these stories are supposed to disappear, she took a picture of the post and showed it to her mother, who was a cheerleading squad coach. So as a result, Brandi is dismissed from JV cheer, and she's suspended from cheer for a year. So, this is an official school punishment. So, the question is: Can the public school--which of course is the government--officially punish Brandi for her Snapchat story that's posted from the Cocoa Hut? Should they be allowed to do that?

Roman Mars [00:21:20] I cannot wait to find out.

Elizabeth Joh [00:21:23] So the Supreme Court decides just this month. They say, "Look, the school isn't totally powerless to punish campus speech. But it's going to be really hard because some kinds of campus speech are certainly things that schools should be allowed to address. You know, if there's a threat to a teacher or to other students, if there's some kind of really extreme bullying, if there's online school activities--that's really pandemic sensitive here. You know, these are things that don't happen on campus, but they do have more or less a direct effect on what the school does." But the Court also says, in Brandi's case, "There are some kinds of speech where schools really don't have as much power or

shouldn't have as much power because, number one, the school isn't taking the place of the parents because the kids aren't actually in school. The parents are there. And there's the danger of the school being allowed to regulate almost everything a kid does 24 hours a day if they can regulate off campus speech. And then what is the school for? School is really for teaching kids to be citizens." And the Supreme Court says, in Brandi's case, that schools should also help protect unpopular expression. And as the Court says in Brandi's case, "Public schools are the nurseries of democracy." So, what happens in Brandi's case? Well, the Supreme Court says there's no evidence of disruption. And if the school has any interest in being against vulgarity in her snap, that's just not enough to outweigh her free speech rights. And this speech that she engaged in from the Cocoa Hut didn't really abuse anybody, and she just directed it to her Snapchat followers. So, she wins. She's quoted; she says, "I was frustrated. I was 14 years old. And I expressed my frustration the way teenagers do today. Young people need to have the ability to express themselves without worrying about being punished when they get back to school." The Supreme Court makes it clear in Brandi's case that the school violated her free speech rights, even if what Brandi said was dumb. And how do I know that? The Supreme Court says, "It might be tempting to dismiss B.L.'s words as unworthy of the robust First Amendment protection discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary."

Roman Mars [00:23:53] I like it. That's a good case.

Elizabeth Joh [00:23:57] And what's interesting here is that Marybeth and John Tinker from the Tinker case--they filed a friend of the court or an amicus brief in support of Brandi. And in their legal brief, the Tinkers say, look, if the government could freely punish kids for what they say outside of school, then maybe their own case wouldn't have come out the way they did. And what we find out in their brief in 2020 is that people in the community were really upset over the Tinkers--these kids--wearing black armbands to protest the Vietnam War. People threatened to blow up their house and kill them. Now, if you think about it just in terms of disruption, well, presumably a school could say, "This is really disruptive. People are getting upset over your black armbands." But the Tinkers said, "You can't let school interests go that far." And imagine if the Bong Hits 4 Jesus kid posted his message just on Facebook or Snapchat, should he really be punished for that? So, this is really about what are the outer limits of any public school? Even if they have good reasons sometimes to restrict speech when it comes to kids, there are some limits. The case of the Cocoa Hut cheerleader Snapchat is clearly an example of the Supreme Court saying, "We're going to step in and draw a line here."

Roman Mars [00:25:20] I just want audio of each of the Justices saying, "The Cocoa Hot" in a supercut. That'd be so great.

Elizabeth Joh [00:25:29] Yeah, I love it. I love it.

Roman Mars [00:25:34] So what is the third and final case that we're talking about today?

Elizabeth Joh [00:25:37] The third case is kind of like Brandi's case in that it shows us that sometimes a pretty minor incident can become a legal case that the Supreme Court ultimately decides to review and route change or kind of establish new legal principles about the Constitution.

Roman Mars [00:25:54] Okay.

