

Bribery

Roman Mars [00:00:04] Raisins are big business in California.

Elizabeth Joh [00:00:08] If you were watching TV in the late 1980s, you'll remember the California Raisins. Those are the little raisin-shaped claymation men who became famous for singing--

California Raisins [00:00:18] Don't you know that I heard it through the grapevine...

Elizabeth Joh [00:00:22] And those singing raisins were developed by the California Raisin Advisory Board. Those commercials boosted sales for Sun-Diamond Growers. This is a group of agricultural cooperatives that pool their resources for things like marketing. They represent the growers of products like prunes, walnuts, and raisins. Just one of the group's members, Sun-Maid, is the biggest raisin and dried fruit producer in the country--and in the world, actually. You know, the maker of those little red raisin boxes with the girl in the bonnet on the cover. Pretty much the entire American raisin industry is located within a few hundred square miles in California's Central Valley, about halfway between San Francisco and Los Angeles. Raisins alone are a serious \$500 million industry. Just until a few years ago, we even had a National Raisin Reserve. In the 1990s--

Roman Mars [00:01:16] Like, just in case we ran out of raisins?

Elizabeth Joh [00:01:17] Exactly.

Roman Mars [00:01:18] Okay.

Elizabeth Joh [00:01:19] You would never want to run out of those.

Roman Mars [00:01:21] No. Jeez. What would happen? Okay.

Elizabeth Joh [00:01:23] In the 1990s, Sun-Diamond was worried about changes to two government policies that it benefited from. One involved federal reimbursements for overseas marketing campaigns by groups that Sun-Diamond belong to, like the California Prune Board and the Raisin Administrative Committee. The other was the use of methyl bromide. In raisin farming, methyl bromide was a popular pesticide. So, changes were coming that were going to disadvantage Sun-Maid, and they didn't like it one bit. So, around this time, Sun-Diamond happened to give a lot of gifts to a man named Mike Espy--tickets to the 1993 U.S. Open tennis tournament, luggage, meals, a crystal bowl--thousands of dollars' worth of gifts.

Roman Mars [00:02:10] So who exactly was Espy?

Elizabeth Joh [00:02:12] At the time, he was a Secretary of Agriculture--the guy who was in a position to change and to influence federal agricultural policy, which matters if you're in the business of dried fruit and nuts. Were these things--the tickets, the crystal bowl--just gifts? The federal government didn't think so. And in 1996, a federal grand jury indicted Sun-Diamond for giving illegal gratuities. That's the crime of giving a gift to a public official for something the official either did or was going to do. And that case eventually made its way up to the United States Supreme Court. In 1999, the Supreme Court rejected the government's theory of why Sun-Diamond was guilty. Prosecutors didn't link the company's gifts with any particular thing the secretary of agriculture did or was going to do.

The Court's opinion was written by Justice Scalia, who chose to explain the crime of illegal gratuities by referring to its statutory cousin, the federal bribery statute. "While committing the crime of illegal gratuities means you're giving a reward to a public official, bribery is different," said Justice Scalia. Quote, "For bribery, there must be a quid pro quo--a specific intent to give or receive something of value in exchange for an official act." That's the essence of bribery--a quid pro quo--a Latin phrase that means "something for something." A quid pro quo is what makes bribery bribery as opposed to other crimes involving corruption. We've heard a lot about bribery, quid pro quos, and impeachment in the last few months. At a rally in Hershey, Pennsylvania, on December 10th, President Trump announced--

Donald Trump [00:04:02] This is the lightest impeachment in the history of our country by far. It's not even, like, an impeachment.

Elizabeth Joh [00:04:11] Actually, it's a real impeachment. Trump is about to become the third president in American history to be impeached by the House of Representatives. At the center of the allegations against Trump are what the House has described as a "bribery scheme." What is the crime of bribery, and how do Trump's actions measure up?

Roman Mars [00:04:32] 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 and six-page rambling letters 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. Okay. This time we're going to jump right in with Trump.

