

What Trump Can Teach Us About Con Law Pattern and Practice

Roman Mars [00:00:00] So we're recording this on Wednesday, April 28th, and Trump has not been in office for quite some time. So, what are we going to talk about?

Elizabeth Joh [00:00:08] All right. Well, let's take a little time travel trip. Let's go back 30 years to Los Angeles. And 30 years ago, the general manager of a local Rescue Rooter--that's a plumbing company--he bought a Valentine's Day gift for his wife. That was a Sony Video8 Handycam camcorder, state of the art. He'd been using it, and he was going to videotape one of his employees running in the LA Marathon. In the middle of the night, after he'd set his alarm to wake up early so he'd go to the marathon on time, the manager--his name's George Holliday--he wakes up. There's really loud police sirens right in his neighborhood. The neighborhood is called Lakeview Terrace. There are squad cars, and there's even a police helicopter in the sky with a spotlight. So, Holliday grabs his camcorder, and from the window of a second-floor apartment, he starts taping. Now, the video he takes is short. It's just 90 seconds. There's no sound. And the images are grainy, not sharp. But what happened is very clear. The video shows a Black man down on his hands and knees, surrounded by police officers. He'd already been hit twice by an electronic stun gun. And he is repeatedly beaten by a group of four LAPD officers at the scene--56 times by metal police batons--all the while, while he's on the ground. There's also a group of about ten other officers at the scene. And they're just there. They watch as the other police beat Rodney King.

Newscaster [00:01:41] Dramatic videotape obtained by Channel Five news shows what appears to be a group of LAPD officers beating a suspect.

Rodney King [00:01:50] I thought they were going to kill me. That's what I thought. After they tied me up like that and handcuffed me, I thought I was going to die.

Elizabeth Joh [00:01:56] Now, all of this started when California Highway Patrol officers saw King's car speeding. When he didn't pull over, they began a high-speed chase. Now, King eventually stopped his car, and for reasons that were never fully clear, King's car met not just by those cops but also by LAPD officers. And even some officers from the LA Unified School District show up. Now, after the beating, King is put in handcuffs, he's dragged to the side of the road, and they call an ambulance. He suffered a broken cheekbone, an ankle, and he received 20 stitches. He was initially charged with speeding and resisting arrest, but the charges were later dropped. Now George Holliday, the man with the video camera, didn't even realize what he'd captured until he put the tape into the VCR at home. Now, Holliday thought, well, of course, the LAPD would be interested in what he'd seen. They weren't. So, he sold his tape to the local news for \$500, and the video was then picked up by CNN and was seen everywhere--the way a video could go viral in 1991 by cable news. Remember, Facebook wouldn't exist for another 13 years. Local prosecutors charged the four officers directly involved. And when they were acquitted in 1992, LA exploded. There were days of riots and absolute chaos. I remember there was a lot of damage, a lot of property destruction. But 40 people died and more than 2000 people were injured. And it was one of the worst riots in American history. And if you remember--I'm sure you do, and I do--Rodney King made this public statement calling for peace. Remember, he said, "People, I just want to say, can't we all get along? Can't we all get along?"

Rodney King [00:03:43] I just want to say, you know, can we all get along? Can we get along?

Elizabeth Joh [00:03:50] Now, two of the LAPD officers directly involved in the beating of Rodney King were eventually convicted by federal prosecutors, but no further charges were brought against any of the others on that night of March 3rd, 1991. And the LA police chief at the time, Daryl Gates, apologized just a few days after everyone saw that video. But he said the whole thing was an aberration. Now, a lot of people found that conclusion shocking and wrong. At the time, Jerome Skolnick, who was a policing expert, said this of the LAPD: "It's highly unlikely that this is unrepresentative of Los Angeles police. Two people can go crazy. But if you have ten or 12 people watching them--not doing anything--this tells you that this is a normal thing for them." Now, in 1990, there were definitely legal responses to excessive force by the police. Federal law lets you sue the police and recover a money judgment from them. But it's really hard to win those cases. And prosecutors can criminally charge officers for things like excessive force. But successful convictions were and still are pretty uncommon. Now it's 2021. There have always been issues in policing, especially excessive force. But things feel sort of different now. People from lots of different backgrounds are calling for some fundamental changes about what the police do, even what policing is supposed to do. And we don't just have one guy with a video camera. Everybody has a cell phone, so everyone's a potential citizen journalist. And of course, there's social media. And what about the president of the United States? What can a president do about reforming the police?

