

Criminal Justice and the POTUS

Roman Mars: In the early morning hours of April 20th, 1989, two construction workers walking through Central Park in New York City made a horrific discovery: the body of an unconscious, barely alive young woman who had been jogging in the park.

Elizabeth Joh: She'd been brutally raped, beaten, and left for dead. The "Central Park Jogger," as she'd become known, was a 28-year-old white woman and an investment banker who worked for Salomon Brothers. Trisha Meili eventually recovered but remembered nothing of the attack. Her identity wasn't revealed at the time, but she has since spoken publicly about her experience. The police immediately focused on a large group of teenagers who had been in the park hours before. And some of them had been participating in what seemed to be random acts of criminality, like harassing and attacking passersby. You see, in the 1980s, New York City was a very different place than it is now, both in people's experiences and their perceptions of violent crime. And Central Park wasn't immune from those fears. The poet and humorist Ogden Nash wrote this of Central Park in a poem called City Greenery from 1961.

Roman Mars: If you should happen after dark To find yourself in Central Park, Ignore the paths that beckon you And hurry, hurry to the zoo, And creep into the tiger's lair. Frankly, you'll be safer there.

Elizabeth Joh: And so New Yorkers were understandably riveted by the story. There was enormous pressure on the police to solve the case as quickly as possible. The police eventually focused on five teenagers that they thought were responsible for the attack. Yusef Salaam, Raymond Santana, Kevin Richardson, Antron McCray, and Korey Wise. Four were African American, one was Hispanic, and all of them were between the ages of 14 and 16 at the time of their arrests. In other words, they were kids.

Roman Mars: New York City Mayor Ed Koch called it the "crime of the century."

Elizabeth Joh: Newspapers quickly referred to the teens as part of a "wolf pack" that was engaged in the night of "wilding." And the case seemed to be a sure thing for the prosecution. All of them were provided with Miranda warnings, and each decided to speak to the police. And they were subjected to hours of interrogation. The police ultimately obtained confessions from all five. And each one argued that while he hadn't personally participated in the horrible crime, they'd witnessed one of the others committing it. The trials of the five teenagers--or the Central Park Five, as they came to be known--took place in August of 1990. The prosecution's case rested almost entirely on the confessions. There was no physical evidence linking them to the crime. The jury found all five guilty, and Salaam, Santana, Richardson, McCray, and Wise all served prison sentences ranging from five to 13 years.

Roman Mars: So, let's fast forward to 2002.

Elizabeth Joh: That May, a New York State prisoner named Matias Reyes told a prison guard that he wanted to talk about that 1989 crime. Reyes eventually provided a DNA test, and it was a match. It was a match for the DNA found on the Central Park Jogger's body. The Central Park Five had been wrongfully convicted. The following December, a New York State Court judge considered a motion by lawyers representing the Central Park Five. They asked that the convictions for the 1989 attack be vacated or wiped out, based on the new DNA evidence. The judge noted that the case pretty much turned on the defendant's

confessions and not much else. Because the DNA evidence showed that someone else--not the Central Park Five--had committed that terrible crime, the judge agreed to vacate their convictions.

Roman Mars: There's another detail in the Central Park Five case worth mentioning, especially given our mandate here.

Elizabeth Joh: Just two weeks after the attack in 1989 and months before any of the five faced trial, full-page ads ran in the New York Times, the Daily News, the New York Post, and New York Newsday. The ad ran with the heading "Bring Back the Death Penalty." It read, "Muggers and murderers should be forced to suffer. And when they kill, they should be executed for their crimes." The ad didn't mention the Central Park Five by name, but everyone knew who they were.

Roman Mars: The ads were paid for by a well-known real estate developer in New York.

Elizabeth Joh: And his name was Donald Trump. On October 31st of this year, another terrible crime happened in New York City. Immediately after the police arrested the suspect, Trump again called for the death penalty, and there are new questions about confessions.

Roman Mars: The big difference now is that Trump is not just a real estate developer. He's the president.

Elizabeth Joh: So, what does the Constitution say about confessions? And what's the usual relationship between the president and the criminal justice system?

Roman Mars: The usual is in the rearview mirror, my friend. It's Trump Con Law time. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the tweets and the rhetoric of the 45th president of the United States and channel our unease into learning our 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. The Due Process Clause of the 14th Amendment forbids the states from depriving people of life, liberty, or property without due process of law.

