

Confrontation Clause

Roman Mars [00:00:00] One morning in September of 1922, Raymond Schneider and Pearl Balmer were heading to a well-known lover's lane in New Brunswick, New Jersey, future birthplace of Roman Mars. But on this sad day under a crabapple tree, they found another couple lying in the grass.

Elizabeth Joh [00:00:17] The man was dressed in a gray suit, and his face was covered with a Panama hat. The woman lying next to him wore a blue polka dotted dress. A scarf covered her face. Both had been shot dead. And love letters had been scattered over their carefully posed bodies. The slain man was Reverend Edward Wheeler Hall, the 41-year-old rector of the local church. The woman was Eleanor Mills, a pretty 34-year-old who sang in the church choir. Both were married, but not to each other. The police heard a curious story from Jane Gibson, a local pig farmer, who claimed to have seen two men and two women arguing near the apple tree on the night of the murder, some 36 hours before the bodies were discovered. She said she'd ridden out into the night on her mule, Jenny, because she thought she'd heard some corn thieves. Gibson, whom reporters dubbed "The Pig Woman," claims she saw the murdered man's wife, Frances Hall, at the scene of the crime. The widow and her two brothers appeared to be prime suspects. But a grand jury failed to issue an indictment, and years passed. In 1926, The New York Daily Mirror reported the existence of new evidence in the case. The hints in the reporting of a coverup created renewed pressure on the case. Investigators took another look, and a grand jury issued indictments against Hall's widow and her two brothers. All of them were charged with first degree murder.

Roman Mars [00:01:46] This was a tabloid-ready case--a gruesome and staged murder scene, an illicit affair, and the fact that the state's star witness was called the Pig Woman. And her alleged firsthand account had grown more colorful and detailed over the years.

Elizabeth Joh [00:02:01] The Wheeler-Hall murder trial began on November 3rd, 1926, and it made the front page of The New York Times again and again that fall. Although the case may not be famous now, it was considered one of the trials of the century at the time. By the time the murder trial took place, though, the state faced a problem. The so-called ace of the prosecution, the Pig Woman, had become seriously ill with cancer. Her doctors said she was too ill to testify. But remember, she was the state's star witness. The solution worked out by the prosecutors and the Pig Woman's doctors was this: On November 18th, 1926, the Pig Woman was driven by ambulance to the courthouse in Somerville, New Jersey. As the New York Times reported on its front page that day, prosecutors had an iron hospital bed installed in the pit before the judge's bench. The Pig Woman testified while lying in bed with a nurse and a doctor at her side. According to the New York Times' reporting that day, "the defense has let it be known that the cross-examination of Mrs. Gibson will be exceptionally severe. The attorneys say that by their duty to their clients, they are charged with a solemn obligation to inquire searchingly into Mrs. Gibson's narrative." And they did. The Pig Woman's testimony was decidedly inconsistent. Maybe even worse was the courtroom presence of her 76-year-old mother. According to the reporters there that day, the woman peered at her daughter testifying from bed and muttered, "She's a liar. A liar, liar, liar. That's what she is." The jury wasn't convinced either. On December 3rd, 1926, Hall's widow and her two brothers were acquitted of first-degree murder after just five hours of deliberations. And the case remains unsolved. The defense attorneys for Mrs. Hall and her two brothers were present for the direct testimony of the Pig Woman. They were also able to cross-examine her. The Constitution guarantees this opportunity to criminal defendants--to meet your accuser in court. It turns out that

President Trump--by now almost certainly facing impeachment by the House and trial in the Senate--has been making a similar claim.

Donald Trump [00:04:21] The whistleblower gave a very inaccurate report about my phone call. My phone call was perfect. It was totally appropriate. The whistleblower should be revealed.

Elizabeth Joh [00:04:36] It sounds like a good argument--that he should have the opportunity to confront adverse witnesses. But is that really what the Constitution guarantees for the president?