Roman Mars [00:05:35] Let's find out. This is What Trump Can Teach Us About Con Law, an ongoing series that could probably use a rebranding here soon, where we take 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 Joh. And I'm your fellow perpetual student and host, Roman Mars.

Elizabeth Joh [00:06:27] So let's start out with thinking about how police works in the United States, right? Policing is pretty similar to schools. It's really local, very decentralized. There are state laws that regulate some of what police do, and the Supreme Court decides a lot of cases about the procedures police use in their investigations. But when it comes to direct control, that happens at the local level. So, we're talking about mayors, city councils, board of supervisors--bodies like that. And then, of course, there's federalism. That's the idea that there are state and federal government responsibilities. So, when you think of federal law enforcement like the FBI or the Drug Enforcement Administration--these are all directly controlled by the federal government. Congress funds them, and the president is the head of the executive branch. But when it comes to the more than 18,000 local law enforcement agencies--and that's your city police, your county sheriff--the president doesn't directly control them at all.

Roman Mars [00:07:25] So if they don't control them at all, what can the federal government do about police reform?

Elizabeth Joh [00:07:29] Well, one thing Congress can do is spend money. And they do, in fact, spend millions on policing. So that money can come with strings attached. They can say to local police departments, "You want this money? You don't have to take it. But if you want it, you have to abide by these new standards or procedures or maybe you start doing something different as a condition of receiving these grants." It's a really powerful incentive because there's a lot of federal money on the table. Now, the second way that the federal government can get involved in police reform is the reason why we started with

Rodney King. When LAPD officers beat Rodney King as he lay on the ground, it was a shock moment. The world saw it, and it's pretty clear it wasn't one rogue officer. Something was deeply, deeply wrong with the culture of the LAPD. Now, even before the Rodney King case, there had been proposals for federal laws to give new powers to investigate or just to do something about troubled local police departments. But after George Holliday's video went viral, a House committee on Civil and Constitutional Rights called a hearing to see how the federal government might be able to respond to the problem of police brutality. And a big part of their discussion was Rodney King's case. And eventually there was enough congressional support to address police reform in a giant crime bill called the Violent Crime Control and Law Enforcement Act of 1994. So, the portion that I want to focus on here is this--because of that law, it's illegal for a police department to engage in what the federal law says is a pattern or practice of unconstitutional conduct. That's the first part of the provision. And in the second part, Congress gave the attorney general the ability to sue to eliminate the pattern or practice. This was originally called Section 14141, and now it's been redesignated. But let's just call it "pattern and practice" to keep it simple.

Roman Mars [00:09:27] Okay.

Elizabeth Joh [00:09:28] So to summarize, because of this 1994 law, the attorney general has the ability to sue a local police department if there's evidence that the police department itself has systematic problems--not just one or two or three bad officers--widespread problems that violate citizens' rights. So, pattern and practice cases, as they're often called, are meant to start long lasting changes in a police department.

Roman Mars [00:09:54] So the two methods seem to incentivize the right behavior through funding--and then the second one seems to be policing the police. You know, they have the right to be the people that can prosecute local police departments now because their federal law allows them to do so. So how does pattern and practice enforcement really work? Is it like news trickle up to the attorney general, then they file a lawsuit, and it just kind of starts? Or what's the procedure here?

Elizabeth Joh [00:10:19] Well, actually not. And in fact, I think if there was a lawsuit that might be considered a little bit of a failure. So, here's what typically happens. The civil rights division of the Justice Department is responsible for these pattern and practice cases. So, what actually happens in the beginning is that there's usually a formal investigation into the police department to figure out whether there's actually a pattern or practice of unconstitutional conduct. It's a really big undertaking. So, the department will review the policies and procedures used by the police. They'll conduct interviews with the police at every level of rank. They'll talk to local political leaders, community members--basically, anybody who might have anything to say about policing problems in that particular area or city. And they also do ride-alongs. They see what police do. They got a roll call. They spend a lot of time just figuring out what's going on. They look at lots of data if there's any data collected by the police department. And then that means that they spend a lot of time; sometimes investigations can take an entire year.

