

Roman Mars: At 6:30 on the morning of June 4th, 1959, federal narcotics agents knocked on the door of a laundry located at 1733 Leavenworth Street in San Francisco.

Elizabeth Joh: When James Toy opened the door of his business, a federal agent identified himself. Toy responded by slamming the door and running to the back of the building. A group of agents forced open the door, chased Toy down, and arrested him. But no evidence of any crime turned up in Toy's laundry. Why were federal law enforcement agents interested in Toy? Because just a few hours earlier, they'd arrested another man, named Hom Way, for heroin possession, where he said he'd gotten his drugs from a "Blackie Toy, a guy who ran a laundry on Leavenworth Street." A group of federal agents told Toy, the laundry operator, that Hom Way was the person who'd identified him as a drug dealer. Sitting in his bedroom, Toy said, "Nope, you've got the wrong guy. You should go to the house of a guy called Johnny Yee. He's the heroin supplier." So, the federal agents then showed up at Yee's house. Keep in mind, this is all happening in the same morning. Yee's arrested. And he does, in fact, have some heroin on him. Now it's Johnny Yee who was in trouble. And this guy tells federal agents yet another story. "I actually bought this heroin from Toy and a guy called Sea Dog." The agents find Sea Dog, whose real name is Wong Sun, and arrest him. Now all of these men are in trouble; they're charged with violating federal narcotics laws. In James Toy's case, there was the heroin that he supposedly sold and a confession he provided to the police. Everything began with a chain of events triggered by the arrest of Hom Way. But there was a problem. The federal agents shouldn't have relied on Hom Way's say-so to arrest James Toy. Way wasn't a particularly reliable informant. Toy's arrest, in other words, lacked probable cause. And that violated James Toy's Fourth Amendment rights. But then there was the incriminating evidence, the heroin, and the statements. That pointed to Toy's guilt, right? But in 1963, the United States Supreme Court said that the heroin and Toy's statement were the "fruit of Toy's illegal arrest. And for that reason, the evidence had to be thrown out. It was the fruit of a poisonous tree. Toy's bad arrest was the tree, and the fruits were the heroin and his statement. The investigation had been tainted." You know who else is interested in tainted investigations? President Trump. For several months now, he's been tweeting angrily about the special counsel's investigation of Russian involvement in the 2016 presidential election. Trump and his supporters have been insistent that the investigation should be shut down because of political bias.

Roman Mars: So, it's time to talk about the Constitution, tainted evidence, the Fourth Amendment, and that Nunes memo. Yeah. Here we go. 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 his supporters and use them to examine our rights in the Constitution like we never have before. Our music is from Doomtree Records. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

Elizabeth Joh: The Fourth Amendment says, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched and the persons or things to be seized." Pretty clear, right? Government is not supposed to engage in unreasonable searches and seizures.

Roman Mars: But what if the government violates those rights?

Elizabeth Joh: The problem is that the Fourth Amendment doesn't tell us specifically what's supposed to happen when you claim that the government has interfered with your

rights. It's been left up to the Supreme Court to devise a solution. And their answer, first recognized in 1914, has been to recognize that the Fourth Amendment has what's called an "exclusionary rule." The exclusionary rule means that if the police violate your Fourth Amendment rights, let's say, by conducting an unlawful arrest, then the evidence they find because of that arrest should be suppressed--not to be considered for your prosecution. It doesn't matter whether the crime is minor or serious. And it doesn't matter if the evidence is central to the government's case or not. The American legal system is unusual in this way.

Roman Mars: So, let's get to the fruit of the poisonous tree.

Elizabeth Joh: Here's how it works. Sometimes violating a person's Fourth Amendment rights leads the police to one more piece of evidence, say a confession, which in turn leads to the discovery of more evidence, say illegal drugs. The exclusionary rule means that not only does this evidence that comes about directly from the government's misconduct is inadmissible in court, it also means that any further evidence that was discovered is inadmissible, too. That's the legal idea called the "fruit of the poisonous tree." So, in James Toy's case, his unlawful arrest was the poison tree. The fruits of that tree were his statement, which led to the drugs found at Johnny's house. Both were suppressed, according to the Supreme Court's case, even if this evidence would have been critical to prosecuting Toy. Now, it doesn't work this way all of the time. The Supreme Court has recognized a number of exceptions to the exclusionary rule and the fruit of the poisonous tree idea. And you can see an example of this in James Toy's own case. Remember James Toy's statement led to Johnny Yee and Yee's statement eventually led to the discovery of Sea Dog or Wong Sun. Well, Wong Sun also said things to federal agents that implicated James Toy, like the fact that Sun and Toy had first met in Marysville, California, a few months earlier and discovered their mutual interest in heroin.

