

## The Emoluments Clauses

**Roman Mars:** [00:00:00] When you were the president of the United States, you received gifts--a lot of gifts.

**Elizabeth Joh:** [00:00:05] Many of them are what you'd expect: ceremonial platters, crystal vases, frame pictures, and other things that seem appropriate to present to a president.

**Roman Mars:** [00:00:15] Other gifts are more unusual.

**Elizabeth Joh:** [00:00:17] Take the gift of King Mongkut, who ruled Siam in the 19th century. His relationship with his governess was the inspiration for the Rodgers and Hammerstein musical *The King and I*.

**Anna Leonowens** [00:00:27] Getting to know you, getting to know all about you.

**Elizabeth Joh:** [00:00:33] In 1861, the real king of Siam sent a sword, two elephant tusks, and a photograph to President James Buchanan. Buchanan was in the last month of his administration at the time.

**Roman Mars:** [00:00:47] Good riddance.

**Elizabeth Joh:** [00:00:47] The king also offered President Buchanan several pairs of elephants that could be turned loose into the American wilderness.

**Roman Mars:** [00:00:54] They were so we could start our own wild elephant population.

**Elizabeth Joh:** [00:00:57] It was left up to President Lincoln, Buchanan's successor, to respond. And he did with a polite refusal.

**Roman Mars:** [00:01:04] Oh, come on, Abe. Imagine elephants everywhere.

**Elizabeth Joh:** [00:01:07] Lincoln explained to the Siamese king in a letter that, quote, "our political jurisdiction does not reach a latitude so low as to favor the multiplication of the elephant." In other words, it's just not hot enough for them here.

**Roman Mars:** [00:01:20] I guess Lincoln has a point. That's why he's the best.

**Elizabeth Joh:** [00:01:22] So we didn't end up with our population of wild, American elephants. But presidents do, in fact, accept many gifts--thousands of gifts. And when the president receives a gift from a foreign government, there are a lot of rules to follow. Federal law says that when the president receives a gift of more than, quote, "minimal value"--that's a couple of hundred dollars today--Congress requires that the acceptance is on behalf of the United States. In other words, the president doesn't get to keep all those jewel-encrusted ceremonial swords, silver bowls, and fancy pens. What usually happens is that these gifts are handled by the gift office. And yes, there is a federal gift office in the State Department. Those gifts are then stored by the National Archives--unless it's 300 pounds of raw lamb meat, which the second President Bush received from the President of Argentina, or the live puppy he received from the President of Bulgaria. Those were donated elsewhere. A list of all of the gifts foreign nations give to the president and the First Lady are published every year by the State Department.

**Roman Mars:** [00:02:25] You can see the list online. It's great. The last column of the report describes why the gift was accepted.

**Elizabeth Joh:** [00:02:31] If you're wondering what reason a president might give to accept a gift from a foreign country, it's because, quote, "non-acceptance would cause embarrassment to donor and U.S. government." That language comes from federal law. I like to think of that reason--non-acceptance would cause embarrassment to donor and U.S. government--when I think of President Obama accepting the black, velvet flip-flops the government of Myanmar gave him in 2014.

**Roman Mars:** [00:02:56] I bet those are some sweet flip-flops.

**Elizabeth Joh:** [00:02:58] So you might ask yourself, "Why all of this protocol for presidential gifts? Why so many rules?" The answer comes from the Constitution itself--a part of the Constitution that, up until now, almost no one paid any attention to.

**Roman Mars:** [00:03:13] Up until now. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the extreme actions of the chief executive of the United States and channel that chaos into learning our Constitution like we never have before. Elizabeth Joh is our professor. And I'm your fellow student and host, Roman Mars. Gifts are never really free. Listen to this, and then we'll have more Trump Con Law.

**Elizabeth Joh:** [00:03:52] The reason why there are so many rules about how and whether the president can personally accept gifts from foreign countries, is because of what the Constitution says about emoluments. The word comes from the Latin term gain or profit.