Roman Mars [00:04:46] It's time to find out. This is What Trump Can Teach Us About Con Law--an ongoing monthly series of indefinite length, where we take the tweets of the 45th president and his critics and use them to examine our Constitution like we never have before. Our music is from Doontree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. The Constitution's Sixth Amendment says that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." This phrase is referred to as the Confrontation Clause. The Supreme Court has called it "a bedrock procedural guarantee" in criminal cases.

Elizabeth Joh [00:05:56] The idea behind the clause is a rejection of secret, adverse witnesses. So, here's the idea: If the government wants to use witness testimony, they shouldn't hide it from the criminal defendant, and the defendant should have an opportunity to cross-examine those witnesses if he wishes. This is a guaranteed right for criminal defendants. The Constitution's very explicit about that. But it's just for criminal cases. A Confrontation Clause doesn't apply to civil cases, no matter how serious the consequences might be. And it doesn't apply to every single part of a criminal proceeding. So, for example, the Supreme Court has made it clear that the Confrontation Clause doesn't apply to preliminary hearings. These are hearings before trial where the prosecutor has to show that there's enough evidence to charge the defendant. In other words, there's no Confrontation Clause right during government investigations. Think of an ordinary criminal case--one that starts off with an informant who tips off the police. Then imagine the police do their own investigation, and the informant is just the starting off point. The police find incriminating evidence, witnesses to the crime, and so on. If that investigation becomes a formal prosecution and the defendant faces all kinds of incriminating information, the government may not need the informant to testify at trial. Now, with some exceptions, the defendant won't have a right to find out who that informant is.

Roman Mars [00:07:25] Now, let's get to Trump.

Elizabeth Joh [00:07:26] A lot has happened since an anonymous whistleblower's complaint became public a few months ago. Remember that The Washington Post reported in the middle of September that a whistleblower--somebody in the intelligence community--had filed a complaint that Trump made some sort of promise in a communication with a foreign leader. On September 25th, the White House released a summary of the phone conversation in question. It's not a word for word transcript, but we can call it that for now. The transcript referred to a July 25th phone call between Trump and the newly elected Ukrainian president, Volodymyr Zelensky. The whistleblower said that Trump pressured Zelensky to open an investigation into Joseph Biden and his son Hunter, who was a director of a Ukrainian energy concern, Burisma. We learned from the transcript, which was released by the White House itself--

Newscaster [00:08:20] At one point, President Trump said, "I'd like for you to do us a favor," and pushed for Volodymyr Zelensky to look into Democratic rival Joe Biden.

Elizabeth Joh [00:08:29] And to be clear, there's never been any serious evidence backing up the claim that either Joe Biden or his son Hunter have done anything illegal. And we now know much more of the background. Trump had \$390 million in military assistance withheld from Ukraine while this favor was being negotiated. The aid was ultimately released after congressional pressure. And in the background of that July 25th phone call was a set of conversations among Trump administration officials to have the Ukrainian government open a public investigation into the Bidens in exchange for military support and a public invitation to the White House.

Roman Mars [00:09:10] Central to these conversations were Kurt Volker, the former U.S. special envoy for Ukraine, Bill Taylor, the diplomatic chief of mission in Ukraine, and Gordon Sondland, the U.S. ambassador to the European Union. Sondland was a major Trump donor but had no diplomatic experience prior to this appointment.

Elizabeth Joh [00:09:29] On September 9th, Taylor, the career diplomat, texted Sondland, the political appointee, and said, "As I said on the phone, I think it's crazy to withhold security assistance for help with a political campaign." And Sondland texted back, "Bill, I believe you were incorrect about President Trump's intentions. The president has been crystal clear. No quid pro quos of any kind." And Trump's personal lawyer, Rudy Giuliani, turns out to have been centrally involved in a campaign to dig up dirt on the Bidens that ran against official U.S. policy toward Ukraine. So, all in all, the whistleblower's complaint summarizes two very serious claims--first, that Trump was involved in a corrupt use of his official powers for his own political and personal purposes, and second, that there were actions taken by White House officials to cover all of this up.

