

Roman Mars: Okay, so here's a tweet from Trump on June 5th, 2017. "In any event we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe. The courts are slow and political!" which brings to mind this question, which is a question that does not normally come up. Why does the president have to do what the Supreme Court says--or any court really? Why does he have to care?

Elizabeth Joh: So you remember in February when a federal judge temporarily blocked the enforcement of the president's first travel ban--the one that barred entry to the U.S. for citizens of seven majority Muslim countries. Trump said in a tweet that he's criticized the opinion of this "so-called judge."

Roman Mars: The "so-called judge" in this case was U.S. District Judge James L. Robart.

Elizabeth Joh: So a lot of people are aware of this ban because it sparked a huge outcry. We saw large protests at airports around the country. Volunteer lawyers were rushing to help people who were being detained.

Roman Mars: But let's just focus on the tweet itself and think about what it means.

Elizabeth Joh: What's pretty remarkable about the president's comment there is that it's an attack on judicial legitimacy, this idea that judges are legitimate, and that the rulings that they make are legitimate, too. So that brings up the really maybe unusual or weird question of whether Trump has to bother to listen to the courts at all. It's not a typical question we ask about presidents, but he's not a typical president.

Roman Mars: I know. This is not normal.

Elizabeth Joh: So one of the amazing things about living in 2017 is that we are starting to ask questions about stuff that we've always taken for granted.

Roman Mars: Yep. That's why we're getting down to the fundamentals. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where law professor and extremely patient person Elizabeth Joh comes to my house every week to teach us all a lesson about a constitution that is being tested in new and interesting ways by the 45th president of the United States. I'm your fellow student and host, Roman Mars. We got some good law 101 fun after this. The topic of the day is judicial legitimacy.

Elizabeth Joh: So, you think about judicial legitimacy--it's a thing, right? It's this idea that we think, "Well, we respect the judgments of the courts." Well, why is that? One of the things to think about is actually judicial legitimacy is pretty remarkable. It's kind of like Santa Claus. We all have to believe in Santa Claus to make him real. Same with judicial legitimacy. You don't believe in it, it disappears. And that's really important because if you think about the other branches of the federal

government--the president is the commander in chief--pretty formidable power, right? The Congress has the power to legislate and, more importantly, the power of the purse. These are important powers. Judiciary--they've just got legitimacy, and that's pretty much just an idea.

Roman Mars: So you might say that it's pretty amazing that presidents in our system of government listen to the courts at all.

Elizabeth Joh: But it turns out that we have a pretty good history of presidents complying with judicial rulings, even with ones that they detest or disagree with intensely.

Roman Mars: Which brings to mind a case called Youngstown Sheet & Tube versus Sawyer, also known as the Steel Seizure Case.

Elizabeth Joh: So this case is decided against the backdrop of the American involvement in the Korean War. So essential to the military effort is you need a lot of steel, right? So you need an uninterrupted supply of steel for the use of military--for ammunition and tanks and things like that. So in November of 1951, the United Steelworkers of America began some pretty tense negotiations with steel companies for wage increases, but it didn't really go very well.

Roman Mars: Negotiations were going so badly. Then in April of 1952, the steel workers announced they were going to strike.

Elizabeth Joh: And very shortly thereafter, the steel companies began to shut down the mills. That's a pretty big crisis when you absolutely need the steel mills. So in response to this potential crisis, President Harry Truman issues an executive order that actually directs the governmental seizure of the nation's steel mills in order to keep them running, whether or not the steelworkers are going to strike or not. So on 10:30 PM on April 8th, 1952, Truman goes on the radio and on TV, and he tells the country that he had ordered his Secretary of Commerce, Charles Sawyer, to operate the steel mills on behalf of the federal government. So within an hour of Truman's address, lawyers for two of the biggest companies--Youngstown Sheet & Tube and Republic Steel--they run to a judge. They ask for a halt to the President's order. Several other steel companies also eventually do the same thing. And eventually--and this is very, very quick for the Supreme Court--the Supreme Court decides to grant review.

Roman Mars: Truman made his announcement that the government planned to take over the steel plants in April of 1952, and arguments were heard in front of the Supreme Court in May of 1952.

