

Foreign Affairs

Roman Mars [00:00:00] On September 15th, 1983, Mario Cuomo and Tom Kean gave some unusual instructions to the Port Authority.

Elizabeth Joh [00:00:08] That's the agency that's responsible for most of the bridges, tunnels, and ports in the region. It's supervised by both the governors of New York and New Jersey. And in 1983, they were Cuomo and Kean. Port Authority officials were told to refuse to allow Andrei Gromyko to land at any of the airports in the region, as he had done many times in the past. Gromyko was a Soviet foreign minister, and he was planning to go to the 38th session of the United Nations in New York on September 27th. Kean told reporters that he and Cuomo "accomplished what we wanted to accomplish with the airport ban. We demonstrated the total indignation of the people of this country over the Soviet action. And Mr. Gromyko obviously received our message. "The governors of New York and New Jersey were protesting the destruction of a Korean Airlines flight by a Soviet fighter plane over the Sea of Japan on September 1st, 1983. The missile destruction of the plane killed 269 people, including 61 Americans. And it had departed from Kennedy Airport.

Ronald Reagan [00:01:17] This crime against humanity must never be forgotten, here or throughout the world. Our prayers tonight are with the victims and their families in their time of terrible grief. Our hearts go out to them...

Elizabeth Joh [00:01:29] The whole incident caused an international uproar.

Roman Mars [00:01:32] But can the governors actually do that? The background here is complicated.

Elizabeth Joh [00:01:38] A spokesperson for the U.N. said the governor's ban violated an agreement between the U.N. and the United States that should have allowed entry of all foreign envoys. But Gromyko could not have used the Soviet state carrier Aeroflot. President Reagan had banned the airline's flights for Soviet support of martial law in Poland. His workaround was flying in a special, noncommercial plane that was not barred by the president's sanctions. The U.S. State Department tried to intervene by offering Gromyko permission to land at a military airport. The Soviets refused. The State Department spokesman told reporters it could try to challenge the decision to close the airports in court. But litigating the case would stretch beyond the time that Gromyko was scheduled to go to the U.N. What was unusual about barring the Soviet foreign minister? These state governors were stepping into U.S. foreign policy, and foreign affairs are usually thought of as something only the federal government has the authority to engage in. As a practical matter, it would be confusing and chaotic if the states were allowed to participate in foreign affairs.

Roman Mars [00:02:46] But what about the federal government? Which branch has the primary responsibility of managing the country's foreign affairs?

Elizabeth Joh [00:02:53] It turns out that there isn't always a clear answer to this. Although all of the modern presidents have a ready answer: "Me." And the role of the president in foreign affairs matters now because it's becoming entangled in the House impeachment inquiry of President Trump and a 30-minute phone call with the Ukrainian president that might change the course of Trump's presidency.

Roman Mars [00:03:16] What does the constitution have to say about foreign affairs and the president? 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 of the United States 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. When you look at the Constitution, there are a few things that are clearly spelled out in terms of who is responsible for what in foreign affairs.

Elizabeth Joh [00:04:11] Some powers are given only to Congress. That includes the power to declare war and the power to raise and support armies and navies. Other powers are given just to the president. The Constitution says that the president is supposed to receive ambassadors and that he is the commander in chief of the military. And there are still other foreign affairs powers that are shared between Congress and the president. Treaties, for example, require cooperation between the president and the Senate. But the Constitution doesn't address every possible way that the president or Congress might try to act on behalf of the United States with other foreign nations. Think about it. You probably assume that American presidents can talk with foreign leaders and try to form policies and arrangements with them. But why? The case that constitutional law scholars usually turn to as a reference arises from a land war in what is now northern Argentina, southeastern Bolivia, and northern Paraguay. It's a dry, low-lying plane called the Gran Chaco. And both Bolivia and Paraguay laid claim to the land. The reason the two countries entered into a long running conflict over this territory, which hardly anyone lived in, was oil. The American Standard Oil Company discovered oil just west of the Chaco region in 1928. Everybody assumed that the Chaco would be filled with oil, too. Bolivia and Paraguay began fighting over the region in 1932 until they agreed to a cease fire in 1935. And there turned out to be no oil there at all. During the height of the conflict, it became clear that American weapons companies were profiting from the dispute. Congress passed a law in 1934 that banned sales of arms to either side in the Chaco war. But it was the form of the law that was a little unusual. Congress left it up to President Franklin D. Roosevelt to decide whether to ban the sales of arms to the warring countries. And he did. Despite the fact that it was now illegal to sell arms to Bolivia or Paraguay, the American Curtiss-Wright Corporation continued to ship bombers to Bolivia. And in 1936, federal prosecutors brought a criminal case against Curtiss-Wright and some of its employees. Was it constitutional for Congress to leave the decision of banning arms sales to President Roosevelt? The Supreme Court said yes. And if it had just said that, the decision wouldn't be especially famous. But Justice George Sutherland, who wrote the Court's opinion in the Curtiss-Wright case, instead used the case to make some sweeping statements about presidential power. Sutherland says that "when it comes to foreign affairs, the federal government has some inherent or implied powers." This means you can't find them in the Constitution; they're just there. And who has a special role here? Well, this is the most famous part of the Curtiss-Wright decision. Here's what Sutherland says--