Roman Mars [00:10:24] Since the news of this Ukraine story broke, the White House and the Republicans have offered a constantly changing set of reasons as to why Trump's actions were not wrong.

Elizabeth Joh [00:10:34] First, there was the denial of a quid pro quo, a corrupt exchange. On September 24th, Trump tweeted, "You will see it was a very friendly and totally appropriate call. No pressure. And unlike Joe Biden and his son, no quid pro quo. This is nothing more than a continuation of the greatest and most destructive witch hunt of all time." Then on October 4th, Trump suggested that any attempt to investigate the Bidens was fine because he was doing it to end corruption, not to help himself. "As president, I have an obligation to end corruption, even if that means requesting the help of a foreign country or countries. It is done all the time. This has nothing to do with politics or a political campaign against the Bidens. This does have to do with their corruption."

Roman Mars [00:11:25] On October 31st, Trump tweeted, "Read the transcript." Everyone did. And the House began a series of closed-door depositions--that's testimony under oath--of administration officials who knew about the efforts in the Trump White House to pressure Ukraine to investigate the Bidens.

Elizabeth Joh [00:11:41] Some of the people testifying were actually present during that July phone call. Kurt Volker, Bill Taylor, and Gordon Sondland--the officials in those texts--have all testified before the House in the last couple of weeks. So has Lieutenant Colonel Alexander Vindman, a Ukraine expert on the National Security Council, who was

on that July call. Vindman testified that he was alarmed by the call and, quote, "did not think it was proper." Fiona Hill has also testified--she's the former Trump White House adviser on Russia. Hill testified that as Sondland talked about an agreement the White House had with the Ukrainians, her boss, John Bolton, was, quote, "looking completely alarmed." Bolton was Trump's former national security adviser who has since quit or was fired, depending on which Twitter accounts you're following. And then on October 17th, acting White House Chief of Staff Mick Mulvaney held a press briefing. When asked about the Zelensky call, Mulvaney said this--

Mick Mulvaney [00:12:42] Get over it. There's going to be political influence in foreign policy. I'm talking, Mr. Carl. That is going to happen. Elections have consequences. And foreign policy is going to change from the Obama administration to the Trump administration...

Elizabeth Joh [00:12:56] It became clear that denying the existence of a corrupt exchange was going to be more and more difficult. Remember Gordon Sondland? He's the ambassador to the European Union who texted Kurt Volker that Trump was not involved in a quid pro quo on that July phone call. He initially testified on October 17th to house investigators and said he knew nothing about a Ukraine quid pro quo. After a number of other people who knew about the call testified otherwise, Sondland changed his mind. And on November 4th, Sondland revised his statement. He said, quote, "I now do recall a conversation in which military aid would be suspended until there was a public statement of an investigation into the Bidens."

Roman Mars [00:13:42] And now new defenses are emerging.

Elizabeth Joh [00:13:45] On November 7th, Senator Lindsey Graham offered this explanation--

Lindsey Graham [00:13:50] What I can tell you about the Trump policy toward the Ukraine--it was incoherent. It depends on who you talk to. They seem to be incapable of forming a quid pro quo.

Elizabeth Joh [00:13:59] So in other words, Trump is too inept to engage in this kind of behavior. Then there was this explanation. Senator Rob Portman said on October 29th, "I thought it was inappropriate for the president to ask a foreign government to investigate a political opponent. I also do not think that it's an impeachable offense."

Roman Mars [00:14:18] On November 10th, Representative Mac Thornberry said on a Sunday morning talk show, "I believe that it is inappropriate for a president to ask a foreign leader to investigate a political rival. I believe it was inappropriate. I don't believe it was impeachable. So, it's wrong. This is not impeachment level wrong."