Roman Mars: It's so nice to have friends with common interests.

Elizabeth Joh: Wasn't Wong Sun's statement tainted in the same way? After all, it comes at the long end of this chain of events. Well, the Supreme Court said no. Wong Sun spoke to the government after he'd been released on his own recognizance and decided to come back to the agents to talk. It was that voluntary choice that broke the connection between James Toy's illegal arrest and what he said. And Wong Sun's own statement could be used against him.

Roman Mars: So, what does this have to do with Trump?

Elizabeth Joh: Well, Special Counsel Robert Mueller has been charged with investigating ties between Russia and the Trump campaign during the 2016 election. Trump has called first the FBI and now the Mueller investigation a "witch hunt" at least 20 times so far in his tweets. So, for example, last June, Trump tweeted, "You are witnessing the single greatest witch hunt in American political history, led by some very bad and conflicted people. MAGA." On January 10th of this year, Trump tweeted, "The single greatest witch hunt in American history continues. There was no collusion. Everybody, including the Dems, knows there was no collusion. And yet, on and on it goes. Russia and the world is laughing at the stupidity they are witnessing. Republicans should finally take control." And on February 3rd, Trump tweeted, "This memo totally vindicates Trump in probe. But the Russian witch hunt goes on and on. There was no collusion. And there was no obstruction. The word now used because after one year of looking endlessly and finding nothing, collusion is dead. This is an American disgrace."

Roman Mars: The memo that Trump is referring to in that tweet is a memo written by Republican staff members of the House Intelligence Committee about the Russia investigation.

Elizabeth Joh: Devin Nunes, a Republican congressman from California, didn't write the memo himself. But he is responsible for what it says. Normally, these memos aren't available to the public, but Trump, as the president, chose to declassify this one. The basic claim in the memo is that the FBI abused their authority in this investigation. In particular, the Nunes memo focuses on the use of a dossier compiled by Christopher Steele, a former British intelligence officer. This so-called "Steele Dossier" is filled with lots of lurid allegations about Trump, his advisors, and their ties to Russia. And while a politically conservative group initially paid for the information, it was eventually funded by a law firm and a research organization paid for by the Democratic National Committee.

Roman Mars: The memo says that the FBI relied in part on tainted information--politically biased intelligence--when it asked the Foreign Surveillance Intelligence Court in October 2016 for an order to wiretap a man named Carter Page.

Elizabeth Joh: Page was an adviser to the Trump campaign with a lot of Russian ties--a whole lot of interesting Russian ties. And the court authorized the FISA warrant. After Trump declassified the Nunes memo, some people started to argue online that the whole investigation, now headed by Mueller, had to be shut down. What were they saying? They were saying that any evidence found would be the "fruit of the poisonous tree." That's the same metaphor from the Wong Sun case. So, here's where the Nunes, Page, FISA controversy is pretty different from the Supreme Court's 1963 case. So first, the exclusionary rule really means that a particular piece of evidence is deemed inadmissible. It doesn't lead to the automatic shutdown of an investigation. In ordinary criminal cases, the exclusionary rule could mean that drugs or a confession or a gun might be suppressed. The rule doesn't tell police and prosecutors, "Just stop what you're doing" altogether. And it's also worth noting that the FBI obtained a surveillance order on Carter Page well before this controversy in 2013, when they thought the Russians were trying to recruit Page as a spy.

Roman Mars: This suggests that the FBI has more evidence than the dossier.

Elizabeth Joh: Second, could Trump or anyone else say, "Tainted! Exclude"? Not really. The Supreme Court has made it very clear that your Fourth Amendment rights are personal. Carter Page can complain about any bad warrant application but not Trump or anyone else. They lack what's called "Fourth Amendment standing." You can't assert someone else's rights, only your own. Now, here's the tricky part. Does a misunderstanding of the fruit of the poisonous tree mean that Trump can't shut the investigation down? Well, that's a totally different question because Trump is a special person. He's the president of the United States and the head of the executive branch. In theory, he could start off a chain of events that leads to the firing of Robert Mueller. And Trump could claim that he has the constitutional authority to do so. It's also possible that in doing so, Trump might be accused of trying to obstruct an investigation. And that could be a theoretical basis for impeaching him. Alternatively, Trump might also decide to pardon everybody targeted by the special counsel's investigation. That's also well within his power to do so. Although using the power in that way might also raise concerns that this would be a way of shutting down the investigation, although in an indirect way. And that also might lead to impeachment.