Elizabeth Joh: And until the second half of the 20th century, the way defendants presented legal claims about how the police obtained confessions was by relying on the Due Process Clause, a criminal defendant would say, "the police used methods that resulted in an involuntary confession." So, if you could convince a court that the interrogation in your case produced an involuntary statement and that was a violation of your due process rights, then the court would say it was inadmissible--couldn't be used in your case. So physical methods--such as holding back water or food or sleep--and even sometimes psychological pressures could make a confession involuntary. But ultimately it wasn't a very satisfactory way to regulate confessions. What if the police didn't do obviously questionable things? It's still scary to be interrogated by the police. How could courts ensure that defendants had their legal rights protected? And of course, for the police, what should they do to make sure that they were following the law? So, in 1966, the Supreme Court decided to turn to another part of the Constitution--and that's the Fifth Amendment's privilege against self-incrimination. That clause says, "No person shall be compelled in any criminal case to be a witness against himself." The court relied on that portion of the constitution to decide the famous case of Miranda versus Arizona.

Roman Mars: If you watched any crime show up in the past 50 years, you've heard the Miranda rights.

Elizabeth Joh: These are the warnings people hear before they're about to be questioned by the police.

Roman Mars: "You have the right to remain silent. Anything you say might be used as evidence against you. And you have the right to the presence of an attorney, either retained or appointed."

Elizabeth Joh: In the Miranda case, the Supreme Court decided that the Constitution's privilege against self-incrimination required the police to say these warnings before they interrogated suspects in custody. "Without these warnings, it was impossible," as the Supreme Court said, "to dispel the compulsion inherent in custodial surroundings." In other words, when you're in these incredibly stressful situations, people suspected of criminal wrongdoing actually need to hear these warnings to know that they have legal rights. It didn't matter whether the police used physical methods or psychological ones. The court in the Miranda case recognized that the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. So, the so-called Miranda warnings were here to stay. And in fact, even Chief Justice William Rehnquist, who was no fan of the Miranda decision, wrote in a case from 2000 that "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." Of course, whether these warnings actually work as the Supreme Court intended is really an open question. Most people who receive these warnings by the police waive or give up their rights after hearing them. And as the Central Park Five case shows, these rates don't necessarily prevent outcomes like wrongful convictions.

Roman Mars: There are a lot of myths about Miranda rights, too.

Elizabeth Joh: Some people think that if the police don't read you your rights, you walk free. That's not even remotely true. If the police failed to read you your rights when they're supposed to, any confession you make is supposed to be inadmissible. It can't be used at trial. That's the effect. And over time, the Supreme Court has recognized a lot of exceptions to the Miranda warnings. One important one is called a "public safety exception." So, here's an example. In September of 1980, two police officers were driving to an A&P supermarket in Queens, New York. They were looking for a suspect who they thought might have a gun with him. When they found him--a man named Benjamin Quarles--he was wearing a shoulder holster, but it was empty. One officer asked him where the gun was. Quarles answered, "The gun is over there." They found a 38-caliber revolver on a carton and arrested him. So, this is the kind of situation you'd usually expect the police to provide a suspect with Miranda warnings. But they didn't. So, the incriminating statement Quarles made? "The gun is over there." That should be thrown out, right? Not exactly. In the 1984 case of *New York versus Quarles*, the Supreme Court said that when the police are trying to protect the public interest with public safety, there is an exception to the Miranda requirement. You see, here, the police were worried that there was a missing gun in the supermarket. There was a concealed gun somewhere and Quarles might have an accomplice nearby. That concern excused the fact that they questioned Quarles without reading him his rights. What that means is that a statement could in fact be used against him in court.

Roman Mars: That public safety exception has been used a lot. It's especially popular when law enforcement officials believe the person in custody is involved in an act of terrorism.

Elizabeth Joh: In these situations, the police might fear that there are still accomplices out there who might pose a danger to the public.

Roman Mars: So now let's get to Trump.

Elizabeth Joh: What would Trump say about the criminal justice system as president? Less than a year into his presidency, we've already found out. On the afternoon of October 31st, a driver deliberately drove into a crowded bike path along the Hudson River in New York City. This deadly attack killed eight people and injured 11. The driver was stopped when he jumped out of the truck and was shot by a police officer. The police later identified the driver as Sayfullo Saipov, a 29-year-old immigrant from Uzbekistan. Federal officials later said that the attack had been inspired by ISIS. The next morning, during a televised cabinet meeting, Trump commented on the truck attack. He said, "We need quick justice and we need strong justice--much quicker and much stronger than we have right now because what we have right now is a joke. And it's a laughingstock." When asked if he'd send Saipov to the U.S. military prison in Guantanamo Bay, Cuba, Trump replied, "I would certainly consider that. Send him to Gitmo. I would certainly say that, yes."

