

Attorney-Client Privilege

Roman Mars [00:00:00] On July 20th, 1993, Deputy White House Counsel Vincent Foster had a cheeseburger for lunch at his desk and left his office saying that he'd be back.

Elizabeth Joh [00:00:09] But five hours later, his body was found next to a Civil War cannon in Fort Marcy Park, Virginia. A number of investigations, including one from the U.S. Park Police, later determined that Foster had committed suicide by shooting himself with an old revolver. That official determination hasn't deterred a lot of conspiracy theories, though, about Foster being secretly murdered.

Roman Mars [00:00:31] Foster had been reportedly suffering from very serious depression.

Elizabeth Joh [00:00:35] He had also been caught up in the first of several ethics' controversies in the Clinton presidency. A new presidential administration usually means that there's a lot of job turnover in the White House, and that includes the White House travel office, which is in charge of booking travel for the White House press corps. And it's staffed with people who, in theory, can be fired at will. But traditionally, they stay in their jobs.

Roman Mars [00:00:57] The Clinton administration, however, decided that they did want to get rid of the Travel Office staff.

Elizabeth Joh [00:01:02] So they had the FBI look into what seemed to be some financial problems in the office. Maybe that would be a good reason to fire them. And that turned out to be quite a mess. One of the staffers was eventually charged with embezzlement but later acquitted. These travel office firings eventually became known as Travelgate.

Roman Mars [00:01:20] Trust me, kids, the "gate" suffix given to all scandals was already tiresome.

Elizabeth Joh [00:01:24] Then Travelgate itself launched a number of investigations that lasted for the next several years. Much of the focus was about whether a President Clinton or First Lady Hillary Clinton were involved in the firings and whether they provided misleading comments about their involvement. But no criminal indictments were ever issued as a result. But in July of 1993, the start of Travelgate was just an enormous headache for the Clinton White House. Shortly before his suicide, Vince Foster spoke to James Hamilton for about two hours about the possibility of Hamilton representing him as a lawyer for any investigations into the Travel Office firings. Hamilton took three pages of notes. Almost two years after that meeting, Kenneth Starr asked a federal grand jury to issue subpoenas--these are requests for the production of documents--to Swidler & Berlin, the law firm where Hamilton was an attorney. Starr was the independent counsel appointed to look into a different Clinton ethics controversy that was known as the Whitewater affair. That controversy arose when the Clintons were involved in an ill-fated business partnership called the Whitewater Development Corporation. And, of course, it was the wide-ranging nature of Starr's investigation that led to his 1998 report and ultimately President Clinton's impeachment. And as for those notes before Foster's suicide, a federal trial court said that Starr couldn't see them. And in June of 1998, the United States Supreme Court agreed those notes had to be kept secret permanently, even though Foster had died. Now that 1998 Supreme Court case is about federal evidence law

not constitutional law. And it involves what's known as the attorney client privilege. But you know who is really upset about attorney client privilege?

Roman Mars [00:03:15] I think you can guess.

Elizabeth Joh [00:03:16] Probably the most important single person in the constitutional scheme, Donald Trump.

Roman Mars [00:03:25] I'm so glad nothing happened while we were gone.

Elizabeth Joh [00:03:27] Yeah, nothing at all. Absolutely still. I'm surprised we're even back.

Roman Mars [00:03:32] Okay, here we go. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length where we take the tweets and specious legal analysis of the 45th President of the United States and use them to examine our rights 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 [00:04:14] So let's turn to the law. The law of evidence determines what kinds of information can be admitted in a legal proceeding. And in our system, the core idea is relevance--admitting information that will further the legal question or issue at stake. But there are a number of exceptions to the idea that relevant evidence can be admissible. And one longstanding and important one is called the attorney client privilege. The basic idea here is simple. You should be able to keep secret the things you say to your lawyer. That's true even if what you say to your lawyer might be really important to determine a legal proceeding. So, to make things simple, the privilege means that you, the client, can refuse to answer a question about what you said to your attorney. And you can also prevent your attorney from revealing what you said. That's the core of the attorney client privilege. In its 1998 decision to keep secret Vincent Foster's conversation with his lawyer, the United States Supreme Court noted that the attorney-client privilege is, quote, "one of the oldest recognized privileges in the law. So why do we have such a rule? Well, it's because our legal system has made a social choice that it's important for people to be able to speak confidentially and candidly to their lawyers.

Roman Mars [00:05:30] If that information wasn't privileged--that is, secret--then people wouldn't be able to talk freely to their lawyers and get good legal advice and behave lawfully.