Elizabeth Joh [00:05:26] To recap, beginning in September, we learned from an anonymous whistleblower's complaint that President Trump held a 30-minute phone call on July 25th with the newly elected president of Ukraine, Volodymyr Zelensky. The United States is a very important ally to Ukraine and its struggles against Russian aggression, including fighting Russian led forces. We are their most important ally. Zelensky was hoping to arrange for a White House visit as a public symbol of the U.S.-Ukraine alliance, and Congress had already approved \$391 million in aid to be provided to Ukraine. And while the U.S. and Ukraine are allies, it's fair to say that Ukraine is not exactly in an equal relationship here. According to the White House's own released summary of that July call, Trump now infamously said to Zelensky, "I would like you to do us a favor, though." That favor included two things. First, to look into what is a baseless conspiracy theory that it was Ukraine, not Russia, that interfered in the 2006 election. The second favor was for Ukraine to launch an investigation into Joe Biden and his son for corruption. Like the first part of the favor, the idea that either Biden or his son engaged in corruption has no factual basis. We learned later that the aid to Ukraine that Congress had already approved had been put on hold by the White House before the July phone call. After the House Foreign Affairs, Intelligence and Oversight Committees announced on September 9th that they would launch an investigation into what happened to those funds, the Trump administration released the hold on the money on September 11th. There are two parts of the favor in that now famous phone call between Trump and Zelensky. But to make things simple, let's focus on Trump asking the president of Ukraine to launch an investigation into the Bidens.

Roman Mars [00:07:24] Bribery was a serious enough crime that it was one of the few that was explicitly mentioned in the Constitution. The Constitution says that "impeachment

can be based upon treason, bribery, or other high crimes and misdemeanors." But could what Trump did qualify as the crime of bribery? The short answer is yes.

Elizabeth Joh [00:07:42] So let's begin with the federal criminal statute on bribery. That's 18 U.S.C. 201. It makes it a crime for a public official to directly or indirectly corruptly demand, seek, receive, accept, or agree to receive or accept anything of value personally in return for being influenced in the performance of any official act. Thus, you need 1) a public official, 2) who is demanding, accepting, or promising, 3) a benefit or a thing of value, 4) with a corrupt state of mind, and 5) to be influenced in an official act. Now let's address the easiest and most confusing thing that's been discussed. "Wait," say defenders of the president, "he's obviously not guilty of bribery because Ukraine received the money." This was one of the arguments made in a House Republican memo of talking points released just before the public impeachment hearings in November. "Ukraine got the money anyway." That point was repeated again and again. Former U.N. Ambassador Nikki Haley said, "It's hard for me to understand where the whole impeachment situation is coming from because what everybody's up in arms about didn't happen." Ann Coulter tweeted on November 13th, "If no crime was committed, it doesn't matter what stopped you." And Laura Ingraham said on Fox News on November 14th--

Laura Ingraham [00:09:07] Attempted bribery isn't in the Constitution.

Elizabeth Joh [00:09:11] Two things about this. First, the suggestion that nothing wrong happened because a crime failed is like fingernails on chalkboard for law professors. Failed crimes are still crimes. People get convicted of criminal attempts all the time. "Attempts are not punished?" That's pretty much the Sideshow Bob defense from The Simpsons. In a 1994 episode of the show, Bob--he's a circus clown and a murderous one--calls into a radio show from prison and dismisses his conviction for unsuccessfully trying to murder Bart Simpson.

Sideshow Bob [00:09:45] Attempted murder? Now, honestly, what is that? Do they give a Nobel Prize for attempted chemistry? Do they?

Elizabeth Joh [00:09:53] Not for chemistry, but sure for crime?

Roman Mars [00:09:56] It turns out being bad at bribery does not exonerate you.