Roman Mars: But for now, these are just hypothetical possibilities that we've explored in other episodes of Trump Con Law, so you should check those out. But in the meantime, there's an interesting twist in the 1963 James Toy case that we want to share with you. And Elizabeth will answer some of my questions right after this.

Elizabeth Joh: So, a postscript about that 1963 case... When Hom Way, the informant, was arrested, he said his source for heroin was a guy named Blackie Toy on Leavenworth Street--no specific address. That led federal agents to James Toy and his laundry. But how did they know that they had the right place? After all, the sign above, Toy's Laundry said Oy's Laundry. Plus, in the legal record of the case, there was nothing identifying James Toy as Blackie Toy. The Supreme Court had asked Edward Bennett Williams, a famous defense attorney, to argue the case for the defendants. The night before the Supreme Court argument, Williams realized this potential weakness in the government's case. Wasn't there some doubt that the agents had arrested the right Toy or not? But Williams was in Washington, D.C. not San Francisco. He needed a friend to help him out. In the middle of the night, Williams called his friend Joe DiMaggio, who is now living in San Francisco. He asked DiMaggio in the middle of the night to drive up and down Leavenworth Street and count the Chinese laundries. And there were more than a few. And in fact, the very next day at oral argument, Justice Douglas asked the question, "Were there other laundries on the street?" And Williams, the defense attorney, was able to say with confidence that, "Yes. Yes, Justice Douglas. There were a number of Chinese laundries on the street." Now, the Supreme Court, as a legal matter, wasn't allowed to officially take into account this offhand remark. But James Toy did win his case, and that late night drive on Leavenworth Street might have done the trick. And 1733 Leavenworth Street? It appears again today to be a laundry.

Roman Mars: So, there's speculation that they just raided the wrong place? But they don't know.

Elizabeth Joh: Right. So, Williams' thought was: "Wait a minute. The informant said, 'Go find this guy, Toy, at a laundry.'" So, what we know is that the federal agents went to a place that didn't say Toy--just said Oy's Laundry. They open the door, and the guy inside started running.

Roman Mars: Are people using the term fruit of the poisonous tree in a metaphorical way, kind of like they throw around the term "unconstitutional," when it's just clearly, you know, just something that makes them mad?

Elizabeth Joh: You know, we've all watched television shows. We've all watched CSI and Law & Order. So, it kind of sounds like a term that we're all familiar with. And we've seen cases where someone says, "Fruit of the poisonous tree," and someone gets acquitted on TV. And so, the dangerous thing here is when we hear that in conjunction with discussions about the Russia investigation, people think, "Wow, this is just like that Law & Order episode I saw. So, it must mean that he has to shut down the investigation." So, it's a deliberate kind of confusion. So, it's important to know there are many questions during this unusual presidency where we don't have a lot of clear answers. But in certain respects, like the fruit of the poisonous tree discussion, there are some very clear answers. So, it's important to separate the kind of unknown constitutional questions from the very clearly established stuff.

Roman Mars: And the clear answers here are this term really doesn't apply to anything the way that they've used it.

Elizabeth Joh: Right. So, there's a lot of legal experts jumping out of the woodwork on Twitter, apparently. But it doesn't quite apply in this case the way that the term is actually used outside of Trump world, Law & Order, and in actual criminal cases. But again, it has a kind of sinister ring. And the wonderful thing for Fourth Amendment law is that "fruit of the poisonous tree" has such an arresting image in your mind. You think, "Wow, that really sounds like a terrible thing to happen in your case. There must be some immediate effect." And it does have an effect, but not the effect of just forcing police and prosecutors to walk away. It just doesn't have that effect.

Roman Mars: The show is produced by Elizabeth Joh and me, Roman Mars. Special thanks to Ken White for inspiring Elizabeth to make this the subject of this week's episode. You can find us online at trumpconlaw.com on Facebook and Twitter. 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 the album Dangerous Jumps by SHREDDERS. I swear I'll switch it up one of these days. But I just love this album so much. You can find out all about Doomtree Records, get merchandise, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.