Elizabeth Joh [00:05:40] And in the end, we'd all be worse off in that world. That's the usual justification for this rule. But the attorney client privilege doesn't cover every single thing you might say to a lawyer. For the privilege to apply--that's this wall of secrecy--you have to be making some communication to a lawyer that's confidential for the purpose of legal advice. So, let's explore that a little bit further. A communication can be a conversation or a memo. What about your identity--the mere fact that you're consulting a lawyer? I'll say more about that in a minute. Well, usually courts allow questions about that, with some exceptions. You have to be making a communication in a lawyer-client relationship. So, of course, that's the case when you're paying a lawyer. But the privilege can also apply if you're talking to a lawyer to decide whether or not to hire that person at all. And remember, the public policy idea here is that recognizing this privilege means that we want to encourage people to seek legal advice. And it really doesn't matter if money doesn't change hands. Think about it. We have pro bono or free lawyers all the time.

Roman Mars [00:06:47] And they have the same attorney client privilege.

Elizabeth Joh [00:06:49] For the privilege to apply to your case, the communication also has to be confidential. So, for example, if you talk to your lawyer for advice, but you do so with a bunch of your friends around, that's probably not confidential enough to be covered by the privilege. And finally, if you want the privilege to apply, you have to be talking about legal advice. If you've got a lawyer friend--I'm sorry--if you're talking about sports or the movies, that's not covered by the privilege. So, what subjects can you talk about when you want to rely on the attorney client privilege? Well, the attorney client privilege can protect your conversation with your lawyer for things that you did in the past, even if you did illegal things in the past. The idea here is we want you to get good legal advice. But the privilege doesn't apply if you decide you want to get advice from a lawyer about how to commit a crime in the future. This legal doctrine is called the Crime Fraud Exception. In a 1933 case, Supreme Court Justice Cardozo famously stated that "the privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." In short, if you're seeking legal advice because you want to seek help to commit a crime, that can't be kept secret.

Roman Mars [00:08:07] So what does this have to do with Trump?

Elizabeth Joh [00:08:09] Well, on Monday, April 9th, FBI agents in New York City executed a search warrant at the office and hotel room of Michael Cohen. The agents seized ten boxes of documents and about a dozen electronic devices and computer hard drives. Who's Michael Cohen? He's not the president's lead counsel for the special counsel investigation. That's John Dowd, who quit in March. He's not the White House counsel who reportedly threatened to quit rather than carry out Trump's order to fire Robert Mueller last June. That's Don McGahn. He's not the president's lawyer representing him for the special counsel investigation as a volunteer. That's former New York City Mayor Rudy Giuliani. Instead, Michael Cohen is the president's longtime personal lawyer, also known as his fixer. Cohen is a lawyer who drew up a nondisclosure agreement with porn star Stephanie Clifford, better known as Stormy Daniels. Daniels was paid \$130,000 as part of that agreement on November 27th, 2016. That was just 12 days before the election. Daniels stated in a TV interview that she received the money in exchange for keeping quiet about an alleged sexual encounter with the president in 2006.

Roman Mars [00:09:22] And now Cohen appears to be the target of a criminal investigation.

Elizabeth Joh [00:09:25] We don't know a lot about this investigation because the government hasn't made much of it public, including why Michael Cohen is under investigation and for what possible crimes. But as soon as the news of the FBI raid broke, the president made his unhappiness known. As the president was beginning to meet with military and national security officials about possible action on Syria, Trump spoke to reporters the same day of the raid. And he said, "So I just heard that they broke into the office of one of my personal attorneys, a good man. And it's a disgraceful situation. It's a total witch hunt. I've been saying it for a long time. I wanted to keep it down. We have given, I believe, over a million pages worth of documents to the special counsel. And it's a disgrace. It's, frankly, a real disgrace. It's an attack on our country in a true sense. It's an attack on what we all stand for. So, when I saw this and when I heard it--I heard it like you did--I said, "That is really now in a whole new level of unfairness. So, this has been going on. I saw one of the reporters who is not necessarily a fan of mine--not necessarily very

good to me--he said, in effect, that this is ridiculous. This is now getting ridiculous. They found no collusion whatsoever with Russia. The reason they found there was no collusion at all. No collusion." Now, whether this is an attack on our country is the president's opinion. But stating that the execution of the Cohen warrant as a break in is fiction. If the FBI executed a search warrant, that means that a federal magistrate judge agreed with the government that there were enough facts to establish probable cause that evidence of a crime existed at Cohen's hotel room and office. Probable cause is the legal standard for warrants under the Fourth Amendment. And as an aside, Special Counsel Robert Mueller didn't secure these warrants himself. Cohen's lawyer--that's the president's lawyer's lawyer--said that the search came about from a referral from Mueller. But it was actually carried out by the U.S. attorney's office in the Southern District of New York. So, these are the federal prosecutors working in Manhattan, and they're independent of the special counsel. But what's unusual here is that the FBI executed a search warrant on a lawyer's files.