Roman Mars [00:07:19] "In this vast external realm--with its important, complicated, delicate, and manifold problems--the president alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate, but he alone negotiates.

Elizabeth Joh [00:07:36] As Marshall said in his great argument of March 7th, 1800, "In the House of Representatives, the president is the sole organ of the nation in its external relations and its sole representative with foreign nations." This is very broad language. The Court suggests that the president of the United States has exclusive inherent authority not

written down in the Constitution when it comes to foreign relations and national security. Now, many constitutional law scholars have criticized the decision, saying things like, "Well, Sutherland quoted Marshall out of context, for instance." But the important thing is that this idea, which is known as the "sole organ doctrine," has been cited by presidents ever since to argue they can do whatever they want when it comes to foreign policy. "Curtiss right, so I'm right." That's the joke.

Roman Mars [00:08:27] Now let's get to Trump.

Elizabeth Joh [00:08:28] On October 2nd, Trump tweeted, "All the Do-Nothing Democrats are focused on is impeaching the president for having a very good conversation with the Ukrainian president. I knew that many people were listening. Even have a transcript. They have been at this stuff from the day I got elected. Bad for country." What was this all about? The news started in mid-September. On September 18th, The Washington Post reported that a whistleblower in the intelligence community had filed an official complaint on August 12th. The complaint alleged that Trump had made some kind of troubling promise or deal to a foreign leader, which later turned out to be Ukrainian President Volodymyr Zelensky in a call on July 25th. And the call focused on investigating Joe Biden and his son, Hunter. The day after the Post story broke, Trump tweeted, "Another fake news story out there that never ends. Virtually any time I speak on the phone to a foreign leader, I understand there may be many people listening from various U.S. agencies. Not to mention those from the other country itself. No problem. Knowing all of this, is anybody dumb enough to believe that I would say something inappropriate with a foreign leader while on such a potentially heavily populated call? I would only do what is right anyway and only do good for the U.S.A." On September 23rd, Trump told reporters.

Donald Trump [00:09:58] I didn't do it. You take a look at that call. It was perfect. I didn't do it. There was no quid pro quo.

Elizabeth Joh [00:10:05] On September 24th, House Speaker Nancy Pelosi announced that the House was now officially engaged in an impeachment inquiry against Trump.

Nancy Pelosi [00:10:14] The president must be held accountable. No one is above the law.

Elizabeth Joh [00:10:19] Trump responded that afternoon on Twitter, "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 a few hours later, he tweeted, "PRESIDENTIAL HARASSMENT," all caps. The next day, September 25th, the White House released a summary of that July phone call between Trump and Zelensky. What we now know is that Trump had been interested in trying to investigate whether there was something wrong with Joe Biden's attempts to fire Ukraine's then chief prosecutor, a man named Viktor Shokin. The theory behind this was that Biden, who was vice president at the time, was trying to stop an investigation into a Ukrainian energy company where his son, Hunter Biden, happened to be serving as director. To be clear, there is no evidence of any wrongdoing on Biden's part. Even Trump's former homeland security adviser, Tom Bossert, recently described this as a "debunked conspiracy theory." It is true that Biden was pushing for the firing of the Ukrainian prosecutor, but this was part of official Obama administration policy. He wasn't doing it for personal reasons. But that's not what Trump believed. On that July phone call with the president-elect of Ukraine, Trump had this exchange, according to the White House's own released summary. At one point, Zelensky