**Roman Mars:** [00:04:07] There are actually two Emoluments Clauses in the Constitution.

**Elizabeth Joh:** [00:04:10] One is found in Article I--that's the section addressed to Congress. That clause is usually referred to as the Foreign Emoluments Clause. And it says, and I'm quoting, "No Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress," remember that phrase, "accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." The Foreign Emoluments Clause arises from a concern from our founders that American ambassadors might be corrupted by gifts from European powers. If you're an ambassador to France, say, you might be more likely to hear what the king has to say after he gives you a diamond studded snuffbox. That was the gift given to Benjamin Franklin from Louis the 16th. What does the Foreign Emoluments Clause of the Constitution mean? Well, from the words themselves, someone holding a position of trust in the federal government can't take a gift from a foreign country unless Congress says it's okay. In other words, the Constitution flat-out prohibits the people covered by the clause from receiving anything from a foreign country without Congress' permission.

**Roman Mars:** [00:05:23] There's also a second Emoluments Clause in the Constitution. This one's called the Domestic Emoluments Clause.

**Elizabeth Joh:** [00:05:29] Unlike the Foreign Emoluments Clause, the Domestic one is found in a different part of the Constitution: Article II--that's the part that's addressed to the president. The first part of the Domestic Emoluments Clause talks about the president's

salary, which isn't really relevant here. But the second part says that the president shall not receive any other emolument from the United States or any of them. In other words, if the Foreign Emoluments Clause talks about a general ban on the president receiving gifts from other nations, then the Domestic Emoluments Clause says the president can't receive special gifts from any of the states or the federal government. And while the Foreign Emoluments Clause says that Congress can give the president permission to accept gifts, the Domestic Emoluments Clause just says no. No gifts from the states or the federal government. Period.

**Roman Mars:** [00:06:18] Now, if you asked anyone before November of 2016 what the Emoluments Clauses were, very few people would have been able to tell you.

**Elizabeth Joh:** [00:06:26] It's no exaggeration to say that these clauses were, until fairly recently, really obscure parts of the Constitution. They don't usually come up. Emoluments have become part of the national vocabulary because of President Trump. When Trump became president, he didn't leave behind his ownership of the many hotels, golf courses, commercial real estate properties, and television productions that make up the Trump Organization around the world.

**Roman Mars:** [00:06:52] His businesses and his role as president are very intertwined.

**Elizabeth Joh:** [00:06:57] The Trump International Hotel, for example, has the president's name displayed in very large letters above the front entrance. It's just blocks from the White House. Trump has called his private club in Palm Beach, Mar-A-Lago, the Winter White House. So, imagine that officials from a foreign nation decide to rent rooms or conference space at a Trump property, rather than any other hotel, in order to curry favor with the president. Ultimately, Trump, the businessman who benefits from any use of his business, is the same as Trump the president. He's the same person, of course. The question is whether this activity violates the Foreign Emoluments Clause. Here's another example. Imagine that one of Trump's companies sold its products or services to a federal or state government agency. If a state agency buys hundreds of Trump steaks and bottles of Trump wine, Trump the businessman benefits--but so does Trump the president. Is that a violation of the Domestic Emoluments Clause? Well, here's the problem. It's not that there aren't a lot of Supreme Court cases on the subject. There aren't any. There isn't a clear answer. Look at any law school textbook on constitutional law. I can guarantee you there is no emoluments section. We've never really thought about it before.

**Roman Mars:** [00:08:17] But we've never really had a president like Trump before.

**Elizabeth Joh:** [00:08:19] The fact that there aren't any Supreme Court cases--or any important legal cases for that matter--on either Emoluments Clause hasn't stopped people from going to court.