Roman Mars: As an aside, no one arrested in the United States has ever been sent to Guantanamo Bay.

Elizabeth Joh: And then Trump started tweeting about the case. Later the same day, he tweeted, "NYC terrorist was happy as he asked to hang ISIS flag in his hospital room. He killed 8 people, badly injured 12. SHOULD GET DEATH PENALTY!" All caps. Very early the following day, he tweeted, "Would love to send the NYC terrorist to Guantanamo, but statistically that process takes much longer than going through the federal system."

Roman Mars: Again, it's never happened. So, it's a sample size of zero, but we'll let Trump continue.

Elizabeth Joh: "There is also something appropriate about keeping him in the home of the horrible crime he committed. Should move fast. DEATH PENALTY!" Exclamation point.

Roman Mars: And all caps.

Elizabeth Joh: During these series of tweets, federal prosecutors didn't listen and did in fact charge Saipov with multiple terrorism related offenses against Saipov for the attack. Trump's remarks and tweets on the Halloween day truck attack bear a striking similarity to things we've seen before. Just as he's attacked the courts, the press or intelligence agencies, NFL players engaged in peaceful protests, and his political opponents--

Roman Mars: To name a few.

Elizabeth Joh: Trump is now attacking the criminal justice system itself. "It was a joke, a laughingstock, not to be taken seriously, an attack on the legitimacy of the system..." And his call for the death penalty just a day after the truck attack and long before any trial might occur sounds a lot like his reaction to the Central Park Five 28 years earlier. Whether or not Saipov will actually face the death penalty is a decision that usually takes months

under the Justice Department procedures. And there are bigger complications with these statements now because, of course, Trump is the president of the United States. He's the head of the executive branch, which includes the Department of Justice. He's also a man with an active Twitter account with more than 40 million followers. Now, of course, it's true that the Constitution allows the president to make his own choice for attorney general--that's the head of the Justice Department--so long as the Senate approves. And when it comes to firing the attorney general, the president can make that decision all by himself.

Roman Mars: See Episode #2 of Trump Con Law.

Elizabeth Joh: But we've also thought for a long time--decades--that the Justice Department should be independent from the White House when it comes to individual criminal cases. It's the same reason why the FBI director serves ten-year terms. That's to have some insulation from politics. Although the FBI director himself--as we've found out--can be fired by the president, too.

Roman Mars: Again, Episode Two.

Elizabeth Joh: A political influence-free Justice Department isn't mandated specifically by the Constitution, but there have been internal guidelines issued from the Justice Department from both parties since the 1970s. In other words, it's not the law, but it is a norm. It's a powerful norm--a norm that Trump doesn't seem to be respecting at all with his tweets. And those death penalty tweets? They have a pretty good chance of making Saipov's prosecution that much harder. The defense attorneys for Saipov will almost certainly argue that Trump's tweeting has made it impossible for Saipov to receive a fair trial and to be judged by an impartial jury. And the issue of Miranda rights has also come up with Saipov. Senator John McCain issued a statement the same day that Trump called the criminal justice system a joke. He said that Saipov should not be treated like an ordinary criminal defendant but like an "enemy combatant." An enemy combatant is a term for an unlawful combatant during wartime.

Roman Mars: That's in contrast to a "prisoner of war," who is a lawful combatant that is entitled to protections even when captured.

Elizabeth Joh: McCain said that Saipov should, quote, "not be read Miranda rights as a result." And Senator Lindsey Graham also said, "The last thing he should hear is his Miranda rights."

Roman Mars: All right, tough guy.

Elizabeth Joh: By charging Saipov with federal crimes, federal prosecutors did, in fact, decide to treat him like an ordinary criminal defendant. The Washington Post reported that federal agents did not provide Saipov with a Miranda warning before questioning him, at least at first, when Saipov talked about his plans to commit the truck attack. The justification for holding back on the Miranda warnings? That's the public safety exception to Miranda. And that comes from the Supreme Court's decision in the Quarles' case--the one about the A&P supermarket. Federal officials did eventually provide Saipov with Miranda warnings later. He heard the warnings and kept on talking. And Trump? He kept on tweeting. So, one last thing about the criminal justice system. It's really important here to understand this in context, and that is the perceived fairness of the criminal justice system--despite whatever Trump says--is really, really important. And in general, that's a

pretty conventional and controversial norm. And Chief Justice Earl Warren--who wrote the majority opinion in the Miranda case--he'd not only been the governor of California. Warren had spent 22 years in law enforcement as a prosecutor. So, in other words, he'd actually questioned suspects himself. Warren's long time chief investigator, Oscar Jahnsen, remembered that his boss used to say this: "Intelligence and proper handling can get confessions quicker than force. Be fair to everyone, even if they're breaking the law."

