Quid Pro Millions

ROMAN MARS: It is Thursday, October 29th, at 2 p.m. as we record this. What are we going to be talking about today?

ELIZABETH JOH: All right, Roman, when Greg Melville was appointed, 26 years ago, to run Louisiana's new voter fraud initiative, he had an inkling of what kind of problems he might encounter. And that's because the state has a long and unfortunate history of political corruption. But it was worse than he anticipated. When Melville investigated a voter fraud complaint in Cajun country, he spoke to an elderly Black woman about a recent election. She told Melville openly about how election day usually worked. Someone would drive her to the polls. She'd be given instructions on whom to vote for. And when she cast her ballot, the driver would give her $5. Vote buying, it turns out, was pretty common. Middlemen would receive $10 per voter from candidates. Half the money went to the middleman and half to the voter. And sometimes, instead of $5, the payment was a lagniappe, a pork chop sandwich and a drink. The woman didn't know that this was illegal. "Besides," she explained to Melville, "we poor people need the money."In Winn Parish, the winner of the 2002 election for police chief, a man named Benji Phelps, reportedly set up credit at a local convenience store, the Winnie Mart. Voters were driven to the polls, told to vote for Phelps, and then driven to the Winnie Mart. There, they could tell the clerk a code word and receive $5 in store credit.

Vote buying is, of course, against the law. It's a crime under federal and state law to offer cash, gifts, or incentives in exchange for supporting a particular political candidate in an election. The woman Greg Melville spoke to wasn't supposed to accept $5 for her vote. And the reason we have these laws are because, well, that undermines the integrity of the democratic process when we distort voting outcomes based on bribes, gifts, and cash. In other words, in our system, we reject the idea of using money to influence elections because that sounds like a quid pro quo, a favor for a favor.

Wait, is that right? Do we reject that idea? It turns out that quid pro quos, the First Amendment, and the Supreme Court's decisive role in campaign finance helps explain the rise of the biggest campaign contributor in American history. And that's Elon Musk. Why has Elon Musk been allowed to do what he's done to our elections? And is there any way to hold him accountable? Time to find out.

ROMAN MARS: Let's do it.

This is What Trump Can Teach Us About Con Law, an ongoing series of indeterminate length and sporadic release, where we look at how Elon Musk speaks with his millions and use it 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.

ELIZABETH JOH: Okay, Roman, I think most people are pretty familiar with Elon Musk. He's the CEO of Tesla, the CEO SpaceX, and since 2022, the owner of Twitter, now called X. And Musk is, of course, the richest person in the world, at least on paper. He's worth around a trillion dollars, right? And over time, Musk has become very politically opinionated. And since about 2022, he's openly advocated right-wing talking points about immigration, diversity, and race, alleged censorship of right-wing views, attacked transgender rights, and the list goes on and on, right? Now, Musk used to be a more conventional business-minded political donor. So sometimes he would contribute to

Democrats and sometimes to Republicans. But if you'd looked at his public profile, he wasn't saying anything particularly controversial. But beginning in 2022, he decided to align himself with Trump.

And you might remember that Trump had been kicked off of Twitter right after January 6th, 2021, for advocating violence. And Trump's posting was in violation of Twitter's policies. But in November of 2022, Musk, now the owner of Twitter, reinstated Trump. And then he also renamed Twitter X. And then Musk also began to tell his users on X to vote for a Republican Congress in the 2022 midterms. And not only did Musk endorse Trump on X, which of course he's allowed to do, he started to use the platform to boost right-wing conspiracy theories, like the Democrats for bringing in undocumented immigrants to vote for them, things like that. So Musk turned X into a pro-Trump campaign machine. And he did things like-- Do you remember there was a live stream with Trump in 2024?

ROMAN MARS: Yeah, I do remember that.

ELIZABETH JOH: Yeah, that was really crazy. He let Trump say all kinds of false things about crime and immigration. And then just allowing Trump to be on X let Trump post everything, exaggerations, threats, lies of all kinds, no limit. He was allowed to say whatever he wanted. So X was Musk's megaphone. But then there was his money. And so for that, we need to turn to campaign finance law, okay? So federal campaign finance law is a pretty complicated and dry area of law. But there are some basics everybody should know to have an understanding of what Musk has been up to for the past several years. So, Roman, let's imagine that we have an upcoming election, let's say, and you want to support a candidate. Do you have a sense of how much you can give?

