

## Treason

**Roman Mars** [00:00:00] Life as a West Virginia coal miner in the early 20th century meant living at the mercy of coal companies.

**Elizabeth Joh** [00:00:06] Miners were paid low wages, used rented tools, and lived in company housing. Wages were often paid in scrip--this was credit that could only be used at company owned stores. And trying to organize for better working conditions meant risking eviction, unemployment, and violence. Coal operators wanted to stamp out any effort of the miners to unionize, and there was a private army at their disposal. This included local police paid to harass union organizers and armed mine guards from the Baldwin-Felts Detective Agency. But many miners were determined to organize for better pay and working conditions, to end violence by mine guards, and to be able to join the union. Songwriter Walter Seacrist described the miners' story in the lyrics of his song Law in the West Virginia Hills. "These miners got together one warm July day. They laid away their tools and struck for better pay. Then the cruel company gunmen with officers from all around came and drove them from the houses, threw their stuff out on the ground." The early 1900s saw several violent clashes between miners and coal company guards. The governor of West Virginia even declared martial law three times. And on August 24th, 1921, a few thousand miners gathered at Lens Creek in Kanawha County, West Virginia. They were determined to march the 65 miles south towards Logan County to rescue miners there who had been jailed and abused for trying to unionize. A local union official named Bill Blizzard officially led the minor army. In response, the coal companies and the governor quickly assembled the state police, a citizen militia, and the mine guards. As the armed miners marched to Logan County, their numbers grew to several thousand. Both sides met at Blair Mountain for what would become known as the West Virginia Mine War. Many on both sides were injured, and several people were killed, although the exact number isn't clear. The governor of West Virginia asked President Harding to intervene, and he did. Harding sent more than 2,000 federal troops, who arrived at Blair Mountain on September 3rd, 1921. The miners--many of them World War I veterans--were reluctant to take up arms against the troops and returned home. The next year, several hundred of the miners who fought in the mine war found themselves facing criminal charges for their participation. A large group of these criminal cases were moved far from the coalfields to another county. Prosecutors, who also happened to be coal company lawyers, agreed to try Bill Blizzard first. He was, after all, the leader of the battle at Blair Mountain. And the charge? Treason. Treason against the state of West Virginia. The state's constitution said that "treason against the state shall consist only in levying war against it or in adhering to its enemies, giving them aid and comfort." West Virginia, like most states in the United States, punishes treason as a crime. So does the federal Constitution. The term treason has come up a lot these days. Many questions have been raised about President Trump's loyalties and where they lie.

**Roman Mars** [00:03:38] So what does our federal Constitution say about treason? And when exactly does someone commit a treasonous act? And when Trump tweets the single word "treason" with a question mark, probably in reference to the anonymous New York Times op-ed, is he using that word correctly? Well, let's find out. 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 critics and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. The Constitution is fairly specific--for a change--about treason.

**Elizabeth Joh** [00:04:50] Article III, Section 3 says that "treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." And the Constitution also requires a pretty high standard of proof. That same section says that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court." It's not a particularly new crime. The punishment of treason goes back centuries in English law. So, what is treason exactly? As the Constitution defines it, there are two ways to be convicted of treason. Let's take the first way. It's treason to levy war against the United States. Well, there aren't that many legal decisions about what this means. The Supreme Court has said that "levying war" means that there must be an actual assemblage of men for the purpose of executing a treasonable design. Probably the best interpretation of what this means is that "levying war" refers to the use of some kind of force by a group of people. So conventional wars like World War II would count. But what about other means? After all, muskets and cannons aren't the only way to wage war today. What about a cyber-attack from a foreign nation? In theory, that could count. Imagine a cyber-attack that would shut down the entire power grid in the United States or--even worse--explode our own missiles on American soil. The federal government could treat a cyber-attack as an act of war, but it hasn't done that so far. The Constitution's treason clause also says that treason can be committed by "adhering to the enemies of the United States by giving them aid and comfort." When you first hear that phrase, you might think that it's pretty easy to be guilty of treason if you help out nations whose interests are at least sometimes hostile to the United States. Take Russia or China--probably never Canada. But that's not really what an enemy of the United States is. For the purposes of the Constitution's treason clause, an enemy would be a nation or an organization at war with us. It's not enough for a country to be an adversary in trade or in political interests. Remember, even during the Cold War, we weren't formally at war with the Soviet Union. And we're not currently in a conventional war with any nation. It's possible to say that we're currently at war with organizations like Al Qaeda and the Islamic State. So right after the attacks of September 11th, 2001, Congress approved the use of military force against anyone responsible for those attacks or anyone who aided them. And that authorization is still in effect. So, on closer examination, it turns out that the Constitution defines the crime of treason pretty narrowly, and only a few people have ever actually been convicted of the federal offense of treason in our nation's history. And most of them were eventually pardoned or released. No one person has ever been executed for treason, even though Congress has authorized the death penalty as a possible punishment for the crime. Now, that doesn't mean that the crime itself is actually uncommon. If you think about it, all of the thousands of men who fought for the Confederacy during the Civil War and everyone who helped the Confederacy was guilty of treason. These people either did levy war against the United States or provided aid and comfort to the enemy, which in this case was the Confederacy.