says, "We are ready to continue to cooperate for the next steps. Specifically, we are almost ready to buy more javelins from the United States for defense purposes." Javelins are anti-tank missiles. And then Trump responds, "I would like you to do a favor, though. There's a lot of talk about Biden's son--that Biden stopped the prosecution and a lot of people want to find out about that. So, whatever you can do with the attorney general would be great. Biden went around bragging that he stopped the prosecution, so if you can look into it... Sounds horrible to me." During the entire phone call, there are also at least five separate times that Trump asked Zelensky to talk to Bill Barr, the attorney general, or Rudy Giuliani, his personal lawyer, about investigating Biden. We've learned since that the White House had also blocked \$391 million in aid to Ukraine shortly before the phone call was made. The funds were eventually released after congressional pressure. And texts provided to the house by Kurt Volker provide even more background to that White House call. Volker was a former U.S. special envoy for Ukraine. And the other figures in these texts are Gordon Sondland, the U.S. ambassador to the European Union and a political appointee of Trump--and there's also Bill Taylor, the diplomatic chief of mission in Ukraine. On July 19th, Volker texts Sondland and Taylor, "Most important is for Zelensky to say he will help investigation." You see, the newly elected president of Ukraine was looking for two things--aid from the United States, as well as a White House invitation to demonstrate American support. And on July 25th, right before Trump's call with Zelensky, Volker texted Andrii Yermak, a top aide to Zelensky, "Heard from White House. Assuming President Z convinces Trump he will investigate, get to the bottom of what happened in 2016, we will nail down a date for visit to Washington." Then Trump has his call with Zelensky, which now includes that infamous line, "I'd like you to do us a favor, though." After the phone call, there are more texts that try to set up a statement from the Ukrainian government, announcing formally it would pursue an investigation against the Bidens, just as Trump wanted. In one text, Sondland--that's the political appointee--tells Volker--that's the U.S. envoy--that Trump, quote, "really wants the deliverable." On September 1st, Ambassador Taylor texts Sondland and asks him directly, "Are we now saying that security assistance and White House meeting are conditions on investigation?" Sondland replies, "Call me." On September 9th, the day that the Congressional Intelligence Committees are told that a whistleblower complaint exists, Taylor texts Sondland and says, "As I said on the phone, I think it's crazy to withhold security assistance for help with a political campaign." Five hours pass. Keep in mind that the texts prior to this question look like the texts that we write all the time. There aren't any capitals. There's little abbreviations. They're ungrammatical. Sondland's text after this question is very different. He says, "Bill, I believe you are incorrect about President Trump's intentions. The president has been crystal clear no quid pro quos of any kind. The president is trying to evaluate whether Ukraine is truly going to adopt the transparency and reforms that President Zelensky promised during his campaign. I suggest we stop the back and forth by text." It has the tone of "There's nothing to see here." On September 26th, the House Intelligence Committee releases a declassified version of the whistleblower's complaint. It's a seven-page document that summarizes an alarming set of claims. The first full paragraph is worth quoting. "In the course of my official duties, I have received information from multiple U.S. government officials that the president of the United States is using the power of his office to solicit interference from a foreign country in the 2020 U.S. election. This interference includes, among other things, pressuring a foreign country to investigate one of the president's main domestic political rivals. The president's personal lawyer, Mr. Rudolph Giuliani, is a central figure in this effort. Attorney General Barr appears to be involved as well." The whistleblower also alleged that the White House moved the verbatim transcript of the Zelensky call from the computer system where these records are normally kept. It was moved to a computer system designated for especially sensitive government secrets--things like covert operations--to which only a very small number of people have