Elizabeth Joh [00:14:37] Trump, however, wasn't too pleased with this. On November 10th, he tweeted, "The call to the Ukrainian president was perfect. Read the transcript. There was nothing said that was in any way wrong. Republicans, don't be led into the fool's trap of saying it was not perfect, but it is not impeachable. No, it is much stronger than that. Nothing was done wrong." The defense of that July conversation will probably change again because things are happening very quickly. On October 31st, the House voted 232 to 196 to pass a resolution that establishes the rules for the impeachment inquiry. This was a highly partisan vote. No Republicans voted in favor of the resolution, and two Democrats voted against it. On November 6th, House Intelligence Committee

Chair Adam Schiff announced that the House will be holding public televised hearings starting on November 13th. The first people to testify have already provided hours of testimony, but this will be the first time the public will be able to hear what they have to say live on television.

Roman Mars [00:15:42] One Republican argument in the Ukraine story has not disappeared. Officially, we still don't know who the whistleblower is, although the president's son, Don Jr. tweeted out the supposed name of the whistleblower on November 6th. Others have too.

Elizabeth Joh [00:15:56] The whistleblower's name has been kept confidential by U.S. Officials. And that's consistent with the federal law designed to protect whistleblowers. And it's that anonymity that has been the subject of Trump's frequent tweets. On September 29th, he tweeted, "Like every American, I deserve to meet my accuser, especially when this accuser, the so-called 'whistleblower,' represented a perfect conversation with a foreign leader in a totally inaccurate and fraudulent way." On October 20th, Trump tweeted, "This scam going on right now by the Democrats against the Republican Party and me was all about a perfect phone call I had with the Ukrainian president. He's already stated, 'No pressure.' Where's the whistleblower?" On November 2nd, Trump tweeted, "The whistleblower has disappeared. Where's the whistleblower?" And on November 4th, he tweeted, "The whistleblower gave false information and dealt with corrupt politician Schiff. He must be brought forward to testify. Written answers are not acceptable. Does he even exist? Where is the informant? Con." And November 9th: "Whatever happened to the so-called informer to whistleblower number one? Seems to have disappeared after I released the transcript of the call. Shouldn't he be on the list to testify? Witch hunt." Adam Schiff, the chair of the House Intelligence Committee and one of the leading figures in the impeachment inquiry, has said that the House may not actually have to ask the whistleblower to testify. He said on October 13th--

Adam Schiff [00:17:33] Well, our primary interest right now is making sure that that person is protected.

Elizabeth Joh [00:17:38] Schiff also noted that calling the whistleblower might not be necessary because of all of the other evidence the House had already gathered.

Roman Mars [00:17:45] So what is all this?

Elizabeth Joh [00:17:47] On the internet, there are dozens of people who are tweeting and posting that this is a serious violation of the Constitution's Confrontation Clause.

Roman Mars [00:17:55] So does the Constitution give Trump the right to meet the whistleblower? The short answer is no.

Elizabeth Joh [00:18:02] Remember that the Constitution's Confrontation Clause says, "Defendants can confront adverse witnesses in all criminal prosecutions." Impeachment is not a criminal prosecution. The very worst thing that could happen to Trump would be removal from office. There's no other penalty. And there's good reason for people to be confused. Nikki Haley, the former ambassador to the U.N., said in a television interview on November 8th--

Nikki Haley [00:18:30] Norah, impeachment is like the death penalty for a public official.