Elizabeth Joh [00:25:55] This is a case that begins in 2016. It's about 10:00 at night in Sonoma, California. And a California Highway Patrol officer sees Arthur Lange drive by, playing music, and he's honking for no particularly good reason. He decides that "You know what? I'm going to pull this guy over. Something doesn't seem right." And the officer turns the overhead lights on on his squad car. He's about 100 feet away from Lange's home. Lange doesn't pull over. Instead, he pulls into his own driveway, and then he pulls his car into his own garage. The police officer now gets out of his own squad car. And, you know those little sensors that are part of the garage door? He sticks his foot by the garage door sensor, so the door goes back up. We've all experienced that. He talks to Lange. "Didn't you see me?" Lange says, "No." And the officer thinks, "Well, okay, something is strange here. Maybe he's under the influence." So, he decides to question Lange, and he fails a field sobriety test. He's ultimately charged with DUI, driving under the influence, which is a misdemeanor--a minor crime--and a noise infraction for being noisy. That's the honking for no good reason. So, when we talk about misdemeanors, we usually in American criminal law divide the universe of crimes into felonies and misdemeanors. And misdemeanors are generally crimes that have a maximum punishment of less than a year in jail. So, these are not big deal crimes, right? So, Lange is basically getting an infraction--just, like, a violation--and a misdemeanor for a DUI. Although some DUIs, particularly multiple DUI offenses, can eventually turn into felonies. But Lange's argument says, "Look, all of this evidence has to be thrown out because the police officer only found out about whether or not I was sober by coming into my house without a warrant." It was his garage. But the garage is clearly part of his house for constitutional purposes. The government says the officer had a lawful reason to arrest him because he didn't pull over when he told him to pull over. So, he was a fleeing criminal because you're not supposed to do that. When a police officer tells you to do something--for example, pull over when they want you to pull over--and you don't do it, that's delaying or obstructing a police officer during the course of his or her own duties. That's its own particular crime. It's a misdemeanor. Now, the home has always been considered kind of a sacred place as far as the Fourth Amendment's concerned. The Supreme Court's always recognized a really high degree of constitutional protection for our homes. And they specifically referred to the sanctity of a person's living space. Part of that is because the word "house" is specifically mentioned in the Fourth Amendment. So as a matter of Fourth Amendment law, the Supreme Court has often said that the presumption here is that if the government wants to get into your house, they need a warrant. But sometimes the Supreme Court has also recognized that there may be emergencies that mean that the police don't have enough time or there are some other circumstances--some other reason--that they can't get a warrant. There could be a medical emergency. You know, someone says, "Help, help!" So, the police officer just runs in--doesn't bother to get a warrant. Or sometimes someone has committed a serious crime--very serious crime--is fleeing from the police and runs into their house. But that's not Lange's case. So, the Supreme Court is asked to consider the question: When a person has just committed a minor crime and they're fleeing the police, is the government always allowed to go into their house to go after them? Or does it depend on the circumstances? So, in June, the Supreme Court decided in Arthur Lange's case, it's the second; it's going to depend on the individual's case. Now, why is that? Certainly, the Court says, "There are going to be some times when a fleeing person has committed a crime--and it's a misdemeanor or a minor crime--but it's really an emergency." Maybe they're trying to destroy evidence, or maybe they're posing some threat of violence. And the misdemeanor felony thing can be a kind of wobbly distinction because some things we consider kind of creeping on to serious, like domestic violence, sometimes can be considered a misdemeanor but can be really dangerous in some circumstances. But not always, right? Sometimes the circumstances make it clear that the police may not have a very good reason to run into somebody's house after them. So, let's imagine that you

have a teenager. The police officer wants to pull over a teenager in a car. The kid gets really scared, drives home, runs inside his parents' house, and then hides in the bathroom or something. Do we really want to say that the police officer should just be able to run inside without a warrant? Then there's the other problem in American criminal law--we love to criminalize things. There are so many things that are crimes. There are lots and lots of laws that cover minor nonviolent conduct. And actually, in one of the legal briefs in this case, there is an 80-page appendix of the misdemeanors that are just in California. So, here's one: In California, it's a misdemeanor--a minor crime--for anyone who sells or gives away any live chicks, rabbits, ducklings, or other fowl as a prize for or an inducement to enter any contest, game, or other competition, or as an inducement to enter a place of amusement or place of business.

Roman Mars [00:31:43] And they're saying that shouldn't be a reason they break down your door?

Elizabeth Joh [00:31:47] Right. So, in other words, in California, you can't auction off a rabbit as a prize. That's a crime. That is a crime. So, at oral argument, this particular crime delights Justice Breyer, who keeps bringing it up to point out the absurd things that we criminalize. So, he's suggesting, you know, is the government really arguing that a fleeing rabbit auctioneer can be pursued into his house without a warrant? Justice Breyer says at one point during oral argument, "Look, I mean, the rabbit case--that's ridiculous." He just loves this example. He says, "Do we really want the police to be able to enter your home without a warrant for this kind of a reason?" The Supreme Court's answer in Arthur's case? "No. No, we don't."

Roman Mars [00:32:34] Well, cool. Thanks for that roundup. Talk to you soon.

Elizabeth Joh [00:32:37] Thanks, Roman.

Roman Mars [00:32:45] The show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. The music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership exclusives at doomtree.net. We are part the Stitcher and SiriusXM Podcast Family