

Taking the Fifth

Roman Mars [00:00:00] Are you now or have you ever been a member of the Communist Party?

Elizabeth Joh [00:00:03] This was the question posed to more than 40 actors, directors, writers, and movie studio executives called in to testify before the House Un-American Activities Committee in October of 1947. Why that question? Because in the 1940s and '50s, Americans had grown fearful about the perceived dangers of communism as the Cold War intensified between the United States and the Soviet Union. After World War II, members of the House Un-American Activities Committee turned their attention to what they thought were communist threats in Hollywood. Dozens of people from the film industry were called in to testify. And many of those subpoenaed cooperated fully. One of these friendly witnesses was Walt Disney, who claimed that communists had been responsible for a strike at his studio. Another friendly witness was the president of the Screen Actors Guild, who testified that there was a small clique of Communists who have attempted to be a disruptive influence. His name was Ronald Reagan. But a small group of screenwriters, producers, and directors banded together and refused to testify at all. They argue that being forced to answer whether they had ever been members of the Communist Party violated their First Amendment rights to free speech and association. The House Committee was unimpressed. And on November 24th, 1947, the full House of Representatives--in a 346 to 17 vote--decided to approve contempt citations against the group of ten men who had refused to testify. They would become known as the Hollywood Ten. In the spring of 1948, the Department of Justice successfully prosecuted two of the ten--screenwriters John Lawson and Dalton Trumbo. The cases of the remaining eight were put on hold until the first two cases remained final. And if Lawson's and Trumbo's lawyers were confident that the United States Supreme Court would reverse their convictions, they were wrong. In the summer of 1949, two liberal members of the Court, Justices Wiley Rutledge and Frank Murphy, died suddenly. And the conservative Justices who replaced them joined the majority that declined to review Lawson's and Trumbo's convictions. And as a result, all of the Hollywood Ten went to prison for sentences that range from six months to a year. But even when the Hollywood Ten were done serving their sentences, there was more punishment awaiting them. You see, in 1947, in November, the same month a Congress had voted to approve contempt citations against the ten, a group of studio executives gathered in the Waldorf Astoria Hotel in New York City. They emerged with an agreement, the Hollywood blacklist. No one admitting to or accused of being a communist would find work in the movie industry. That ban forced many people out of Hollywood. Some left the film industry, some fled the country, and others worked under assumed names to escape a blacklist that lasted until the 1960s. The first people targeted by that blacklist? The Hollywood Ten. And the refusal of the Hollywood Ten to testify before Congress? Remember, the group relied upon a claim to their First Amendment rights unsuccessfully. They chose not to rely on their Fifth Amendment rights--what's known as the "privilege against self-incrimination." Very soon after the Hollywood Ten were convicted, the Supreme Court made clear in a 1950 case that you could invoke your Fifth Amendment rights about questions of Communist Party membership. As a result, after the Hollywood Ten went to prison, some film industry people who were ordered to testify before the House Committee did rely on their Fifth Amendment rights. They stayed silent. They could not be punished for that silence--at least not by the government--because remember, admitting to or even being accused of Communist Party membership meant certain punishment under the Hollywood blacklist. It meant professional exile. You'd be called a "Fifth Amendment communist." And in the eyes

of the public, invoking the Fifth was as good as guilt. Critics of the House Un-American Activities Committee called the hearings a "witch hunt." That's right, a witch hunt.

Roman Mars [00:04:33] Witch hunts are back in the popular consciousness, and so is the Fifth Amendment. Why? Because of President Trump. Let's do this. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length where we take the tweets of the 45th President of the United States 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. You've probably heard of taking the Fifth. But what does that really mean?

Elizabeth Joh [00:05:35] The Fifth Amendment of the Constitution says that "no person shall be compelled in any criminal case to be a witness against himself." The Supreme Court has interpreted the Fifth Amendment much more broadly than the words themselves suggest, though. And today, the Fifth Amendment privilege against self-incrimination means that you're allowed not to answer any questions in any proceeding where you're compelled or forced to give an answer. That constitutional protection exists if the answer you'd be forced to give would, in the Supreme Court's words, "furnish a link in the chain of evidence needed to prosecute you." In other words, you can't be forced to provide information that might be used later to help convict you in a criminal case. You have a right to silence. If you're a defendant in a criminal case, you have an absolute right not to testify at all. And the prosecutor is not even supposed to comment about that silence. You can think of the Fifth Amendment's protection as having three parts. First, it's a testimonial privilege; it doesn't cover things like physical evidence in most cases. It's about what you're saying. Second, it's a privilege about things that might be incriminating--that might get you into criminal trouble. And last, these are situations where you are compelled--you are being forced--to provide this information. And at this point, you might think, "Only guilty people invoke the Fifth Amendment, right? Otherwise, why would you need this protection?" And the answer is no. In fact, the Supreme Court itself stated in the 19th century that, quote, "It is not everyone who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others, and attempting to explain transactions of a suspicious character will often confuse and embarrass a defendant to such a degree as to increase rather than remove prejudices against him." And in a 2001 opinion, the Supreme Court said that, quote, "One of the Fifth Amendment's basic functions is to protect innocent men who otherwise might be ensnared by ambiguous circumstances." But does the law of the Fifth Amendment mean that people have never taken advantage of the right? Well, of course they have. In 1974, the jury in the Watergate case heard a tape recording of President Nixon telling his aides these words: "I want you all to stonewall it. Let them plead the Fifth Amendment. Cover up or anything else if it'll save it--save the plan." Nixon was referring, of course, to the break-in of the Democratic National headquarters at the Watergate office complex and the subsequent cover up that would end his presidency.