access. And the whistleblower says this wasn't the first-time information in the Trump White House had been used this way. These are two very serious allegations against the president--a corrupt use of presidential power and what looks like actions to cover it up. So back to the Constitution. Modern presidents all have had nonpublic meetings and phone calls with foreign leaders. The Supreme Court itself said in the Curtiss-Wright decision that a president, quote, "has the better opportunity of knowing the conditions which prevail in foreign countries. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials." In other words, that's what presidents do. And Trump hints that he's just trying to target corruption in Ukraine when he tweeted this on October 3rd, "As president of the United States, I have an absolute right--perhaps even a duty--to investigate or have investigated corruption. And that would include asking or suggesting other countries to help us out." But here's why the tweet is misleading. According to the White House's own released summary, Trump wasn't just generally interested in rooting out corruption in an ally. He wasn't--as the Supreme Court said in the Curtiss-Wright case--acting as the "sole organ of the federal government in the field of international relations." Have presidents spoken to foreign leaders about problems in their own countries? Of course. Have presidents promised aid to foreign nations to help them with their own internal problems? Of course. But we assume that presidents do these things on behalf of the United States not to serve themselves or to gain personal advantage for corrupt purposes. And that's the problem with the July call with the Ukrainian president. Trump doesn't appear to be acting at all like the sole organ of the nation. Instead, in the Zelensky phone call, Trump is using his presidential authority to dig up non-existent dirt on a political opponent for the 2020 election. If that sounds bad, it is.

Roman Mars [00:19:18] First, accepting foreign aid in an American election is illegal and can be prosecuted as a crime.

Elizabeth Joh [00:19:24] As the chair of the Federal Election Committee tweeted out on October 3rd, "I would not have thought that I needed to say this. Let me make something 100% clear to the American public and anyone running for public office. It is illegal for any person to solicit, accept, or receive anything of value from a foreign national in connection with a U.S. election. This is not a novel concept. Electoral intervention from foreign governments has been considered unacceptable since the beginnings of our nation. Our Founding Fathers sounded the alarm about foreign interference, intrigue, and influence. They knew that when foreign governments seek to influence American politics, it is always to advance their own interests, not America's. Anyone who solicits or accepts foreign assistance risks being on the wrong end of a federal investigation. Any political campaign that received an offer of a prohibited donation from a foreign source should report that offer to the Federal Bureau of Investigation." Now, federal law makes it illegal to knowingly solicit, accept, or receive from a foreign national any contribution or donation. The benefit doesn't have to be cash. It can be something of value, like damaging information against a political rival in an upcoming election. And other legal experts have brought up that Trump's conduct raises other federal laws, like the federal bribery statute. Federal law makes it a crime for a public official to corruptly demand anything of value in exchange for doing an official act. And Trump, who first denied that there was any quid pro quo, doubled down in front of reporters on October 3rd. He said--

Donald Trump [00:21:04] They should investigate the Bidens because how does a company that's newly formed--? And all these companies that you look at-- And by the way, likewise China just started an investigation into the Bidens...

Elizabeth Joh [00:21:18] This, of course, raises again the matter of whether a sitting president can even be charged with a crime. And remember, it's Justice Department policy that a president cannot be criminally charged.

Roman Mars [00:21:29] That brings up the second problem for Trump--impeachment.

Elizabeth Joh [00:21:33] The Zelensky call looks awfully like Trump is using his presidential authority to pressure a country dependent on the United States for aid and alliance to help him--help him for corrupt purposes--a smear campaign against a political opponent. Whether this merits any articles of impeachment will now be up to the House, and if they decide to do so, then the matter will move to the Senate. Through it, Trump will keep tweeting, as he did on October 2nd, "The Do-Nothing Democrats should be focused on building up our country not wasting everyone's time and energy on bullsh*t, which is what they have been doing ever since I got overwhelmingly elected in 2016. 223 to 306. Get a better candidate this time. You'll need it."

Roman Mars [00:22:21] So why is quid pro quo a huge part of the defense of what is happening here with this call with Ukraine?

Elizabeth Joh [00:22:30] So it's kind of classic misleading information, right? So, what do you think when you think of quid pro quo?

Roman Mars [00:22:35] I do something for you, and then you do something for me, and it's a requirement of that condition.

Elizabeth Joh [00:22:39] Right. So, notice the first defense that Trump has is "there was no quid pro quo. I didn't, you know, offer something in exchange for something else. I didn't offer Ukraine aid in exchange for dirt on Biden." Well, first of all, if you have a quid pro quo situation, it doesn't have to be "I will give you this, and then you will give me that."

Roman Mars [00:22:59] It doesn't have to be explicitly stated.