Roman Mars [00:11:43] Remember that the attorney client privilege is a well-recognized legal idea.

Elizabeth Joh [00:11:48] So when the government decides to search a lawyer's files, federal prosecutors have special rules when they decide to do that. Much of what the government is supposed to do is spelled out in the U.S. Attorney's manual. That's the set of guidelines federal prosecutors are supposed to follow. So, what are these special rules? Federal prosecutors are supposed to, for instance, try other means first, such as obtaining a subpoena.

Roman Mars [00:12:12] That's really just a request to get someone to turn over their own documents.

Elizabeth Joh [00:12:16] A search of a lawyer's files, however, should have high levels of approval. So, this wasn't the decision of one low level prosecutor. And maybe most important is the complicated review process of the materials that are seized from a lawyer's files. Any time the government seizes an attorney's files, there's a good chance that they'll have in their possession the things that are protected by the attorney client privilege. In other words, these are things that the government is not supposed to look at, at all. So how do they separate this material? Well, one method is that the government can establish two sets of investigators--a clean team and a dirty team. That dirty team is also called the "taint team." It's the taint team's job to go through everything seized and determine what is covered by the attorney client privilege and what isn't. If there's a dispute or something questionable, the judge would look at it. Another method is for the judge to appoint a "special master." That's just a fancy term for a neutral third-party lawyer to do this job. And keep in mind that not everything seized from a lawyer's files can be kept secret. Some materials might have nothing to do with confidentially seeking legal advice in a lawyer client relationship. And if there's any legal advice sought about breaking the law in the future, the crime fraud exception removes that right to secrecy.

Roman Mars [00:13:36] Predictably, Trump tweeted about the seizure of Cohen's files.

Elizabeth Joh [00:13:39] On April 10th, early in the morning, he tweeted, "Attorney client privilege is dead!" A few minutes later, he tweeted, "A TOTAL WITCH HUNT!!!" Of course, the privilege isn't dead. There is currently a dispute between the government and Cohen. On April 13th, Cohen's lawyers filed a motion for a temporary restraining order. This is really just an attempt by Cohen to try and stop the government from going through the

seized materials. Over the following weekend, Trump tweeted, "Attorney client privilege is now a thing of the past. I have many (too many!) lawyers and they are probably wondering when their offices, and even their homes, are going to be raided with everything, including their phones and computers, taken. All lawyers are deflated and concerned." "All" is probably not true. And now the president is legally involved, too. On April 13th, the federal judge who is reviewing these attorney client privilege claims allowed President Trump to be an intervenor. When you're an intervenor, you're not actually a party to the case, but you have certain arguments that you want to make because you have a legal interest in that case. And remember, the president is one of Cohen's clients.

Roman Mars [00:14:58] So who else is a client of Cohen's? It turns out that Cohen doesn't have that much business.

Elizabeth Joh [00:15:03] He stated that he had three clients. One was President Trump. Another one was Elliott Broidy, a Republican fundraiser for whom Cohen drew up another nondisclosure agreement regarding an affair Broidy had with a former Playboy playmate. But Cohen's lawyers didn't want to name the third client because they said it would be too embarrassing. Judge Kimba Wood wasn't persuaded by that reason and, at a court hearing on April 16th, ordered Cohen's lawyer to disclose the client's identity during the hearing. Client number three turned out to be Sean Hannity, the Fox News host. Hannity, of course, has been a very vocal supporter of the president. Hannity then responded in a series of his own tweets as soon as his identity became public. One tweet stated, "Michael Cohen has never represented me in any manner. I never retained him, received an invoice, or paid legal fees. I have occasionally had brief discussions with him about legal questions about which I wanted his input and perspective." He later also tweeted, "I assumed these conversations were confidential. But to be absolutely clear, they never involved any matter between me and a third party." Well, Hannity seems to think that an invoice matters--it doesn't--and that formal representation is the key. It isn't necessarily. So right now, the main legal question in the Cohen case is who gets to review all of this material seized from Cohen's office and hotel room first. Trump has already lost one argument. His lawyers argued that the president should be the first one to look through the seized materials before the government does. The president's lawyers--not Cohen, but in fact, a different set of lawyers--claim that, quote, "in the highly politicized, even fevered, atmosphere that envelops this matter, it is simply unreasonable to expect that a team of prosecutors could safeguard the important interests of the president."

Roman Mars [00:17:04] Judge Wood rejected that argument.