Roman Mars [00:08:18] So to review, the Fifth Amendment privilege means you can assert a right to silence if being forced to testify might incriminate you. And invoking that right does not necessarily mean you're guilty of anything.

Elizabeth Joh [00:08:31] Even though that's the law, people still believe that taking the Fifth automatically means you're guilty. In fact, when sexual assault claims were made about the comedian Bill Cosby in November of 2014, a New York real estate developer tweeted, "I am no fan of Bill Cosby, but nevertheless, some free advice. If you are innocent, do not remain silent. You look guilty as hell."

Roman Mars [00:08:56] That real estate developer was Trump in case that wasn't clear.

Elizabeth Joh [00:08:59] In April of 2018, a Pennsylvania jury found Bill Cosby guilty of three counts of sexual assault. As a presidential candidate, Trump repeatedly referred to three former staffers of Hillary Clinton who had invoked their Fifth Amendment rights about Clinton's infamous email server. Trump said at a September 2016 rally, "The mob takes the Fifth Amendment. If you're innocent, why are you taking the Fifth?" And at a rally in Reno the next month, Trump said, "She lied to Congress under oath. And her staff has taken the Fifth Amendment and got immunity deals." This is an odd perspective from a man who himself has relied upon the Fifth Amendment protections. In the summer of 1990, Donald Trump was in the middle of a bitter divorce from Ivana Trump, his first wife. Ivana's lawyers asked Trump, who was under oath, whether he had been faithful. During five depositions, Trump was asked questions about his marital infidelity. He pleaded the Fifth 97 times. But then Trump became president in January of 2017. And on May 17th of that year, former FBI Director Robert Mueller was appointed as a special counsel to oversee the Russia investigation.

Roman Mars [00:10:13] And people associated with Trump started taking the Fifth.

Elizabeth Joh [00:10:16] Trump's former national security adviser, Michael Flynn, took the Fifth in May of 2017 when he refused to cooperate with a Senate Intelligence Committee order to turn over documents related to any contacts he'd had with Russian officials. And on December 1st of 2017, Flynn pleaded guilty to lying to the FBI about conversations he'd had with the Russian ambassador in 2016. Flynn was the first senior White House official to get a plea deal in Mueller's investigation. In April of this year, the FBI raided the hotel room and office of Michael Cohen, the president's longtime personal lawyer. Among the things the FBI agents seized were documents related to a payment made to Stephanie Clifford, also known as Stormy Daniels, right before the election to silence her about an alleged sexual affair she'd had with Trump. And a few weeks after that raid, Cohen invoked his Fifth Amendment right in a different proceeding. The civil lawsuit filed by Stormy Daniels to get out of the nondisclosure agreement she'd signed in exchange for \$130,000. Cohen is asserting his constitutional right to silence. And by doing so, Cohen avoids being deposed--that is questioned under oath--presumably because answers to those questions might be relevant in the criminal investigation against him.

Roman Mars [00:11:36] And what about President Trump?

Elizabeth Joh [00:11:38] Would he agree to be interviewed by Mueller and his team? It depends when you'd asked him the question. Last June, Trump told an ABC News reporter that 100% he'd be willing to talk under oath about the circumstances of firing James Comey, the FBI director. In January of this year, Trump said at a news conference, "There has been no collusion between the Trump campaign and Russians or Trump and Russians. No collusion. We'll see what happens. I mean, certainly I'll see what happens. But when they have no collusion and nobody's found any collusion at any level, it seems unlikely that you'd even have an interview." And in the middle of April, former New York City Mayor Rudy Giuliani agreed to join Trump's personal legal team. And Giuliani started to go on television a lot. Here's an example. On May 6th, Giuliani was asked on ABC's This Week program about whether the president would comply with a subpoena to testify. "We don't have to," he said. "He's the president of the United States. We can assert the same privileges other presidents have." Not long after, Giuliani said that Mueller's team told them that they had concluded that a sitting president can't be prosecuted. Giuliani

said, "All they get to do is write a report. They can't indict. At least they acknowledged that to us after some battling. They acknowledge that." That perspective that a sitting president can't be prosecuted isn't surprising. Mueller's team is probably relying upon opinions written by the Justice Department's Office of Legal Counsel. And these lawyers have concluded twice--one for Nixon and one for Clinton--that it's unconstitutional to prosecute a sitting president. These opinions aren't the same as a decision of the United States Supreme Court--which has never said anything about the subject--but they are significant all the same.