ROMAN MARS: Of, like, me personally? I feel like it's $2,500. That rings a bell in my head. Is that right?

ELIZABETH JOH: That's pretty close. So, under current federal law, as an individual, you can give one candidate, in a federal election, $3,500 per election. So that can be for a primary and a general election. So 7,000 maximum you can give in an election cycle for one candidate. So if Elon Musk, the individual, wanted to directly contribute money to a candidate of his choice, then he'd be limited to $7,000, period. Of course, that's nothing for the world's richest man. I can't even say it's peanuts for him because I'm not even sure what the right analogy is here. It's nothing. But this year, in 2026, Musk, of course, did not spend $7,000. He spent $446 million to keep Republicans in control of Congress. So that amount makes Musk the largest campaign contributor in American politics, period, ever. And spending that much money, $446 million, has only been possible since 2010.

ROMAN MARS: What horrible thing happened in 2010?

ELIZABETH JOH: Well, you might have heard of a little case from the Supreme Court called Citizens United.

ROMAN MARS: I have heard of it.

ELIZABETH JOH: So we should definitely explain what that case is about, but actually also what it's not about. And that's because Citizens United has kind of become a catchphrase for the outsized role of money in American politics. So you can find a lot of left-leaning organizations saying it's time to get rid of Citizens United. And what they really mean is kind of it's time to get funding from corporations and the ultra-rich out of American

elections. But there's a whole lot of mythology around Citizens United. Citizens United did not decide that corporations have speech rights. That happened before. And Citizens United did not decide that money equals speech. That also happened before the case, too. So it's still understandable because why talk about it in any other way? I mean, it's a lot easier than saying, "It's time to revisit 2 U.S.C. § 441b." Or it's easier than saying, "Let's talk about Buckley versus Valeo and all of these subsequent precedents." So it's far easier just to say, "Citizens United, that's the bad thing."

ROMAN MARS: That's fair.

ELIZABETH JOH: But Citizens United is an important case because it represents a real turning point in how huge, huge amounts of money were suddenly allowed to pour into American elections. So, in order to understand it, we should define a couple of terms, okay? So FECA stands for the Federal Election Campaign Act. That's a big body of federal law that regulates campaign finance in federal elections. And the FEC is the Federal Election Commission. This is the agency in the federal government that provides civil enforcement of FECA. And the term "independent expenditures" refers to money that's spent to support a political candidate, or even to try and defeat a candidate in a way that isn't coordinated with that candidate. In other words, we don't agree with the candidate that this is how we're going to spend the money. That's why it's called an "independent expenditure." And electioneering communications are communications about political candidates that are run within 60 days of a general election or within 30 days of a primary. So, again, this is pretty dry stuff, but it's kind of important to understand the background.

So here's how the case started. In 2008, a nonprofit corporation called Citizens United made a film called Hillary: The Movie. And they called it a documentary, but it was more like a 90-minute negative attack ad on Hillary Clinton. And at the time, she was a senator and she was a candidate in the 2008 presidential primary. And Citizens United released the movie, their movie, in theaters and on DVD. Remember those? But they also wanted to make the movie pay-per-view, so you'd pay to watch it. And so to do that, they wanted to promote the pay-per-view distribution by selling ads on TV. So the problem for Citizens United was that federal law at the time banned or limited their plans for the film and the advertising. And federal campaign finance law said that corporations, like Citizens United, couldn't use their own money to make independent expenditures in elections. Remember, they weren't giving this money to any candidate. They were just using it to attack Hillary Clinton.

ROMAN MARS: Okay. Okay.

ELIZABETH JOH: Now a second provision banned corporations from using their funds for electioneering communications, using that money in this particular time for election purposes. Now, what Citizens United, the corporation, could have done was to have set up a separate fund. And that fund could have been used for political support or attack ads. And it could have been done during a critical time before an election. That separate fund would be known as a "political action committee" or a PAC. Now, setting up a PAC requires adhering to a lot of regulations, like you have to have a treasurer and you have to follow certain accounting rules, things of that nature. And a PAC can actually contribute directly to a candidate or make independent expenditures. But here's the most important part about a PAC. A PAC could only collect certain kinds of funds from certain kinds of sources, not from who anybody they want. And a PAC can be set up to send money to candidates. But they're restricted in how much they can contribute in each election. So it's a restriction

on where the money comes from and where the money is going--how much money's coming out.