Elizabeth Joh [00:10:00] Second, the bribe doesn't even have to be successful for you to actually be guilty of federal bribery. The federal statute punishes public officials even if they only demand to receive something of value in order to perform a public act. The crime doesn't actually require you to go through with an exchange. So, let's go back to the parts of bribery itself. Would the "I would like you to do us a favor, though," qualify for bribery? In this case, the public official is President Trump. He demanded--that's the "I would like you to do us a favor, though"--a thing of value. Courts have made it clear that a thing of value doesn't have to be money. In fact, it doesn't even have to be something that would be valuable to everybody. It just has to be valuable to the person accused of bribery. For Trump, this was a public announcement from Zelensky that he would investigate Trump's political rival--that's Biden--and a conspiracy theory about the 2016 election. Those things count as things of value. Now, if this were a criminal case, there might be slightly more difficulty with the other two parts of bribery. The person accused of bribery has to agree to be influenced in order to get the benefit, and he must have corrupt intent. That means acting out of self-interest rather than for official purposes. Was there a promise that connected the release of U.S. aid in return for the Biden investigation? And was it done out

of the president's interest in getting himself reelected? On October 8th, Trump tweeted, "I would love to send Ambassador Sondland a really good man and great American to testify, but unfortunately, he would be testifying before a totally compromised kangaroo court, where Republicans rights have been taken away and true facts are not allowed out for the public to see." Importantly, Ambassador Sondland's tweet, which few report, stated, "I believe you are incorrect about President Trump's intentions. The president has been crystal clear. No quid pro quos of any kind. That says it all." Well, Sondland did end up testifying publicly and under oath before the House Intelligence Committee on November 20th. Here's what he had to say about that.

Gordon Sondland [00:12:17] I know that members of this committee frequently frame these complicated issues in the form of a simple question: Was there a quid pro quo? With regard to the requested White House call and the White House meeting, the answer is yes.

Elizabeth Joh [00:12:33] But it doesn't even matter whether or not Trump used the words "quid pro quo" or even denied that there was a quid pro quo. That's why Trump's impromptu public statement on November 20th doesn't excuse him either. He read from notes written in Sharpie on an Air Force One notepad right after Sondland testified about what Trump wanted from Ukraine.

Donald Trump [00:12:54] I say to the ambassador in response: I want nothing. I want nothing. I want no quid pro quo.

Elizabeth Joh [00:13:02] Now, in ordinary criminal cases, there's usually only circumstantial evidence that points to an unspoken agreement. Things like what the people involved said, how they behaved, and the timing of their actions. Just denying it doesn't mean you didn't do it. And as for satisfying the corrupt intent requirement of bribery--that means acting out of personal interest--Trump had this to say in a tweet from December 4th. "When I said in my phone call to the president of Ukraine, 'I would like you to do us a favor, though, because our country has been through a lot and Ukraine knows a lot about it,' with the word 'us' I am referring to the United States, our country." Then just a few days later, "Read the transcripts. Also see where I say 'us,' our country, as opposed to 'me,' meaning me, and where I then say that 'the Attorney General of the United States will call you.'" And then three days later he tweeted, "Read the transcripts. 'Us' is a reference to U.S.A. not me." Trump saying that when he said, "I'd like you to do us a favor, though," he meant to do the United States a favor--it's not the most believable of defenses. And remember, the favor he requested wasn't part of any official change in American policy toward Ukraine. The request was viewed by American officials who testified before the House as being "improper, unusual, and politically motivated."

Roman Mars [00:14:30] Take what David Holmes, an official at the U.S. embassy in Ukraine, said when he testified before the House.