Roman Mars [00:13:28] Now, let's go back to the Fifth Amendment. Can Trump take the Fifth?

Elizabeth Joh [00:13:32] Sure. He has the right just like anybody else. As a legal matter, does that mean he's guilty of something? Nope, not at all--just like the Supreme Court has said. And now you're thinking, "Well, what about the requirement that the information protected by the Fifth Amendment might be used in a criminal prosecution? Didn't Mueller's team reportedly say they weren't going to indict Trump? And doesn't that matter?" Well, yes and no. If Rudy Giuliani is to be believed, then Mueller's team said that they had concluded that they couldn't indict a sitting president--a president who is currently president. That doesn't put President Trump or any president out of criminal jeopardy because one day Trump is not going to be president anymore. Whether it's constitutional for a sitting president to be indicted is a different question from whether a former president could be indicted. The answer to that question could also be no, but it's a different question. And this is a good time to remember that President Ford pardoned Nixon, a former president who had resigned in disgrace for, quote, "all offenses against the United States, which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20th, 1969, through August 9th, 1974." That resolved Nixon's potential criminal liability after he left the White House. At the moment, Trump has no such assurance. And on May 17th, 2018, to mark the one-year anniversary of Robert Mueller's appointment as special counsel, Trump tweeted, "Congratulations, America. We are now into the second year of the greatest witch hunt in American history. And there is still no collusion and no obstruction. The only collusion was that done by Democrats who were unable to win an election despite the spending of far more money." And on May 23rd, he returned to a favorite tweet: "WITCH HUNT." All caps. And the Hollywood Ten? In 1960, director Otto Preminger and actor Kirk Douglas both openly credited Dalton Trumbo--one of the Ten--as a screenwriter for the films Exodus and Spartacus. That recognition effectively ended the Hollywood blacklist.

Roman Mars [00:15:51] What part of you as a lawyer and then part of you as a human when you see--?

Elizabeth Joh [00:15:57] I'm both!

Roman Mars [00:16:00] Okay. So, do you also get that slight visceral twinge when someone takes the Fifth that they're guilty?

Elizabeth Joh [00:16:10] No because the part of me that's a law professor is really hard to ignore. And that part of me knows how difficult it is for people to be in circumstances when they're questioned by the government. It's a very unequal playing field, and there are many instances in which people just look bad, even though they haven't done anything wrong necessarily. And so, I very strongly believe in that privilege. Now, I understand why people believe--and Twitter certainly seems to believe--that when you invoke the Fifth, you're

automatically guilty. And for sure, people who are guilty of crimes do invoke the Fifth Amendment. But I really also believe strongly in the tradition of the constitutional protection itself. So, for me, I actually have the opposite reaction, which is: "Well, that's good. You know, that's what should happen." And the problem is, I think, you know, in a case like this, there are so many people who love for the president, for example, to invoke the Fifth Amendment. And that would be their moment to say, "Ha! That means he's guilty." But in fact, all of our traditions weigh in against that. He has rights like anybody else. And that is absolutely right. I mean, you have to separate, you know, whatever one's personal feelings are about whatever wrongdoing you think the president might be engaged in versus upholding the process that's important for everyone, whether you're the president of the United States or an accused shoplifter.

Roman Mars [00:17:31] Although he has one extra privilege, which is he seems to be--by Justice Department memos--unindictable, which is quite a privilege compared to normal people, right?

Elizabeth Joh [00:17:42] Well, sure. As long as he's president. But as long as he's president. So, the moment he's not president, then potentially he's in some jeopardy, which is why he'd be allowed, presumably, to invoke the Fifth Amendment if it ever came to that. You know, for example, President Clinton might have done that, but he decided to volunteer his testimony anyway. That's, again, a question of norms--a question of, well, you know, the president does have the Fifth Amendment privilege like anyone else but sometimes a president might realize, "It's so important for me to be forthcoming with the American public that I should go ahead and testify." We'll see whether President Trump lives up to that test. You're skeptical. But he may. I mean, you know, Trump's invoked it many times, and he certainly has taken advantage of the privilege. Let's put it that way.

Roman Mars [00:18:35] Sure. He seems to take advantage of chance.

Elizabeth Joh [00:18:38] That's right. That's right.

Roman Mars [00:18:39] That seems to be his nature. This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com, on Facebook, and on Twitter. In the last episode, we discussed the case of the Knight First Amendment Institute suing Trump for blocking people on Twitter. And in a couple of instances, we mistakenly referred to them as the Knight Foundation, which is a different organization. The Knight Foundation did help create the Knight First Amendment Institute in partnership with Columbia University, but they don't guide its cases or the work it does. I sincerely apologize for the error. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out all 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.