**Roman Mars** [00:08:33] So let's get to Trump.

**Elizabeth Joh** [00:08:34] With more than a year and a half into his presidency, there have been many, many questions about Trump's ties to Russia. Let's consider some examples. There continue to be more revelations and denials about what was said in the June 2016 meeting between members of the Trump campaign and a Kremlin connected lawyer. On August 5th, Trump tweeted, "Fake news reporting a complete fabrication that I am concerned about the meeting my wonderful son Donald had in Trump Tower. This was a meeting to get information on an opponent. Totally legal and done all the time in politics. And it went nowhere. I did not know about it." And of the Mueller investigation, Trump has tweeted many versions of the kind of tweet he posted on August 1st. "This is a terrible situation. And Attorney General Jeff Sessions should stop this rigged witch hunt right now

before it continues to stain our country any further. Bob Mueller is totally conflicted, and his 17 angry Democrats that are doing his dirty work are a disgrace to USA." Then there is Paul Manafort, the president's former campaign manager. On August 21st, a jury in Virginia found Manafort guilty of eight counts of financial crimes, including bank and tax fraud. He faces another trial on charges from the special counsel's office that includes money laundering and failing to register as a foreign agent. And Manafort's ties to the Kremlin have been widely reported.

**Roman Mars** [00:10:07] And, of course, there's Helsinki.

**Elizabeth Joh** [00:10:09] On July 16th, Trump met with Russian President Putin for a summit in Helsinki, Finland. Shortly before the summit began, Trump tweeted, "Our relationship with Russia has never been worse, thanks to many years of U.S. foolishness and stupidity and now the rigged witch hunt." The Russian Foreign Ministry's official Twitter account retweeted that tweet and added, "We agree." We don't know what was said between Trump and Putin during their two-hour meeting. The only American representative present besides the president was his interpreter. But we do know what happened during their joint press conference afterwards. A reporter from the Associated Press asked Trump, "Just now, President Putin denied having anything to do with the election interference in 2016. Every U.S. intelligence agency has concluded that Russia did. My first question for you, sir, is: Who do you believe? My second question is: Would you now, with the whole world watching, tell President Putin? Would you denounce what happened in 2016, and would you warn him to never do it again?" Trump responded, "I have President Putin. He just said, 'It's not Russia.' I will say this. I don't know any reason why it would be." Trump then added, "I have great confidence in my intelligence people. But I will tell you that President Putin was extremely strong and powerful in his denial today." American responses were immediate and alarmed. The late Senator John McCain tweeted that same day, "Today's press conference in Helsinki was one of the most disgraceful performances by an American president in memory." And the former director of National Intelligence, James Clapper, said in a TV interview, "More and more, I come to the conclusion that after the Helsinki performance and since that I really do wonder whether the Russians have something on him. I think his behavior was just unbelievable." And the very next day, on July 17th, Trump clarified his Helsinki comments at the White House. Here's what he said. "Now I have to say, I came back, and I said, 'What is going on? What's the big deal?' So, I got a transcript. I reviewed it. I actually went out and reviewed a clip of the answer that I gave, and I realized that there is a need for some clarification. It should have been obvious. I thought it would be obvious, but I would like to clarify just in case it wasn't. I said the word 'would' instead of 'wouldn't.' The sentence should have been: 'I don't see any reason why I wouldn't, or why it wouldn't be Russia.' So just to repeat it, I said the word 'would' instead of 'wouldn't.' The sentence should have been: 'I don't see any reason why it wouldn't be Russia.' Sort of a double negative. So, you can put that in. And I think that probably clarifies things pretty good by itself." To the president's critics, this clarification wasn't entirely comforting.

**Roman Mars** [00:13:18] But let's return to the Constitution. Is President Trump committing treason?

**Elizabeth Joh** [00:13:23] If his remarks and other evidence would indicate that he is or was working with the Russian government for Russian interests, would that be treasonous? The short answer is probably not. Remember that the Constitution defines treason narrowly. Let's return to the two ways that treason can be committed. Either you levy war against the United States, or you provide aid and comfort to our enemies. So, the