Elizabeth Joh [00:18:36] Actually, only the death penalty is like the death penalty. So, the clause just doesn't apply to the impeachment process. It's not a prosecution. It's basically a constitutionally specified employee review and firing. And as far as specific procedures are concerned, the Supreme Court has made it pretty clear in a different context that Congress has the ability to set their own rules about how to run an impeachment proceeding. You can't complain to the courts about it. But you know, that wouldn't be any fun if we stopped there, so let's humor this argument for a second. Maybe we could say that impeachment is close enough to a criminal prosecution so that we should consider applying some of the same rights that criminal defendants receive. But that doesn't quite work either. If we said that an impeachment proceeding is like a criminal proceeding, then what the House is doing is similar to what police and prosecutors do before trial--investigation and pretrial proceedings. Any actual trial-like trial will take place in the Senate. That's what the Constitution provides for explicitly. So maybe we could say that the House proceedings are like grand jury proceedings or a preliminary hearing. But these are not times when even ordinary criminal defendants can assert their rights under the Confrontation Clause. But let's go even further with the Republican argument. What if the Confrontation Clause were to apply to the House impeachment inquiry? Even then, it's still no good for Trump. The Confrontation Clause applies to testimonial evidence. When we talk about testimonial, what we mean is something like statements offered to prove some fact in a criminal proceeding. But right now, there's no indication that the House is going to introduce the whistleblower's testimony. So, let's go back to the analogy of a regular run of the mill criminal case. If the police got a tip from a confidential informant and that tip led them to a mountain of evidence that pointed to criminal wrongdoing, some of which was provided by the suspect himself, the government's not likely to say that the informant is a key witness. In this case, the informant just started off the investigation, and that's it.

Roman Mars [00:20:50] In fact, the more we have found out from the impeachment inquiry, the more we learn that most of what the whistleblower stated in the complaint has been confirmed by many other sources.

Elizabeth Joh [00:21:01] So remember the Wheeler-Hall case? The whistleblower isn't the Pig Woman--not even close--because recall that with the Wheeler-Hall murder case, it was the Pig Woman who started off the initial investigation. It was her so-called "eyewitness testimony" that led to the identification of the suspects in that case. And eventually, when the case went to trial, the government's entire case more or less hinged on her supposed eyewitness testimony. And it was because she was so unreliable as a witness that the case eventually fell apart and the defendants were acquitted. So, if we were to analogize that to what's happening with impeachment, it's not even close. The House has now heard testimony from a whole slew of people about this entire set of events in which there appears to be this corrupt exchange between Trump using his official powers for political purposes--personal political purposes--and a possible cover up as well. So, in a way, we don't really need to rely on the whistleblower at all. And this is a very, very different case.

Roman Mars [00:22:09] Say, for example, the whistleblower has completely made everything up.

Elizabeth Joh [00:22:12] Right.

Roman Mars [00:22:14] It's almost as if--and let's go back to the Wheeler case--the Pig Woman says that there were two men and a woman up on the hill, the police go show up, they find tire tracks and blood evidence and all this sort of stuff, then they find a person,

they investigate them, they find other witnesses, and then they prosecute that person. It doesn't even matter what sent them up the hill in the first place.

Elizabeth Joh [00:22:38] Exactly right. Exactly right. It's as if that starting point is almost irrelevant at this point.

Roman Mars [00:22:42] Because there's so many other corroborating witnesses.

Elizabeth Joh [00:22:44] There's so much else. There's so many witnesses. And in fact, as I said before, this is a case where, strangely, the suspect seems to erroneously believe that a transcript he put out is going to exonerate him. But it actually makes things pretty clear that there was some kind of exchange. So, let's do an update on a case. Let's return to a subject that we've covered before--presidential immunity. So, immunity here means legal protection from being sued, right? Very briefly, the Supreme Court has made two things clear--that a president can be sued for things he did before the presidency, and the president can't be sued for things he officially does as president, at least when you're seeking compensation. Trump's obviously been a plaintiff or a defendant in a lot of lawsuits during his presidency. But one case in particular has brought up the immunity issue in a very pointed way. So, in September, state prosecutors in Manhattan subpoenaed Trump's accounting firm--not Trump himself--for eight years of his personal and corporate tax returns. The subpoenas related to a criminal investigation into hush money payments that were made before Trump became president. This subpoena is one that asks only for Trump's private tax returns relating to businesses he owns as a private person. It doesn't involve anything he does as president. So, remember that Trump's former personal lawyer--not Giuliani, this is Michael Cohen--paid Stormy Daniels \$130,000 so she wouldn't talk about an alleged affair she'd had with Trump. New York state prosecutors are looking into whether these payments violated any state laws, such as filing false business records, and to what extent Trump or his private business may have been involved. And remember, we've never seen Trump's tax returns at any point. So, Trump responded by filing a lawsuit in federal court. And this was his argument--that a sitting president can't be subjected to any criminal investigation until he leaves the White House, especially when the investigation is being pursued by state prosecutors. Now, this is a sweeping argument about presidential immunity. It goes farther than anything the Supreme Court's ever said. So, Trump's claim is that the Constitution prohibits the Manhattan DA's office from investigating, prosecuting, or indicting the president while he's in office. So, remember what Trump said in 2016 about Fifth Avenue