Elizabeth Joh [00:14:37] Holmes said that when he asked Gordon Sondland about Trump's position on Ukraine, quote, "Ambassador Sondland agreed the president did not give a sh*** about Ukraine." But from what we now know from all those texts, documents, and sworn testimony, there certainly seems to be a lot of evidence pointing to a corrupt exchange. For instance, Sondland testified that the White House was interested only in an announcement of an investigation into the Bidens. According to Sondland, the Ukraine president, quote, "only had to announce the investigations. He didn't actually have to do them, as I understand it." Remember, Sondland was working behind the scenes to get the

Ukrainians to make this happen. A White House visit, an American aide conditioned on a formal announcement that the Bidens were being investigated. Sondland was one of several people associated with the Ukraine call who testified before the House in the second part of November. Many more people who were asked to testify did not. Why not? Because on October 8th, White House Counsel Pat Cipollone wrote a letter to House Speaker Nancy Pelosi and the three chairs of the House committees running these investigations. It's an eight-page letter, but I can sum it up in one sentence: "We're not going to participate, period." That meant that some people critical to understanding what exactly happened in that July 25th phone call would not be testifying, like Secretary of State Mike Pompeo, Chief of Staff Mick Mulvaney, and former White House counsel Don McGahn. Now, in some of these instances, the House has gone to Court to compel testimony. But we're not likely to know the resolution of these cases for some time. But the House has moved ahead. On December 5th, House Speaker Nancy Pelosi announced that the House of Representatives will be drafting articles of impeachment against President Trump. In her formal address, Pelosi said--

Nancy Pelosi [00:16:31] During the debate over impeachment at the constitutional convention, George Mason also asked, "Shall any man be above justice? Should that man be above it who can commit the most extensive injustice? And if we allow a president to be above the law, we do so surely at the perils of our republic. In America, no one is above the law."

Elizabeth Joh [00:16:58] At 7:00 in the evening just two days later, the House Judiciary Committee held what's called a "markup session" on two articles of impeachment and voted to approve those articles just three days later.

Roman Mars [00:17:08] The full House of Representatives voted on the articles of impeachment on Wednesday, December 18th. With the Democratic majority, the articles were approved, making Trump the third president in American history to be impeached by the House. So, what's the basis of this impeachment?

Elizabeth Joh [00:17:24] So we've spent a lot of time talking about President Trump's actions, words, and tweets over the past couple of years. They've been subjected to lawsuits and protests, endless media coverage. But the basis of the impeachment is pretty narrow. The House has decided to focus on Ukraine. One article accuses Trump of obstruction of Congress. It says that Trump has "directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its sole power of impeachment." The other article of impeachment alleges that Trump has committed an "abuse of power by soliciting the interference of a foreign government in the 2020 United States presidential election." This is a direct reference to that July 25th phone call. You might ask, "Well, isn't this bribery? Why doesn't the article directly charge the president with bribery?" One part of the answer is probably political; abuse of power might just poll better with the public. And bribery has some complications. We've already talked about how some elements or parts of federal bribery may be tricky--although certainly not impossible--to prove. And then there's the complication that the current federal statute and bribery didn't exist when the Constitution was drafted. There was what we call the "common law of bribery"--that's judge-made law. But notice then we start to go down the path of debating which and whether a certain kind of bribery matters. And, of course, in the end, impeachment itself isn't a criminal prosecution at all. There's no conviction at the end of the process in the same way there's a criminal conviction. The worst thing that happens to Trump--the very worst--would be removal from office.

Roman Mars [00:19:06] So why is talking about bribery still useful?

Elizabeth Joh [00:19:09] Because the crime of bribery remains in the background of impeachment, even if it's not formally the basis of an article of impeachment. In fact, when the House released its formal report to support impeachment late in the night of December 15th, it refers specifically to the federal crime of bribery. As the report itself says, "Although President Trump's actions need not rise to the level of a criminal violation to justify impeachment, his conduct here was criminal." And they proceed through the analysis of bribery that we've just walked you through here. The subject of bribery matters to Trump, too. Even before, during, and after the House launched its impeachment investigation, Trump himself was talking about a quid pro quo. On November 3rd, Trump tweeted, "False stories are being reported that a few Republican senators are saying that President Trump may have done a quid pro quo. But it doesn't matter. There's nothing wrong with that. It is not an impeachable event. Perhaps so, but read the transcript. There is no quid pro quo." It's kind of an internally inconsistent tweet.