Elizabeth Joh [00:22:59] It doesn't have to be explicitly stated. And, you know, the Supreme Court and other lower courts have made it clear that when it comes to criminal cases regarding bribery or extortion, courts can't require that prosecutors have to say, "And this is where that explicit agreement occurred" because every criminal could get away with it if they just didn't have to say anything. So, you can infer an illegal quid pro quo from the circumstances, right? And here, the circumstances looked pretty suspicious. Now, the other problem is that if there is a quid pro quo, first of all, the concept of quid pro quo isn't necessarily illegal. It just means exchanging one thing for another. So that's what countries do all the time. You can imagine a country saying, "If you let us sell you soybeans, we'll lower tariffs." Like, there's nothing wrong with that. The only reason it's a problem is that if you have an illegal exchange, in other words, there's an exchange for corrupt purposes. And here the corrupt purpose may be that Trump is trying to use his office--his official authority--in a way to benefit himself and not acting on the part of the United States. And then there's the other issue--it kind of doesn't even matter for impeachment purposes if there was a quid pro quo. This was another Twitter exchange gone crazy because, you know, it seems as if you'd need to prove a quid pro quo in order for Trump to be impeached, right? And that comes from people seizing on the Constitution's Impeachment Clause, which says that someone like the president can be impeached for treason, bribery, and other high crimes and misdemeanors. So, everybody thinks, "Wow, we've got to figure out whether this fits bribery." But actually, you can also be

impeached for high crimes and misdemeanors, which could be things just like abusing your authority. So, in a way that doesn't really matter either. So, the no quid pro quo defense, of course, sounded good, but it kind of fails on lots of different bases.

Roman Mars [00:25:00] The idea of acting in the best interests of the United States--when you are someone like Trump, "Trump being president" is in the best interests of the United States. How do you determine what is in the best interests of the United States and how a certain thing is an abuse of power if the mindset of the GOP and Trump is "the GOP in power is in the best interest of the United States"?

Elizabeth Joh [00:25:21] Well, that's the most cynical way to view it, right? I mean, like the most non-cynical way to view it is to say, "Did this have anything to do with official policy? Like, the broader question is: Can presidents do things to say, "Look, I think there's a crime happening in your country, and I want to help you investigate it"? That sounds like a totally legitimate excuse, right? Or, like, if you want to move it to the domestic arena, you could say something like, "Maybe the president thinks that there's some serious criminal wrongdoing happening in the United States." There are official ways to do that. You can have a referral from the Justice Department. What you don't do is have the president call up the U.S. attorney and say, "Hey, I want you to check this particular guy out and see if we can prosecute him." I mean, that's the analogy, and that's why it's so troubling because it's just his own pet theory and he's trying to pursue it for his own benefit against a rival.

Roman Mars [00:26:09] You know, we've been doing this for a while now, and there's been all this talk about different levels of constitutional crisis. He has a habit of pushing on the boundaries. And the real constitutional crisis is this moment where the legislature has a written, documented constitutional authority to investigate the president. And he just flat out refuses it. It's kind of the fundamental story. Like, the first story we ever did was "What is the power of the Supreme Court at all?" It's just because we say it does.

Elizabeth Joh [00:26:41] Right. What are the power of the institutions? Because we believe in them. Yeah.

Roman Mars [00:26:44] And all of a sudden, this is really being fundamentally put to the test.

Elizabeth Joh [00:26:48] Sure. I mean, part of this is, you know, this now long running campaign on the part of Trump to delegitimize everything. "Don't believe the media. The courts--when they rule against me, they're biased. The House, led by the Democrats, is biased. You can't trust anything anybody says except me." And once you've hammered that message home to his supporters, then they're willing to accept anything he says. Nothing is true, even with regard to the whistleblower's complaint, which has been substantiated by things like the White House's own released summary of the call. Trump says, "Well, that's not true." It's just very confusing because it's unlike anything we've ever seen before. I mean, the president says, "Don't believe the thing that you're reading that we put out. Just believe what I tell you." And that is not just norm shattering, that is the crisis point.

Roman Mars [00:27:37] I mean, even for the contempt power to work, you'd still have to comply. At some point.

Elizabeth Joh [00:27:41] Right, you have to show up or be found or accept that you could be arrested. You know, we believed in the rules of the board game, and somebody comes in and just, like, overturns a table. We're not ready for that.

Roman Mars [00:27:54] Right.

Elizabeth Joh [00:27:56] We're just stuck.

Roman Mars [00:27:56] Yeah, we're just stuck.

Elizabeth Joh [00:27:59] Cheers.

Roman Mars [00:28:02] Here we go. 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 Doomtree Records, the Midwest Hip Hop Collective. 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.