Elizabeth Joh: That's really unusual. This usually doesn't happen unless we're truly facing, like, a national emergency. So, if you're Truman and you know that the Supreme Court's going to review the legality of your action--seizing the steel mills--you probably are feeling pretty good. You know why? Because all nine Justices on the

Court at the time had been appointed by Truman or FDR. Justice Hugo Black and Sherman Minton actually were close friends of Truman's. So you think everyone on the team's batting for you--you're going to do great, right? You're an easy win. In June of 1952, the Supreme Court issues an opinion written by Justice Black ruling that Truman lacked the authority to seize the steel mills. Nothing specific in the Constitution gave Truman the ability to do this, and no federal statute enacted by Congress allowed him to do it, either. There was a law called the Taft-Hartley Act that might've applied in this situation, but the law didn't give the president any specific authority to seize private property in the way that Truman did. So what the Court's really saying here is that Truman was acting alone in a way that exceeded his constitutional authority. It was unlawful what he did.

Roman Mars: So the Youngstown case is the quintessential example of a case that deals with this scope of executive power.

Elizabeth Joh: There's a really famous concurring opinion written by Justice Jackson. And a concurring opinion means that the judge agrees with the result, but the judge wants to add something more. So in this case, Justice Jackson says, "I want to add something more because I think it'll be useful for future cases." He sets up a framework of three parts to think about when is it okay for the president to behave in certain ways? He says, "Look, a president can act in three situations." One, when the president acts with Congress' authorization--when he's acting at the height of his presidential power. He's got his own power plus whatever Congress gives him. So we can more or less presume what the president's doing is valid in those situations. When the president is defying Congress, that's probably when the president is at his weakest."

Roman Mars: In this case, the President didn't even have the backing of Congress.

Elizabeth Joh: Well, and unfortunately for us, there's a kind of zone of twilight in the middle where Justice Jackson says, "Well, sometimes it's not going to be clear whether Congress approved of it or not. What do we do?" And in a very lawyerly fashion, it's sort of like, "Well, it depends. Depends. It's going to depend. Can't tell you the answer. It's going to depend." So presidential power or executive authority is usually the reason people think about this Youngstown decision. But there's a really important part of Youngstown that is really about judicial legitimacy, too. So think about the context of the case. You have a president. He has spoken to the public on the radio and on tv--or today I guess Twitter, right?

Roman Mars: God help us.

Elizabeth Joh: And he declared that the country was facing a "grave danger." He said on TV that these are "not normal times. These are times of crisis." That's why Truman felt he had to have governmental seizure of the steel mills. But the Court says, "Look, you don't have the authority to do that. What you did was

illegal--unconstitutional." So the result? He backs down. He complies. He backs down in the face of the Supreme Court saying, "What you did was unlawful."

Roman Mars: That is judicial legitimacy. The President complied with what the Supreme Court had said,

Elizabeth Joh: And it's all the more remarkable, because--remember--in Youngstown, you had a Court that was composed of people who were very likely to be very friendly towards President Truman. Justice Black, who wrote the opinion, was a friend of Truman's. He, in fact, was a little bit nervous about Truman's reaction. So after the Court issued the opinion, he invited Truman to his home along with the Supreme Court Justices for a party. Justice Douglas, who also attended, later reported that Truman, after having had a few cocktails and canapes, turned to Hugo Black and said, "Hugo, I don't much care for your law. But by golly, this bourbon is good." So to return to Trump, presidents really are always thinking about their place in the constitutional scheme, including how courts interpret the Constitution. But it's always important that historically presidents understand that even if they disagree with what the court says or does, they're supposed to comply because of this idea of judicial legitimacy. So even during his confirmation hearings, Judge Gorsuch was asked about judicial review. Could the Court review the president's decisions when it came to things like national security? Gorsuch referred to the Youngstown case, and he said in his confirmation hearing, "No man is above the law." So it's normal for presidents to have their actions challenged in the courts, and courts do from time to time rule against presidents. What's not normal is the questioning of the assumption that presidents have to listen to the courts.

Roman Mars: You don't have to listen to this next thing, but I wish you would. We have more Trump Con Law after this.

Elizabeth Joh: This case is not typically known for what I just told you. It is usually about what's the scope of executive authority and when presidents can act. And in law school, it's usually a case taught for "Do presidents have any inherent or non-textual authority?" It's, like, a very specific kind of case about that. But what always amuses me about-- If you think about living during that moment, as I said, he went on TV. He said, "We're going to do this thing. We're going to seize the steel mills." And the Supreme Court just comes down and says, "No, you're not." And then that's it. And then Truman complies. And think--that's a remarkable sort of example that the system works--that we have all the actors respecting the legitimacy of the courts. We believe in Santa Claus, right?

Roman Mars: What Trump Can Teach Us About Con Law is produced by Elizabeth Joh and me, Roman Mars. If you just discovered this show and you aren't familiar with my other program, 99% Invisible, that's weird, but I encourage you to rectify that situation. All the music for Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop collective. The two big takeaway lessons from this show are

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