Roman Mars [00:20:19] "I didn't do it if I did do it. No, I did it. But it doesn't matter. But I didn't do it."

Elizabeth Joh [00:20:24] "I also didn't do it." On Friday, December 13th, Trump tweeted, "It's not fair that I'm being impeached when I've done absolutely nothing wrong. The radical left Do Nothing democrats have become the party of hate. They are so bad for our country." By making Ukraine the narrow focus of impeachment, the House also makes the case for the speed of its process. As House Intelligence Committee Chair Adam Schiff said in a press conference on December 10th, "This impeachment is really about the next election." Schiff posed it this way--

Adam Schiff [00:20:59] The argument "Why don't you just wait?" amounts to this: "Why don't you just let him cheat in one more election? Why not let him cheat just one more time? Why not let him have foreign help just one more time?" That is what that argument amounts to.

Elizabeth Joh [00:21:22] And Trump's more recent tweet defenses veer away from what happened in Ukraine. Instead, the president is just pretty upset about impeachment. On December 13th, he tweeted, "How do you get impeached when you have done nothing wrong, a perfect call, have created the best economy in the history of our country, rebuilt our military, fixed the VA, cut taxes and regs, protected your Second Amendment, created jobs, jobs, jobs, and so much more? Crazy." And on December 17th, Trump wrote an angry, rambling, sometimes false, exclamation point riddled, six-page letter to Speaker Pelosi. Among his complaints are the following quotes. "You have cheapened the importance of the very ugly word 'impeachment.' By proceeding with your invalid impeachment, you are violating your oath of office. You are offending Americans of faith by continually saying, 'I pray for the President,' when you know this statement is not true unless it is meant in a negative sense. It is a terrible thing you are doing. But you will have to live with it. Not I. I write this letter to you for the purpose of history and to put my thoughts on a permanent and indelible record." And not to be forgotten, this line: "More due process was afforded to those accused in the Salem Witch trials." And on the eve of his impeachment, Trump tweeted, "They want to impeach me. I'm not worried. And yet they're all breaking the law in so many ways. How can they do that and yet impeach a very successful Economy Plus president of the United States who has done nothing wrong?" Trump's impeachment means that there's going to be a Senate trial. Apart from the legal

issues, for me, there's another question: What will John Roberts wear? Article I of the Constitution says that "when the president of the United States is tried, the Chief Justice shall preside. That means the current Chief Justice, John Roberts, will preside over the Senate trial of President Trump. Roberts has been on the court since 2005. Bill Clinton was the last president who faced impeachment by the House in trial in the Senate. And the Chief Justice who presided over his Senate trial was William Rehnquist. People took note of his robe. So, a bit of background. Judges and other legal systems often wear elaborate robes. The British Supreme Court Justices have handmade, ceremonial robes that are embroidered with real gold thread. The Justices of the Supreme Court of Canada have scarlet robes trimmed with white mink. But in the United States today, federal and state judges generally wear a very simple, plain, black robe. And that goes for the United States Supreme Court as well. Since 1912, the Bentley & Simon robe factory in Salem, Virginia, has made robes for the Supreme Court Justices. They take about five weeks to make, and they're known for their horsehair, canvas-lined collar that helps make them cool and comfortable. Lifetime guarantee. But one day in 1994, Justice Rehnquist had four one-inch-wide gold stripes sewn onto each sleeve of his Bentley & Simon Model J-71. According to fellow Supreme Court Justice Sandra Day O'Connor, "He simply surprised us with the change one morning. He said he'd recently seen a Gilbert and Sullivan opera in which the Lord Chief Justice wore a robe with gold stripes." This would have been a production of *Iolanthe*. And *Iolanthe*? It's just your typical comic opera where immortal fairies confront the House of Lords. A reporter asked the Supreme Court press office, "What's the meaning of the stripes?" "There's no meaning" was the answer. He just likes the look.

Roman Mars [00:25:11] It looked good. I liked them. I remember that.