Roman Mars: I guess my question is, like, why not? The norms of the presidency have kept presidents from weighing in on cases. But clearly the norms of society are filled with celebrity blowhards sounding off on TV about things they know nothing about. Like, that has shifted. And Trump comes from that world.

Elizabeth Joh: When you are the head of the executive branch, all of these bland statements we hear about impartial justice--they actually mean something. It means that if you're going to pursue a prosecution, you have to do it fairly. That's a deeply embedded part of our legal norms, not just in the Miranda cases, but in every aspect of what the Supreme Court has said about criminal defense. You know, we are not looking at did you do it. We're acting in terms of are the prosecution behaving fairly and respecting all the rules. And that goes from everything from we don't prejudge cases, the president does not have any political influence on cases, the president doesn't tell individual prosecutors what to do, the president doesn't tell a jury what to think-- These things seem so obvious that they're almost not worth saying until now. It's actually worth saying now. It's not normal for the president to try and intervene or tell us what to think in an individual case. You know, when that sort of thing happens, we have to have a moment of saying, "Well, wait a minute, that really doesn't happen." And we have to say that this is an actual norm breaking moment. And it's actually totally counterproductive for the government itself. I mean, federal prosecutors--believe me--are not happy that Trump said this. It makes their job that much harder. You know, imagine trying to get a pool of jurors who said, "Well, I didn't see that Trump tweet. I didn't hear about the death penalty." I mean, that they're totally impartial and will have nothing at all in their minds before they hear this case--that's going to be really hard to do. It's going to be very easy for the defense attorneys in that case to raise if it comes to a trial.

Roman Mars: Is there anything close to this that's happened before?

Elizabeth Joh: Nixon commented that Manson was guilty. But they quickly walked that back. They realized the mistake, right? And the most that happened here was that Press Secretary Sanders basically said, "No, he didn't say that" even though we had it on television. There are lots of recordings of him saying that. And that's not walking it back. That's just a "You didn't see what just happened here, folks." And that's the other abnormal part of it. I mean, we read the transcript. We watched the video of what the president says. It doesn't sound like any president we've ever had. He feels very comfortable prejudging a case. He is using--you're right--this idea of his celebrity and having a voice. But then he's now in a totally different job. And, you know, he hasn't changed anything about who he is now that he's become president of the United States. Presidents are usually known for--when you have this high-profile case--they say almost nothing meaningful because they know the import of saying something that might harm the case. And of course, you know, if you're thinking purely in terms of prosecution, you don't want to say anything that's going to harm the case. So here is the president of the United States saying, "You know what?" There's no trial yet. We don't even know what's happening yet. Literally the day after it happened, "He should get the death penalty, folks." And he said it twice!

Roman Mars: But the people who support Trump enjoy this aspect of Trump.

Elizabeth Joh: Sure. I mean, even with Miranda and every Supreme Court case in which the Supreme Court has said, "You know, criminal defendants have this kind of set of rights," there's always another side of this conversation that critiques it as, you know, "Criminal defendants have too many rights. That's why justice is so slow. And, you know, we should just get to faster punishments." And, you know, his statements certainly appeal to that part of it. But, you know, in our conversation right now, I've talked to you about the Central Park Five--that's a perfect example of enormous pressure on the part of the police to find out who had perpetrated this horrible crime. So, they found some people. But guess what? It turned out they didn't do it. And that's what happens when we're motivated by all this emotion and sentiment and the sense that, like, "we have to rush this process through to make sure that justice is done." And that's not justice, of course. That Trump from 1989 is not very different than the 2017 Trump.

Roman Mars: I mean, so much so that when asked about Central Park Five, he still says they did it.

Elizabeth Joh: Trump is not a person who likes to ever admit wrongdoing. He stands by his original judgment--devoid of evidence that they're responsible for the crimes.

Roman Mars: It's not even devoid of evidence. It's contrary to evidence.

Elizabeth Joh: That's right. Contrary to the DNA evidence, he has stuck by--as recently as 2016--that they did it.

Roman Mars: This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com, on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop collective. The music from this specific episode is from Dangerous Jumps, the new full-length album from SHREDDERS, a new group consisting of P.O.S., Sims, Paper Tiger, and Lazerbeak. It is out now, and everyone who listens to it thanks me. Get on it. You can find out all about Doomtree Records, get merch, and learn about current tours and doomtree.net. We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and donors who are listeners just like you.