problem here is that we're not actually at war with Russia. In fact, we are formally at peace with Russia. If President Trump were to take actions or adopt policies that appear disloyal to the United States, even shockingly disloyal, this still would not amount to treason. What about the second means of committing treason, providing aid and comfort to your enemies? Right after the Helsinki summit, former Director of the CIA, John Brennan, said in a TV interview that Trump's remarks were "a betrayal of the nation. He is giving aid and comfort to the enemy." Arizona Senator Jeff Flake described the press conference as a moment when "the president let down the free world by giving aid and comfort to an enemy of democracy." So, these statements echo the aid and comfort language of the treason clause. And, of course, it's a dramatic way to criticize the president, but it still doesn't mean that Trump has committed treason. Again, the main problem is that Russia is not a formal enemy of the United States. So even if there is eventually evidence to show that Trump actively conspired with Russia, knowingly received help from Russia, even asked for help from Russia to win the presidency and maybe even to make executive policy, this still doesn't qualify as treason under the Constitution. Of course, that doesn't mean that President Trump is in the clear legally speaking. We don't yet know what Special Counsel Mueller and his team have found regarding ties between Russia and the Trump campaign. And there are plenty of non-Russian legal troubles for the president as well. On August 21st--the same day that jury found Paul Manafort guilty--the president's former personal lawyer and fixer, Michael Cohen, pleaded guilty to breaking campaign finance laws. In open court, Cohen said he broke the law at the direction of a candidate for federal office. Presumably, that was President Trump. So, depending on the evidence, Trump's activities with Russia in theory might constitute violations of other laws, including election fraud, conspiracy to defraud the United States, computer hacking, and other criminal laws. But it doesn't amount to treason. And what happened to Bill Blizzard, the union official charged with treason against the state of West Virginia? On May 27th, 1922, a jury acquitted Blizzard of treason. Only one of the thousands of men involved in the West Virginia mine war was actually convicted of treason--a coal miner named Walter Allen. Allen was sentenced to ten years in prison. But while he was out on bond, Allen fled the county. He was never heard from again.

**Roman Mars** [00:16:33] I'm very curious about this idea that you can commit treason against the state of West Virginia.

**Elizabeth Joh** [00:16:38] Not every single state. But my understanding is that most of the states do punish the crime of treason against the state. So, I don't think that prosecutions are very common, and I would assume that convictions are even rarer. But I think the West Virginia mine war cases give you a good sense of why it can be a dangerous crime to use politically. You know, we look back in history and think, "Wow, that was a really unfair use of the treason clause." But it was used in such a way to try and punish these miners who were unionizing. They weren't really against the state of West Virginia. They weren't trying to levy war against the state of West Virginia. They wanted to unionize.

**Roman Mars** [00:17:20] Right. If punishing treason is written into state constitutions, how do you define an enemy of a state inside of the United States?

**Elizabeth Joh** [00:17:30] Yeah, I don't know that there's a whole lot written about it. I mean, it's one of these, like, forgotten areas of the law. Like I said, part of it is, I think, there aren't that many prosecutions that we know about under these state treason clauses. I don't know. I mean, in the West Virginia case, there was a sense that there was kind of a crisis in West Virginia politics and public life because of this, you know, armed battle essentially between civilians and the police. And so, the prosecutors argued that was an

act of war against the state itself. It's hard to imagine that there would be another similar kind of occurrence happening with enough regularity that we could really suss out what state treason means. But it's certainly an unusual set of circumstances. And yes, those treason laws exist. But I think the important thing to keep in mind is that the word "treason" keeps coming up a lot. And people love to say it. After Helsinki, "treason" was one of the most commonly looked up words in Merriam Webster. But it really doesn't matter. You know, what really matters is for purposes of constitutional law, is there anything that we've known about so far that might constitute treason on the part of the president? And the answer is no. You know, treason is not just a gut feeling kind of crime. You actually have to follow what the Constitution says. And, you know, no matter how badly the evidence might show at some point in the future that, you know, Trump has done things that would appear perhaps disloyal to our American interests--to, you know, what it means to be an American president--that could be the basis of impeachment, possibly. It could possibly be the subject of a criminal prosecution. But then one runs into the problems of whether it's okay to indict a president. But they certainly don't amount to treason. And that doesn't say anything about how serious those actions might be but that we've made a choice that treason has to satisfy a very stringent set of circumstances. All the people that many people think, "Wow, they were treasonous"--like the Rosenbergs, for example--they weren't actually charged with treason. They were charged on other criminal offenses. So again, there's this, like, cultural idea, like, "Wow, that's treasonous behavior." But we actually don't have that many instances of treason prosecutions.

**Roman Mars** [00:19:39] I mean, so really, you need an enemy to commit treason. And if we don't technically have an enemy...

**Elizabeth Joh** [00:19:47] I mean, I guess it's even possible to say that, you know, the very filing of a treason prosecution another country might see as an act of war, right? Like, if you said, "We're filing this treason prosecution against someone," and they, you know, have affiliations with another country, that country might say, "Are you saying we are an enemy of the United States?" Again, that's a total law school kind of hypothetical. But you can see the problem there. We don't actually have Russia as a formal enemy. We want to believe that somehow treason amounts to being disloyal to our interests. And that's the conversational understanding of treason. But it's not the constitutional meaning of treason.

**Roman Mars** [00:20:39] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at [trumpconlaw.com](http://trumpconlaw.com) and on Facebook and Twitter. 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](http://doomtree.net). We are a proud member of Radiotopia from PRX, supported by listeners just like you.