Roman Mars [00:25:12] Right, that he could shoot a person in broad daylight on Fifth Avenue, and nothing would happen to him.

Elizabeth Joh [00:25:16] So that example came up when Trump's lawyers argued this case before the federal appellate court in New York. So, Second Circuit Judge Denny Chin asked Trump's lawyer, "What's your view on the Fifth Avenue example? Local authorities couldn't investigate? They couldn't do anything about it?" And Trump's lawyer responded, "I think once a president is removed from office--any local authority--this is not a permanent immunity." Judge Chin said, "Well, I'm talking about while in office." Trump's lawyer responded, "No." Judge Chin, incredulous, said, "Nothing could be done? That's your position?" Trump's lawyer said, "That is correct." So, on November 4th, the Federal Court of Appeals issued a ruling against Trump. So, among the observations the appellate court made is this one: "Assuming that the president cannot be prosecuted while he remains in office, it would nonetheless exact a heavy toll on our criminal justice system to prohibit a state from even investigating potential crimes committed by him for potential

later prosecution." And the appeals court noted that Trump's lawyers admitted that the immunity only lasts while he's president. The court says in its opinion, "There is no obvious reason why a state could not begin to investigate a president during his term, and with the information secured during that search, ultimately determine to prosecute him after he leaves office." So, on November 8th, Trump's lawyers announced their intention to seek review of the case with the United States Supreme Court. And the Court will have to decide whether or not to hear the case. And you know that Chief Justice Roberts desperately hopes, "Is there some way to avoid hearing this case?"

Roman Mars [00:26:59] You would think so. They could just not hear it. And then the appellate court is--

Elizabeth Joh [00:27:05] But it seems like a very important issue. And yet it's happening right on the verge of an election year. It's sort of a nightmare scenario for, you know, a very important question about something as momentous as presidential immunity right before Trump, who's in peril of impeachment, might have this case heard with a court whose Chief Justice would have to preside over the Senate trial of Trump himself. So, it's a mess.

Roman Mars [00:27:31] Right. So, you think they'll be forced to weigh in on it even if they uphold it?

Elizabeth Joh [00:27:37] Two choices are to either deny review, in which case the lower court's ruling would stand. It seems kind of iffy because it's so important of an issue. Or they grant cert in the case--they grant review in the case--and then they hear the case. But that will take some time, of course. And then there's this looming issue about immunity that's over the Court for a while that Roberts, presumably at some point in early 2020, will be presiding over the Senate trial. It's a very bizarre set of circumstances.

Roman Mars [00:28:05] Yeah. So, it seems like the simplest thing is to not review it, right?

Elizabeth Joh [00:28:08] Think of some procedural reason not to. I don't know.

Roman Mars [00:28:12] And so the coward's way out for the Court is just to say, "Make up some procedural thing--the reason not to see it."

Elizabeth Joh [00:28:20] Yeah. I mean, I wouldn't call it the "coward's way out," but, I mean, you know, the Court doesn't want to seem too political. And it's hard to avoid seeming political by a) taking the case--and no matter how it decides such a case, it still will be seen as political.

Roman Mars [00:28:36] Yeah. Wow. That's going to be something; we'll have to keep watch on that. Thanks so much. This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doontree Records, the Midwest Hip Hop Collective. You can find out more about Doontree Records, get merch, and learn about current tours at doontree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.