Roman Mars [00:11:22] So after all this investigation, what do they do when they find a problem?

Elizabeth Joh [00:11:27] Well, what typically happens is that the Justice Department issues public findings. Usually there's a letter, but very often there's a really lengthy report that's available to the public that anybody can read. And then the whole process turns to what to do about it. The idea behind a pattern and practice investigation is to reform a

police department. It's not to punish individual cops. So, the carrot here is that the federal government wants to work together with the troubled police department and arrange what's called a consent decree. And a consent decree is a formal legal settlement between the federal government and the investigated police department. It's actually overseen by a federal judge. And the police department will also need an independent monitor to make sure that the reforms are going to actually happen. So, if the Justice Department and the police department can't come together with a plan, that's when a lawsuit happens.

Roman Mars [00:12:20] I see. I see.

Elizabeth Joh [00:12:22] Yeah. So that's why it's kind of like a lawsuit represents a failure--because the Justice Department has actually said that a lawsuit isn't their objective. They don't want to go to that place. They want to go to a place where they agree, "Look, this is what you guys have to do in order to reform your practices."

Roman Mars [00:12:36] So after they come to some kind of consent decree, how do they know or follow up that the changes actually happen?

Elizabeth Joh [00:12:42] Well, a lot depends on what exactly the problem was that they found or the many problems that they might have found. So, if it's an excessive force problem, where the officers weren't being trained properly or maybe they weren't even trained at all, then they have to show that they have guidelines and they're going to follow through with the guidelines. And it might also mean data collection. They want to know from now on how many times are there uses of excessive force. Maybe they want to know which officers have been accused of using excessive force more than once. If there's a problem of racial discrimination at traffic stops, then the Justice Department will want to know, "Well, how often do you do these traffic stops, and who exactly are you stopping? What do they look like?" In other words, usually, like, "What race or ethnicity are they? And does that look really wildly disproportionate to the actual population in your city or in your area?" And that might include things like what are called "hit rates"--like, how often when you stop or search somebody does that go nowhere. So, if there's tons of stops and it turns out nothing's being discovered that's useful in a criminal investigation, then that would suggest a pretty big problem--that you're harassing large numbers of the population. So that's why there's an independent monitor to make sure that the police department's making progress towards the reform goals of the consent decree. And the agreement's finished when the police department has met all the goals of the consent decree, and that might take a couple of years. So, a pattern and practice case is not a quick solution. It's not designed to be a quick solution.

Roman Mars [00:14:13] It doesn't seem like it at all.

Elizabeth Joh [00:14:15] Not at all. But one of the big advantages is that a pattern and practice investigation can see and address a problem that a criminal case against just one cop just wouldn't even address in any way. So let me give you an example. You probably remember that in 2014, a police officer in Ferguson, Missouri, shot and killed Michael Brown. So, remember the circumstances of that shooting--he was Black, he was a teenager, he was unarmed--led to protests not just in Missouri but everywhere, all over the country. And remember, the local prosecutors decided not to criminally charge Darren Wilson, and that was the police officer who shot and killed Brown. Now, after all of this, the Justice Department, under President Obama, launched a pattern and practices investigation into the Ferguson Police Department. And in 2015, they issued a 105-page