**Roman Mars:** [00:08:29] Right now, there are three separate emoluments cases.

**Elizabeth Joh:** [00:08:32] The first involves a lawsuit brought by the Citizens for Responsibility and Ethics in Washington, also known as CREW. CREW is a government watchdog group. The second lawsuit has been brought by the District of Columbia and the state of Maryland. A third lawsuit has been brought by 196 Democratic members of Congress. Three lawsuits. All three lawsuits claim that Trump is in violation of the Foreign Emoluments Clause, the Domestic Emoluments Clause, or both. Trump is head of the Trump Organization and President of the United States at the same time. Because of that,

these lawsuits are claiming that Trump is receiving special benefits from entities who are paying for Trump products and services precisely because of the presidential connection. None of these cases are going to be an easy win for any of the parties bringing them for a couple of reasons. Some of the problems have to do with the Emoluments Clauses themselves. What do they mean? Let's take the Foreign Emoluments Clause. If you read it, it doesn't say the word "president." It doesn't explicitly say that the president can't receive gifts from foreign countries without Congress's permission. Trump might argue that the president isn't covered by this. Here's the thing, though: presidents in the past have behaved as if the Foreign Emoluments Clause applied to them. Three sitting presidents have won the Nobel Peace Prize.

**Roman Mars:** [00:09:54] It comes with a shiny, gold medal and several million Swedish krona.

**Elizabeth Joh:** [00:09:58] When President Obama won the Peace Prize in 2009, Department of Justice lawyers said Obama could personally accept the gold medal and the Swedish krona and not violate the Emoluments Clause. The reason? Well, it had to do with who decides on the prize. It's true that the Storting--that's the Norwegian Parliament--selects the Peace Prize committee. But the committee itself is private and not a foreign government. Department of Justice lawyers spelled all this out in a long memo that assumed that the Foreign Emoluments Clause applied to President Obama. It just didn't violate the clause for Obama to accept the Peace Prize. There's another problem for these lawsuits. Even if foreign government officials were renting Trump hotel spaces and using Trump Organization services to gain influence with the president, do any of these things even count as emoluments under the Constitution? After all, it's not like Trump is personally taking diamond encrusted snuff boxes for himself. Again, the answer isn't obvious because courts haven't had to address this before. It's hard to say, and there are good arguments on either side. Then there is a potential and totally different legal problem for these three lawsuits. It's a legal idea called "standing." Standing is a distinct legal idea that isn't related to the Emoluments Clauses. To require standing means that you have to be the right party to bring a lawsuit. One way to think about this is that you can only bring a lawsuit if you have an injury--it doesn't have to be physical, of course--that a court can do something about. So, you can't just bring a lawsuit because you're mad about something or because you think somebody else is violating the law. Here's how I explain it to my students. Remember the Lorax from Dr. Seuss? "I am the Lorax. I speak for the trees." Well, the Lorax doesn't have legal standing.

**Roman Mars:** [00:11:48] Wait, what?

**Elizabeth Joh:** [00:11:49] You can't just bring a lawsuit just because you see something wrong.

**Roman Mars:** [00:11:53] Dr. Seuss was no lawyer. I guess he was a doctor; it's in the name.

**Elizabeth Joh:** [00:11:57] In each of the three emoluments lawsuits we have so far against the president, the parties bringing the lawsuits are going to have to convince a court that they each have standing--that they have an injury the court can do something about. I won't dive into all of the details about their arguments, but one of the lawsuits--the one brought by the District of Columbia in the state of Maryland--has a really interesting claim. Maryland argues that it has legal standing--that it's the right kind of party to bring an emoluments claim against President Trump. The state's reason goes all the way back to

the founding. Before it joined the United States, the Maryland state constitution had its own emoluments. The punishment for any governor violating the state Emoluments Clause? Banishment--permanent ejection. Maryland's argument for why it can bring a lawsuit against President Trump is this: "Look, when we joined the United States, we gave up some of our own dependence. We gave it up with the understanding that the federal Constitution's Emoluments Clauses would protect the interest we had in our own constitution. That was part of the bargain."