ROMAN MARS: Got it.

ELIZABETH JOH: Okay. So, now, Citizens United didn't set up a PAC to distribute or advertise their movie, Hillary: The Movie. Now, other parts of campaign finance law also said that these kinds of communications that are not directly funded for a candidate have to have some kind of disclaimer and disclosure. So I think a lot of people have seen ads where it says "paid for by" somebody else, right? So some kind of disclaimer there. So Citizens United challenged all of these campaign finance regulations as unconstitutional. And in 2010, the Supreme Court decided the case of Citizens United versus Federal Election Commission in favor of Citizens United.

ROMAN MARS: Citizens United winning this ruling is often cited as catastrophic. So, in what ways was it bad for us?

ELIZABETH JOH: Well, a big part of this is because of the path that the Supreme Court chose in this case. So, first of all, Citizens United and some of the amicus briefs, or the friend of the court briefs, in this case, offered some different ways that the Supreme Court could rule in favor of Citizens United without this really being a blockbuster case. So, for example, the Supreme Court could have decided that these laws don't apply to videos on demand. Or they don't apply when the audience is really small because, honestly, how many people are going to pay for this? Or because this is a documentary. So any of these ways would have been a win for Citizens United, but not a blockbuster case, right? And instead, the Supreme Court in the case decided to go very, very big. They didn't have to, but they did. The majority on the Court--and it was just a bare majority of five Justices--tell us that Hillary: The Movie wasn't just a movie. It was really a piece of political advocacy by a corporation. In other words, this was political speech. And so banning the corporation called Citizens United from distributing their own political advocacy violated its First Amendment rights, period. These limits were unconstitutional.

ROMAN MARS: Why couldn't have Citizens United avoided all this by putting their money into a PAC?

ELIZABETH JOH: Well, so that's part of their challenge. They could have, but they did not want to. Now, remember, to create a PAC, you have some limits on who can contribute, how much can be contributed, and how much can be spent. So this is a significant part of the case, too. The Supreme Court says that a PAC just isn't a good enough alternative. In Citizens United, the Supreme Court said that PACs are burdensome alternatives. They are expensive to administer and subject to extensive regulations. So although Citizens United, the corporation, could have set up a PAC to discourage people for voting for Hillary Clinton, a PAC couldn't be the only way that the corporation would be allowed to express its political views. So for the majority in the Citizens United case, limiting corporations in this way--you can't use your general funds for political advocacy--was a form of government censorship. And that was a core First Amendment violation.

ROMAN MARS: So does this ruling mean that the government can't limit these types of contributions at all?

ELIZABETH JOH: Not exactly. So let's dive into a little bit about what the Court said here. So, when it comes to fundamental constitutional rights like free speech, the government

can regulate or restrict speech, but only for very important purposes. It is a really high bar to clear. And in Citizens United, the Supreme Court referred to their previous decisions. And those decisions said that the government can limit direct contributions to candidates because preventing corruption is a sufficiently important interest. So the concern is, like, with a very large direct contribution to a candidate, that the donor would secure a political quid pro quo. That's what the Court said. In other words, we can expect that a very large direct contribution would result in some favor or influence for the contributor, right? And that's enough of a big concern so that the federal government can impose restrictions on direct contributions to candidates.

ROMAN MARS: I mean, if everyone knows who's donating to what and you kind of know what the agenda is, why doesn't some indirect contribution be ripe for corruption as well?

ELIZABETH JOH: So here's where the Supreme Court's thinking in 2010 sounds either hopelessly naive or completely disingenuous. So, in Citizens United, the majority said that while the First Amendment can give way to the federal government's concerns about political corruption, that's something that only happens with direct contributions. But independent expenditures, where there isn't supposed to be any coordination with the candidate, don't pose the same threats. So the Court says in Citizens United, "Sure, there might be influence with indirect spending, but that's not important enough as a concern." Here's what the court said. They said, "The fact that speakers," and that's Citizens United, "may have influence over or access to elected officials does not mean that those officials are corrupt." It's pretty incredible, right?