report with a lot of findings. But I just want to give you one that's really noteworthy. So, Ferguson, Missouri, is a majority Black city, and about a quarter of the city lives below the federal poverty line. It turns out that the city of Ferguson relies heavily on fines and fees to operate; it's almost a quarter of its budget in 2015. Where these fines and fees come from--the city's municipal courts. And who collects these fees? Well, it's the police department that helps the court collect them. The Justice Department was pretty blunt about this. They said, "Ferguson uses its police department as a collection agency for its municipal court." So, here's a typical kind of thing that would happen in Ferguson. A police officer might give you a citation for violating a city ordinance, like dog creating nuisance, failure to remove leaf debris, or parking ticket. Or every time a Ferguson police officer stopped you for doing something like failing to use your turn signal, it might be their regular practice to give you four or five citations instead of just one--and each has its own fine. And then maybe the officer gives you information about when you're supposed to show up in court and pay it, but a lot of times the information's wrong. And when you go to the website or you try to call the court, you can't find out what you're supposed to do. And, of course, naturally, maybe you miss a court date because of that--and then you don't pay the citation. And then the Ferguson Municipal Court would then issue a warrant for your arrest because you didn't show up. And then they add some more fines--fines that far exceed your original citation. And then you can't pay the total amount because you don't have the money--you don't have the thousand dollars in fines that the city has now imposed on you for a \$100 ticket. The Justice Department, in its patterns and practices report, said this happened all the time in Ferguson.

Roman Mars [00:17:01] That's awful.

Elizabeth Joh [00:17:02] Yeah, policing was just not about community safety. So, changing that broken system was a big part of the Ferguson consent decree. And that's a good example of something that a single prosecution of one officer is just not going to fix.

Roman Mars [00:17:15] Yeah. Or reveal, honestly.

Elizabeth Joh [00:17:17] Or reveal. And there are definitely successes from some of these consent decrees. The Newark, New Jersey, Police Department entered a consent decree with the Justice Department in 2016, and four years later, in 2020, Newark police didn't fire a single shot during the entire year. And that's kind of a low bar if you're listening outside of the United States. But given how bad things were in Newark at the time of the investigation, it was a pretty big deal.

Roman Mars [00:17:44] Okay. So, you mentioned the president at the top. So how important is the president in all this?

Elizabeth Joh [00:17:49] Pretty important because even though Congress is the body that creates the federal power to investigate local police departments, it's the attorney general who's in charge of the Justice Department. And the attorney general sets the tone and the priorities of the department. And the attorney general is handpicked by the president. You might remember that President Trump didn't seem terribly sympathetic to public concerns about policing. And in fact, when he spoke to a law enforcement group in 2017 about arresting people, he said infamously, "Please don't be too nice. Like, when you guys put somebody in the car and you're protecting their head, you know, you can take away the hand. Okay?" And Trump's views on policing were then in turn reflected in his attorney general. So right before Jeff Sessions left being Trump's attorney general in 2018, he established some new rules that made it a lot harder for the Justice Department to actually

begin a pattern and practice investigation. So that's why we didn't see too many of those during the Trump era.

Roman Mars [00:18:52] Okay. So now Merrick Garland is, you know, famously the attorney general. What is the Biden-Garland sort of take on pattern and practice?

Elizabeth Joh [00:19:02] Well, things look like they're going to be really different. Merrick Garland was confirmed in March, and there are already two important things that he's done to show that police reform looks like it's going to be taken differently and seriously. The first one--that memo or the set of rules that Jeff Sessions imposed while he was attorney general under Trump--Garland has already rescinded those restrictions. So that means that pattern and practice investigations can begin in earnest.

Merrick Garland [00:19:31] I strongly believe that good officers do not want to work in systems that allow bad practices. Good officers welcome accountability because accountability is an essential part of building trust with the community, and public safety requires public trust.

Elizabeth Joh [00:19:51] Second, Garland's Justice Department has already announced formal pattern and practice investigations for two departments. One is going to be for the investigation of the Minneapolis Police Department. Minneapolis--that's the department where Derek Chauvin was employed as a police officer. And of course, Chauvin was recently convicted of second-degree murder for kneeling on George Floyd's neck for more than nine minutes in May of 2020. This all began when Floyd went to a convenience store and the clerk thought he'd passed a counterfeit bill. And it was that cell phone video, taken by a bystander of his death and watched around the world, that brought people onto the streets to protest police violence.

Protesters [00:20:36] Take your knee off our necks! Take your knee off our necks!