**Roman Mars:** [00:13:07] That's so cool.

**Elizabeth Joh:** [00:13:08] And there's a good reason to dwell on all of the standing stuff. A court, when faced with a question of legal standing, can say, "Nope, you're not the right party to bring this lawsuit," and dismiss the lawsuit entirely. It doesn't matter how good the Emoluments Clause arguments are.

**Roman Mars:** [00:13:25] This might be the fatal problem with the Emoluments Clause lawsuits. You might interpret Trump's actions as being in violation of the Emoluments Clause. But unless you're an injured party, it might not be your lawsuit to fight, and the court could just not accept the case and sidestep the issue altogether.

**Elizabeth Joh:** [00:13:42] With all of these legal uncertainties. It's not clear that a court would answer whether Trump is in violation of the Foreign or Domestic Emoluments Clauses. It's possible that none of these three cases have the right sort of parties. There is another way to resolve the question, even if it's just a theoretical one. The Constitution's remedy of impeachment exists if enough members of Congress believe that Trump was in violation of the emoluments clauses. That theoretical mechanism exists. But again, here, the barriers are political and not legal. The emoluments questions around Trump are unusual. In the normal constitutional law problem--if there is such a thing--you have a person or an institution that you might disagree with, but it's still working in a recognizable way. You have legal cases on either side that both parties will use to support their position, and you have some historical experience to give you some perspective.

**Roman Mars:** [00:14:37] But with President Trump and emoluments, we really have none of these things.

**Elizabeth Joh:** [00:14:41] It's a perfect example of a stress test of the Constitution.

**Roman Mars:** [00:14:45] I have some follow up questions for Elizabeth right after this. Is this really a thing? Has there never been an emoluments case because there's never been a significant enough perceived violation? Or are the people who are against Trump for all kinds of reasons just trying to find another angle of attack?

**Elizabeth Joh:** [00:15:05] Probably a little bit of both. But I think the real instinct is that, you know, a lot of constitutional law is just embedded in a set of norms, right? So, what that means is that past presidents--whether or not they might be worried about crossing the line and violating something like the Emoluments Clause--have always been cautious enough to take the steps to say, "Well, let's make sure that I'm not violating the Emoluments Clause." President Obama asked the Office of Legal Counsel, "Please prepare a memo to say why I can get the Swedish krona and the gold medal." They do. They say it's not a problem. Here's a president who says, "I don't care. I'm going to keep my hotels. I don't care. It's great for business. It's great for America." So, we just have in the person of this particular president someone who says, "I don't care about the norms. I

don't care if past presidents have been careful, have consulted lawyers, and have taken the steps to make sure that at least there's the appearance of behaving in a constitutional way." This is a president who seems to be saying, "Well, so what? It works for me. It works for everyone. So, it's going to be fine." So yes, it's the kind of thing which, you know, almost invites a lawsuit. And the question is whether that's really the right mechanism to address this kind of problem. And maybe ultimately, the Constitution's answer is it's not. And in fact, it's up to Congress to decide whether impeachment is the right remedy.

**Roman Mars:** [00:16:31] If there's been no case law regarding emoluments, is there something in the fact that former presidents have comported themselves in such a way that somehow gives it this ghost structure of how to behave? And does that have any legal basis whatsoever?

**Elizabeth Joh:** [00:16:50] So, sure, I mean, the Supreme Court and all courts can interpret the Constitution with a variety of tools. One of the most important, of course, is case law--what they have decided before. Here you don't have that luxury. Another form of constitutional interpretation is what has been our lived experience. You know, how have the actors in question--here it would be past presidents--how have they behaved? That doesn't mean that what past presidents do absolutely determines the outcome. But in a lot of important Supreme Court cases, the Court has said, "Well, if we have this unbroken string of behavior, that's pretty important to help us understand something."

**Roman Mars:** [00:17:28] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at [trumpconlaw.com](http://trumpconlaw.com), on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop collective. Every track is like a jewel-encrusted sword from the king of Siam. Find them at [doomtree.net](http://doomtree.net). We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and donors who are listeners just like you.