ROMAN MARS: Yeah, yeah.

ELIZABETH JOH: They go on, too. So, in 2010, long before Trump becomes president, the Supreme Court says this: "The appearance of influence or access will not cause the electorate," that's you and me, "to lose faith in our democracy." And so for these reasons, the Citizens United case strikes down the bans on corporations using money directly from their own general funds to advocate for a candidate or against a candidate as long as it's not a direct contribution for them.

ROMAN MARS: So what does that mean practically?

ELIZABETH JOH: So practically what it means is that a corporation--and Citizens United is a nonprofit corporation but it's not limited to nonprofits--can spend what it wants in the form of an independent expenditure. The federal government can't simply ban that and say, "Oh, the only way you can do this is to set up a PAC, a political action committee." Now a corporation can set up the PAC. But after Citizens United, it doesn't have to.

ROMAN MARS: Yeah, why bother? And so does that explain why Elon Musk can give 487 million dollars to something?

ELIZABETH JOH: So this is part of the mythology of Citizens United. So the answer is yes, partially because of Citizens United. And remember Citizens United has become the shorthand for saying there's a distorting effect of money in American politics today. But the reason why someone like Musk has been so influential is actually partially because of Citizens United but also because of another case that most people don't know much about. And that case is called Speechnow.org versus Federal Election Commission. So let's talk about that.

ROMAN MARS: I have not heard about this at all. So this is crazy. Okay, please tell me more.

ELIZABETH JOH: Okay, so in 2007, David Keating, who's the director of a conservative group called the Club for Growth, decided to create an entity called SpeechNow. Now, SpeechNow was supposed to back political candidates that support certain conservative libertarian views on free speech. That part's not too surprising. But what's interesting about SpeechNow as an organization was that it was specifically designed as a case for the Supreme Court to challenge how federal campaign finance laws regulate independent expenditures--that means not direct political contributions--in political campaigns.

ROMAN MARS: So how did SpeechNow challenge the law?

ELIZABETH JOH: Well, the way SpeechNow was set up was that they were not going to give any money directly to candidates. And they also announced that they were only going to accept money from individuals. And the Federal Election Commission decided that the organization was subject to $5,000 limits if you were an individual who wanted to give money to SpeechNow. So that meant, "Hey, I like SpeechNow. I'm into their objectives. I want to give them money. I want to give them as much as I want." But the FEC said, "No, you can't. You're restricted to $5,000 per election cycle." And so that was the nature of the challenge. SpeechNow said, "That's an unconstitutional limit." So while the Federal Appeals Court in Washington D.C. was considering SpeechNow's lawsuit, the Supreme Court decided Citizens United. And just two months after Citizens United was released, the appeals court decided SpeechNow. Now, of course, it's an appeals court; they were bound by what the Supreme Court had said. And the appeals court relied almost entirely on Citizens United and decided that limits on how much individuals could give to these kinds of organizations making independent expenditures were unconstitutional. So remember that Citizens United said that the government couldn't simply ban corporations from making independent expenditures from their general funds, right? "I want to spend as much money as I like," right? That was censoring political speech, and that includes spending money. And the only reason the government could restrict this kind of political speech was for anti-corruption reasons, which in the Supreme Court's view does not come about when you have indirect or independent expenditures. So if federal campaign finance law couldn't ban corporations in this way, then it wasn't allowed to limit individual contributions to groups like SpeechNow, which were also only going to use these funds for independent expenditures.

ROMAN MARS: Okay. So my head is spinning a little bit. So what is the practical result of this?

ELIZABETH JOH: Okay, so maybe it's helpful to think about how a PAC works different than a super PAC. So, Roman, imagine that you are a billionaire--let's make you a billionaire--and you want to maximize your political influence in an upcoming election, okay? So I'll be your advisor. So I give you one option. You can set up a PAC. So we got to give it a name. It should be something bland and patriotic.

ROMAN MARS: Oh, yeah. Okay, let's see. America Awesome PAC.