Elizabeth Joh [00:20:44] So the pattern and practice investigation announcement was made by the attorney General Garland, one day after Chauvin's conviction. So, investigators are going to look into whether there is a pattern of excessive force in the Minneapolis Police Department, including during protests. They're also going to look at whether the department engages in racially discriminatory policing and what kind of accountability systems they have. Now, the second pattern and practice investigation is going to focus on the Louisville Metro Police Department. Officers from that department shot and killed Breonna Taylor. Taylor was a 26-year-old Black woman who was inside of her apartment with her boyfriend in March of last year. The police said they were conducting a drug investigation of her former boyfriend and they attempted what's called a "no-knock entry." So that was basically a middle of the night police raid without identifying themselves as the police. So, Taylor's boyfriend inside the apartment said he thought there were criminals coming at the door, so he fired a warning shot. And the police responded by firing 32 shots back. And Taylor died in the shooting. And they never did find any drugs. So, the pattern and practice investigation announced by Attorney General Garland will look at whether the Louisville Metro Police engaged in unreasonable force, whether they conduct unconstitutional searches and seizures, and whether there is any evidence of racial discrimination in their policing.

Roman Mars [00:22:15] I mean, how do these pattern and practice investigations and then maybe eventually lawsuit interact with, you know, murder convictions and things like

that? You know, obviously, the one in Minneapolis followed the conviction of Chauvin. You know, do they speak to each other in any way?

Elizabeth Joh [00:22:32] Well, there certainly are both kinds of accountability, right? But they're just really different kinds of concerns. I mean, I think one of the positives about the Justice Department focusing on troubled police departments is that it's an acknowledgment that there are systemic problems. So, when you have a conviction--even like a conviction of Derek Chauvin--I think it's too tempting for a lot of people to say, "Well, that's it. We've solved the problem. We identified this one really bad police officer who deserves to be punished as he assuredly was." But it doesn't allow people to say, "Well, what about the rest of the department? What were the conditions that allowed this kind of incident to happen in the first place?" You know, there's a really tired phrase where people say, "Well, that's just a bad apple, and we cut out the bad apple." But sometimes it's an entire departmental problem that needs to be kind of identified and rooted out at a really, you know, fundamental level. So, they're both forms of accountability. And one of the things that you can see with pattern and practice investigations is it's really an enormous investment, right? So, it's not just a single prosecution. This is a team of investigators that are going to be looking at--whether it's Minneapolis or Louisville--a department for a whole year. They're going to try and hash out a really complex solution to a complex problem. And maybe they won't even get it necessarily right. But it's kind of a signal from the federal government that they're serious about trying to enact some change. As I said, there are 18,000 local police departments. So, it's not going to revolutionize policing in any particular way. But it's an important step.

Roman Mars [00:24:14] So as you described the story in the very beginning, Holliday and King or kind of the patient zero of recording police brutality. Whatever became of all that?

Elizabeth Joh [00:24:25] Well, Rodney King, of course, became a national worldwide figure. He was, you know, interviewed a lot. He was awarded \$3.8 million in damages as a result of the police brutality. He later said in interviews that he had a hard time afterwards finding steady work and he struggled with drug and alcohol problems--didn't seem to really enjoy being in the spotlight that much. And he died in June of 2012 at his home in Rialto, California. He was 47 years old.

Roman Mars [00:24:55] Oh, so tragic.

Elizabeth Joh [00:24:57] It is tragic. And as for Holliday, he continued to be a plumber. The FBI confiscated the tape that he took. And in July of 2020, during the pandemic, Holliday tried to sell his Sony Handycam that he used during the taping at auction. The starting bid was \$225,000. He didn't receive a single bid.

Roman Mars [00:25:22] That's probably for the best. Well, that was fascinating. Thank you so much.

Elizabeth Joh [00:25:30] Thanks, Roman.

Roman Mars [00:25:39] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You find us online at trumpconlaw.com. All the music in Trump Con Law is provided by the great 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. Along with my other show, 99% Invisible, we are now part of the Stitcher and SiriusXM Podcast Family. I've been going through the Stitcher shows

since we joined. And one that I started just recently, and love is Seizing Freedom, which is a US history show focusing on African Americans--specifically letters and diaries of people who are writing in the moment, seizing their freedom. It is awesome. I cannot wait to dive in more. Listen to Seizing Freedom on Stitcher or wherever you're listening now.