Elizabeth Joh [00:25:17] Probably plain, though. That's my expectation about Roberts. He's going to go plain black.

Roman Mars [00:25:21] Oh, for sure. I wonder if there's a betting market on that.

Elizabeth Joh [00:25:25] He's not a razzle dazzle guy.

Roman Mars [00:25:26] Not at all. He doesn't exude that he's super interested in things or something like that.

Elizabeth Joh [00:25:33] Other life. Hobbies.

Roman Mars [00:25:35] Exactly. It just seems like this is all he's ever wanted to do. Even though it would be hard to figure out what the framers meant by "bribery," don't you think it's rhetorically better--if he committed bribery and it's written in the Constitution that bribery is an impeachable offense--to just charge him with it anyway?

Elizabeth Joh [00:25:57] Yeah, I mean, I can see that. But I think the easier thing is to just say when you just do something that's clearly benefiting you and you're the president, that's abusing your power. And I think that's an easier story to tell because once you talk about bribery, then people immediately think of the crime, right? And then reference to the crime invariably gets all kinds of talking heads about, like, "Well, if this were a regular bribery case, would he win or would he be acquitted?" And I think it just becomes much more complicated in that sense, even though, you know, people kind of feel like, "Yeah, I get what bribery is about." It is actually a crime that has to have certain elements proven. And then you get into a bunch of arguments about that. And I think that abuse of power is

a much more kind of simple "you're not supposed to use your position for personal benefit."

Roman Mars [00:26:46] So we're purposely trying to veer away from something that seems like a criminal case because that can bog down this thing that is not a criminal trial.

Elizabeth Joh [00:26:58] I think that's one way of looking at it. So, you can think of bribery in the background--and it clearly is because it's in the House report, supporting their articles of impeachment. But it's almost kind of like the scaffolding, right? It's the reference point to say, "Well, this is what the abuse of power is about. But the actual article itself is a more kind of simple to understand "you're not supposed to do this when you're the president."

Roman Mars [00:27:19] Right. Do you think the narrowness of the articles are built to try to control the narrative because of social media and all these different ways that they can present them?

Elizabeth Joh [00:27:30] That might be part of it. I mean, I just think it's an easy thing to message because, you know, in a world where impeachment was about Ukraine, Russia, nepotism, and emoluments, it becomes out of control, and then you can just pick it apart by a thousand cuts. So, I think there is some logic to saying, "Let's have the impeachment be narrow, let it be fast, and let it be a story that everyone can agree at least what the charges are about, even if they don't agree that there's a there, there. It makes for a stronger case because it's easy to explain in a world where nobody has an attention span anymore.

Roman Mars [00:28:13] Fair enough. Like, I remember the Clinton impeachment. I worked in a lab. It was played on the radio all day long. And it already seems like we've been through so much, voting on the articles, getting out of committee--even the Senate acquittal seems like a fait accompli, actually. And so, you know, historically, what's the value of it?

Elizabeth Joh [00:28:38] Of the impeachment itself?

Roman Mars [00:28:40] Of the impeachment itself. Is it the Schiff argument that you just have to call cheaters "cheaters" when they do it?

Elizabeth Joh [00:28:44] I mean, if the Constitution means anything, it's supposed to rise to the occasion when, you know, Congress thinks that the president's been doing something wrong. I mean, even if the political partisan nature of it means that a lot of people feel like they know the outcome and, you know, the outcome may be virtually certain--if this process means nothing--then why do we even have it? It's one of these things--it has to take place. It has to take place if there is meaningful evidence. And we have every reason to believe that there's all of this meaningful evidence because of all this testimony, texts, things released by the White House itself to suggest that there's wrongdoing. You know, it can't just be that it doesn't matter because everyone knows the outcome. I mean, not to get all professorial on you, but we don't have a rule of law then. It doesn't mean anything.

Roman Mars [00:29:31] Right. All right. Thanks.

Elizabeth Joh [00:29:33] Thanks.

Roman Mars [00:29:42] This story was 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.