ELIZABETH JOH: Okay. That sounds awesome. So we need to pick a treasurer. So then you'll want some corporate structure for accountability. You want to limit your liability. Then you need your PAC to have contributors who will provide funds. And those funds, let's say, will go to a candidate of your choice. But here's the catch. Individuals for your PAC can

only give your PAC $5,000 a year. And there are some other limits, too, like how much your PAC can give to a candidate per election. So there are limits on collecting money and spending money. Here's option two, Roman, you can set up a super PAC. So we can use the same bland and generic name. But this time, I have to warn you, your PAC can't give directly to a candidate. And you're not supposed to coordinate with the candidate, wink, wink. But funding, you can collect and spend as much as you want.

ROMAN MARS: Oh, okay.

ELIZABETH JOH: Which one are you going to choose?

ROMAN MARS: I mean, as a billionaire, I think it's my duty to form a super PAC.

ELIZABETH JOH: Yeah. So Musk thought that, too. So, these two cases together, Citizens United and SpeechNow, give rise to the super PAC. A super PAC sounds like a PAC but just bigger, right? And that's kind of true, but it's kind of misleading. A super PAC only exists for independent expenditures. It can take as much money as it wants, and it can spend unlimited amounts of money. And super PACs simply did not exist before the combination of Citizens United and SpeechNow, those cases. And after those cases, the FEC confirmed that a super PAC is legal. You know, it recognizes super PACs, it imposes some light regulation on them, but certainly does not restrict the money that goes into the super PACs or the money that is spent by the super PACs. And so all of this together explains Musk's rise to become the largest campaign contributor in American history because, by the end of 2010, which is the year that Citizens United and SpeechNow were decided, 83 super PACs were created. Remember, they didn't exist before. In 2026, there were more than 2,000.

ROMAN MARS: Wow.

ELIZABETH JOH: And the story here isn't just the sheer number of super PACS, it's who gives to them. So a recent analysis by the group Public Citizen found that just 515 people account for three quarters of all the money given to super PACs for the 2026 midterms. So that means that a very tiny group of ultra rich people are allowed to engage in not just some political speech, but a lot of political speech. And that's just this cycle because, in the 2024 election, Musk spent money too. He spent more than $290 million. Most of that went to America PAC. Remember the generic name. That's his primary super PAC that he created for the 2024 election. But he also gave millions to other super PACs. And he could have given even more if he wanted because no limits exist.

ROMAN MARS: Yeah, sure, sure.

ELIZABETH JOH: And so unlimited donations are just one part of this massive problem with money and elections. You know, the super PACs are, in theory, not permitted to coordinate with political candidates. That's the line in the sand that the Supreme Court has drawn. That's that anti-corruption line that the Supreme Court talks about in Citizens United. But the general consensus is that that line doesn't exist at all in reality because candidates often make appearances at super PAC fundraisers. And then in the 2024 election, Musk--if you remember--he was often in frequent contact with Trump. Like, they would appear on stage together. So there's basically no enforcement of this distinction. And right now there's a very specific reason for the lack of a distinction. At the moment, there are only two commissioners at the FEC. In order for the FEC to do anything, you need a minimum or a quorum of four commissioners out of the six seats. We only have

two. So if you want to do something like start an investigation into campaign finance regulations or bring a lawsuit, you need four. We only have two. There hasn't been a set of vacancies this long before Trump was president. And I think that's pretty deliberate.

ROMAN MARS: Yeah, that makes sense to me, too.

ELIZABETH JOH: And then there's the other problem. Roman, are you familiar with the idea of dark money?

ROMAN MARS: I am, yeah. Sure.

ELIZABETH JOH: Yeah, so that's another problem. Super PACs are, under the rules, required to disclose who gives them money. But donations can come from groups with very vague and unhelpful names, kind of like the PAC that you created, right? And they themselves might be funded by sources that are really hard to identify. So "dark money" refers to those secret sources. So if you're a politically active nonprofit, then you're generally not required to disclose who your donors are. They could be individuals, companies... It could be another company that is hiding behind another company. And just recently an investigative news organization called Sludge found some interesting details about Cornel West. Do you remember him?

ROMAN MARS: I do remember him, but I kind of know what this story is. Yeah, tell me more.