Elizabeth Joh [00:17:06] But the federal judge is now currently deciding whether or not she should appoint a special master to sort through these files or to allow the government to use its clean team/taint team approach. Also, part of this picture is Michael Avenatti, the lawyer representing Stormy Daniels. Judge Wood permitted Avenatti to speak in a closed meeting with the other lawyers on April 13th. So, this is just a lot of lawyers and lawyers' lawyers.

Roman Mars [00:17:32] Lawyers all the way down.

Elizabeth Joh [00:17:33] Each of the interested parties here is making a claim in this very public case. I'll note one that Cohen's lawyers made. "As the court is surely aware, there is a growing public debate about whether criminal and congressional investigations by the government are being undertaken impartially, free of any political bias or partisan motivation. It is, in this climate, the government that executed an unprecedented search

warrant upon the personal attorney of the President of the United States." On April 13th, the attorney arguing for the federal prosecutors stated of President Trump, "His attorney client privilege is no greater than any other person who seeks legal advice."

Roman Mars [00:18:19] No greater and no less, which seems like a good thing. More Trump Con Law after this...

Elizabeth Joh [00:18:25] And a little postscript. There's a link between Trump and Foster, too. When asked about Foster's death in 2016, then-candidate Trump observed that "Foster knew everything that was going on, and then all of a sudden he committed suicide." Trump described the death as "very fishy."

Roman Mars [00:18:47] Does the fact that they raided Michael Cohen's office mean that they think some kind of crime was committed by a client of Michael Cohen with the help of Michael Cohen?

Elizabeth Joh [00:18:56] Well, I think the most we can say is that the fact that a judge--and that's a different party in the government than the prosecutors--agreed with federal prosecutors that if you go to Michael Cohen's office and home, there is enough evidence to believe that there is some information regarding a crime there. How the crime was committed--for what crime, exactly--we don't know because the government has redacted or blacked out all that information on the publicly available documents. So, it's not clear whether, you know, in what situation Michael Cohen may have committed a crime. But it's possible he used his job as an attorney--perhaps with one of his clients, and he only has three--to commit a crime. Or one of his clients perhaps might have relied on this advice to commit a crime or to ask about a crime. So, if it's about past conduct, even if it was past illegal conduct, that's covered by the attorney client privilege. But if there is any indication that any of this advice was sought to commit a crime in the future--the future being at the moment, when you ask for the advice--then that veil of secrecy that normally the attorney client privilege provides is lifted. So that's what the exception to the attorney client privilege means. It means that if you're going to use this advice to do something in the future that's unlawful, you can no longer keep that secret. So even if there are a number of privilege files--again, totally speaking hypothetically--if some of these things were pieces of communications used to commit a crime in the future at the time the advice was sought, then that's not covered by the attorney client privilege. So, again, presumably, that's why the search warrant was issued or authorized, rather. Some magistrate judge said, "okay, you've convinced me." So, what happens in search warrant situations is that there's a lengthy narrative by the prosecutors. They say, "We have all of this evidence so far suggesting that a crime has been committed and evidence of a crime exists in X place. Let us go search that place." And the judge reads that lengthy narrative--that's called the affidavit--and says, "Okay, go ahead and search it." Now, the problem is we, the public, have no idea for what crime--whether it's related to Cohen being an attorney. Maybe it has nothing to do with him being an attorney, in which case we really aren't talking about attorney client privilege matters. But at this point, the assertion of the privilege, presumably as a way of Cohen's lawyers--that's the president's lawyer's lawyers--making an argument to try and, you know, slow down things, which is a typical tactic in all these kinds of cases. I think one important thing to remember here is that even though it's a kind of a dispute about a rule of evidence that people may have heard a little bit about just from watching legal shows on TV and stuff, what's interesting here is that the president, again, is trying to assert that "there's something special about me. I get to assert these claims. I get to look at this material first because I am the president of the United States." And the government's retort to that is: "You don't get any better rights than any other person who

has this kind of claim of privilege." And what we've seen in this administration is many iterations of this kind of issue. Is the president such a special person that he can't be sued in some situations? Is the president such a special person that he can assertively make certain kinds of claims? You know, it's not a novel issue. But it's come up with such frequency in the past year and a half that it's been pretty remarkable.

Roman Mars [00:23:03] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. The music in this specific episode is from Lazerbeak and the band SHREDDERS. You can find out more about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.

Elizabeth Joh [00:24:05] "Deflated and concerned."

Roman Mars [00:24:07] Do you feel deflated? I mean, I know you do, actually, but not because of this.

Elizabeth Joh [00:24:11] Different reasons.

Roman Mars [00:24:11] Alright. Thanks.