ELIZABETH JOH: Yeah, yeah, remember, he ran for president in 2024. And there were concerns that West would be a spoiler and draw votes away from Kamala Harris. And so these journalists dug into the financial details and discovered that the group that helped to pay to get West on the ballots were funded by a group called People Over Party. And so it turns out that all of the revenues for People Over Party in 2024 were funded by one $7 million grant from another group called Interstate Priorities. And we know that from their tax return. And in turn, Interstate Priorities was given $10 million from a group called Building America's Futures, which was disclosed on its 2024 tax return. And Building America's Future--that's the kind of company within a company within a company--that's a group that's received millions of dollars from us. And somebody--don't know who exactly--gave that group $74 million in 2024.

ROMAN MARS: Wow.

ELIZABETH JOH: So if you're a casual observer, you wouldn't see it. And I'm sure you know some people who were excited about Cornel West at the time, but it really does look like Musk was behind some of this money that put West on the ballot. That's kind of like how dark money works. So while Citizens United and SpeechNow didn't create the concept of dark money, their approval of unlimited independent spending kind of created the conditions for this to flourish. So we have this environment where there's so much money sloshing around in our elections and they're often funneled through one, two, three, four layers of shadowy corporations with vaguely patriotic names, it's very hard to trace where the money is coming from. And Musk is the largest campaign contributor, but there are tons of other ultra-rich donors that are distorting our politics too. So according to the New York Times, the 50 biggest donors have given more than $2 billion to influence the midterms this year. And most of that money went to super PACs, again, which did not exist before 2010.

ROMAN MARS: Wow.

[AD BREAK]

ROMAN MARS: So, why isn't this just referred to as "buying elections?"

ELIZABETH JOH: Well, that's a good question because isn't this a quid pro quo, right? Let's go back to the 2024 election. So, remember, Musk's influence on the election then only exists because of the Supreme Court. Super PACs don't exist before then. And Musk's money spent mostly through his super PAC played a very large role in helping Trump win a second term. What did Musk receive in return? Well, do you remember DOGE?

ROMAN MARS: Yeah, no, I remember DOGE. Yeah.

ELIZABETH JOH: So just days after Trump won the 2024 election, he announced the formation of the Department of Government Efficiency, or DOGE. And the announcement said that it would be led by Musk and Vivek Ramaswamy, and Ramaswamy's a tech billionaire too. And as soon as Trump took office in 2025, he officially created DOGE through an executive order. Now DOGE, for people who aren't familiar, is a not very funny joke, I guess, referring to a cryptocurrency called Dogecoin that Musk was fixated on for a while, I think. And I guess he thought it was a terrific pun to call this thing the Department of Governmental Efficiency so that it could be shortened to DOGE. But at this point, I think most people have some sense of what Musk tried to do with DOGE and that was kind of apply a sledgehammer to the executive branch.

ROMAN MARS: And, like, murder children in other countries.

ELIZABETH JOH: Yeah, just dismantling the government in all kinds of ways. From journalists, we know that DOGE took over the Office of Personnel Management, which kind of serves as the HR for more than two million executive branch employees. They took credit for canceling billions of dollars in federal contracts. They took over the computer systems of all kinds of agencies. They closed USAID, as you just referred to. They gained unauthorized access to the personal information of millions of Americans. And you know, that's what we know from journalism.

ROMAN MARS: But what exactly is DOGE then? It didn't exist before. Like, what is it?

ELIZABETH JOH: Well, that is the $290 million question. That's the amount of money he spent in 2024. And that's the problem. We still don't really know. Everything that I've just listed here, we know from journalism, right? And for some period of time, it almost seems like Musk was acting almost like a shadow president. But what exactly was he doing? So what do you do when you want to know more about an executive agency? You use the Freedom of Information Act, or FOIA. So, as soon as DOGE was created, a nonprofit group called Citizens for Responsibility and Ethics in Washington, or CREW, submitted a request under the Freedom of Information Act to find out exactly what are you doing, Doge? Who are you? Who's in charge? What kind of authority do you have? Things like that. And if that name, CREW, sounds familiar, it's the same organization that brought a lawsuit during the first Trump administration about Trump violating the Constitution's Emoluments Clause--the idea that Trump was accepting gifts from foreign nationals through having hotel rooms booked at the Trump hotel. But Trump ran out the clock on that lawsuit, so it kind of died.

ROMAN MARS: FOIA requests are pretty cumbersome. So let's describe what it takes to do a FOIA request.

ELIZABETH JOH: So FOIA requests generally mean that it's a kind of transparency in government act, right? And the premise is that every agency has to make their records available to the public, to any person who asks for them. You don't have to be a journalist or an academic or anything like that. But at the same time, that doesn't mean that every single entity in the federal government has to give you information. And it also means that there are often many fights about, you know, "I would like this information" and the branch in the government that doesn't want to give it to you might refuse. Sometimes you have to go to court over this. And that's kind of what happened to CREW. So DOGE was created as an entity within the Executive Office of the President or the EOP. And the EOP is a group of agencies and offices that support the president. So the Office of Management Budget, for example, is part of the EOP. So FOIA, the federal law, definitely applies to the EOP in general, but there's a catch. Courts have interpreted the reach of FOIA so that entities within the office of the president have to follow FOIA or they have to respond to FOIA requests only if they "wield substantial authority independent of the president." So Roman, can you guess what the Trump administration has said about DOGE?

ROMAN MARS: That it does not wield independent authority.

ELIZABETH JOH: Exactly. So this is the circular reasoning of the Trump administration. The Trump administration says, "We don't have to give you any information, CREW, because DOGE doesn't have any substantial independent authority. But CREW says, "Well, that's exactly our allegation. And the only way we can know is if you give us the documents." And the administration's response is, "Well, we don't have to because it's not independent at all." So it's kind of a ridiculous argument.

ROMAN MARS: So is this CREW lawsuit going to be important? Does this matter?

ELIZABETH JOH: Well, you know, on one level, if we want to find out what exactly Elon Musk was doing during those early days of the Trump administration, then it is important. I mean, it'd be really good to know what exactly he was telling people, what he was ordering to do, whether he was aware that he was going beyond legal authority--I assume he did--and what he was doing beyond just the stuff he was posting publicly because, remember, even though we kind of know what was happening, we don't officially know. And so we're sort of in the dark about how DOGE operated. We know that Musk bragged on X last year. He said, "We spent the weekend feeding USAID into the woodchipper." I mean, that's terrible, right? But then what was he officially doing? And then Trump praised Musk for the millions of dollars of cuts that Doge made, presumably somehow with Musk's help or direction or advice to the federal government. But public bragging in a democracy isn't enough, right? It's really important for us to know officially what did Doge do and what did Musk do when he played a role in Doge. That would tell us more about what laws might've been broken and what kind of legal authority was exceeded. And so the federal trial court and the appeals court agreed that the government should be obligated to turn over information about DOGE. In other words, they should respond to CREW's request under the Freedom of Information Act--that they were obligated to. But on October 13th, the Supreme Court decided to review the Trump administration's request to hear the case.

So that case is called U.S. Doge Service versus U.S. District Court for the District of Columbia. And so the Supreme Court's decision to hear this as a full-on case during this

term, I think, is pretty ominous because you could say, "Well, this is just a dispute about how to interpret this one statute, the Freedom of Information Act." But the Supreme Court I don't think is going to be limited to that because they seem to think that there's a constitutional issue here because what is happening in a case like this? A court is ordering a part of the executive branch to turn over information, okay? And what is the Trump administration trying to argue? That this isn't an independent part of the executive branch; this was an advisory body to the president. So when a court orders a part of the executive branch that supposedly is giving advice to the president, that might implicate a separation of powers issue.

ROMAN MARS: Whoa.

ELIZABETH JOH: So, in 2004, the Supreme Court decided a case called Cheney versus U.S. District Court. That was a dispute about trying to get the executive ranch to disclose documents. So what happened in that case was that the Sierra Club and Judicial Watch requested information about an advisory group on energy policy. And Vice President Cheney was a member of that. They were just trying to figure out, like, "We're lobbyists having too much influence here." So in the Cheney case, the Supreme Court said that when courts consider these kinds of demands for information, that can implicate separation of powers issues. And so courts should be very careful that they don't intrude upon the president's confidential communications. So, as you can imagine, CREW did not want the Supreme Court to review this case, right? They were like, "This is just a FOIA case. This isn't a constitutional law case." But by taking seriously the Trump administration's argument that, well, this might involve some intrusion upon Trump's constitutional authority to have some communications kept secret, the Supreme Court could use this as an opportunity to demand even more deference to the President. And that would be even less transparency for the presidency. And if the Trump administration prevails, that means we might never find out anything important about what happened with DOGE.

ROMAN MARS: Wow. How did we get to this? How did we get to the point where when the Supreme Court intervenes and we know that something is coming, that it's going to be bad? You know what I mean? That any sort of constitutional question will give the President more power.

ELIZABETH JOH: Well, just because it seems like this particular court seems to bend over backwards to help the President both keep and expand as much constitutional authority as possible. I mean, of course, there will be people who will say, "Well, he's lost a couple of times." And that's true, but that's sort of at the margins. The bulk of the Supreme Court's cases with regard to Trump is they tend to defer to him a lot, whether those are on the merits cases where there's a fully briefed case, and particularly on the so-called "emergency docket," where a lot of things stand or fall. "We need something decided right now," and the Supreme Court then will say, "No, the Trump administration says, 'Put a pause on the pause.' You're not going to do that right now." And they don't even have to opine as to why. So we have a long pattern here of this Court being particularly deferential, I shouldn't say to the presidency, but to President Trump in particular.

ROMAN MARS: Yeah. And, like, what would be the harm of us knowing how the President is advised? You know what I mean? What they're arguing-- I'd imagine they're argument is, like, well, he can't really do his job if everyone has to watch what they are saying. Like, I just think that transparency here would be great. I don't see a downside to it at all.

ELIZABETH JOH: Yeah, I mean, I think that's right. I mean, people right now, I think, are pretty upset about corruption in politics and the influence of money in politics. But the Supreme Court, I assume they decided to take this case, in part, because they see a sort of more abstract value in the presidential secrecy. Yeah, the president needs to be able to freely and robustly make his or her decisions. And that's the line that even goes back to the presidential immunity case, Trump versus the United States. And it's always a kind of abstract president they seem to be talking about, not the one that we actually have.

ROMAN MARS: Right. Right. Right.

ELIZABETH JOH: And that's the problem. And to go back to Musk for a moment, that's just the influence that we can measure through dollars. Musk's contributions here have had untold influence in all ways that we even begin to measure alternatively, through the ideas, through the conversations, through just shaping public opinion or a certain portion of the electorate, what they think about Trump. His contributions then seem like a bargain for him. So, go back to that Citizens United quote. The Supreme Court said, "The appearance of influence or access isn't a big deal because it's not going to lead to the electorate losing faith in our democracy." It's just really hard to swallow at this point.

ROMAN MARS: Yeah, I think that that's what I was going to follow up with. If they had any notion of causing a loss of faith in our election process, why is that out the door now? It feels like there's no faith, all around. I mean, people have been sowing distrust in all kinds of ways. And this just contributes to it.

ELIZABETH JOH: Yeah, it only works if you have the most narrow, literal, and concrete idea of quid pro quo, which is buying a vote for $5, as opposed to taking over a branch or taking over a portion of the executive branch. That's something the Court's not willing to take on. Oh, I forgot, Roman, one more thing. You know SpeechNow, right? That's the case that you didn't hear about until today. It's an appeals court case. Do you ever wonder why it didn't go to the Supreme Court?

ROMAN MARS: Why?

ELIZABETH JOH: Well, the Obama administration can take the fall for this one. The Justice Department decided not to appeal. They thought it would affect only a small subset of federally regulated contributions. So wrong. They were so, so, so wrong.

ROMAN MARS: [LAUGHING] I mean, small in that 515 people pay for three quarters of the money given. So it depends on how you measure small.

ELIZABETH JOH: They were right then. It was disastrous, nevertheless.

ROMAN MARS: Well, this is fascinating, terrifying stuff. And what I hope is that all that money doesn't result in the outcome that they're trying to buy.

ELIZABETH JOH: We can only hope. Thanks, Roman.

ROMAN MARS: This show is produced by Elizabeth Joh, Isabel Angell, and me, Roman Mars. It's mixed by Martín Gonzalez. Our executive producer is Kathy Tu. You can find us online at trumpconlaw.com. All the music in What Trump Can Teach Us About Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. You can find out more

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