

The Takings Clause

Roman Mars: If you've driven on an interstate highway, you can thank the New York World's Fair of 1939.

Elizabeth Joh: The theme of the '39 Fair was The World of Tomorrow, and millions of people came to pay \$0.75 to take a look. One of the most popular attractions at the World's Fair was part of the General Motors exhibit called Futurama.

Futurama: Sensational is the Futurama that projects you into 1960. The highways and horizon show.

Elizabeth Joh: Each day, people waited for hours to see the Futurama exhibit. They wanted to sit in plush, traveling sound chairs. These moved you around a conveyor belt called the "carry-go-round." This 18-minute ride led you around the nearly one-acre model of what cities were going to look like 20 years in the future. This would have been 1960 to the people who came.

Roman Mars: And what did those cities of the future look like?

Futurama: A quarter of a mile high skyscrapers tower with convenient rest and recreational facilities for all. On many of the buildings are landing decks for helicopters and autogyros.

Elizabeth Joh: They were going to be filled with sleek skyscrapers, streamlined cars, and highways--lots of highways. They were supposed to connect the whole country. And these highways were beautiful. Enormous cloverleaf interchanges, elevated ramps, triple decker lanes... And this Futurama exhibit was one of the first times that the American public--remember, they were still recovering from the depression--was introduced to the idea of enormous, multi-lane highways that were going to crisscross the nation. The man who designed this world, Norman Bel Geddes, was so excited by the popularity of Futurama that he wrote to President Franklin Delano Roosevelt about it. FDR was impressed. He invited Geddes to come work on plans for something called the National Motorway Planning Authority. Geddes' ideas were a huge influence on the government's plans for an interstate highway system. And those ideas eventually led President Eisenhower to sign the Interstate Highway Act of 1956 to build 41,000 miles of interstate. The federal law here did something that previous laws hadn't been very successful with. It set up the funding to pay for the Interstate Highway System. And this turned out to be one of the biggest public works projects ever. The new Interstate Highway System raised an issue, though. It was one that previous state projects hadn't really encountered before.

Futurama: On all express city thoroughfares, the rights of way have been so routed as to displace outmoded business sections and undesirable slum areas whenever possible.

Roman Mars: The Interstate Highway System was going to go through places where people already worked and lived. And that understandably upset a lot of people.

Elizabeth Joh: Some communities were successful in saying no to new freeways. People protested to shut down or cut back on projects like the Park East Freeway in Milwaukee. But other neighborhoods were never the same because the Interstate Highway destroyed them, like the Overtown neighborhood in Miami or the Black Bottom neighborhood of Detroit. So how did these neighborhoods make way for freeways? In a great many of

these cases, it's because the government used its power of eminent domain--a power recognized and limited by the Constitution itself. And it's this power--this power of eminent domain--that's going to help President Trump build his wall.

Roman Mars: This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the much-considered plans and much less considered tweets of Trump and channel that chaos into learning our Constitution like we never have before. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. Eminent domain and the Takings Clause when Trump Con Law continues right after this. So, what is eminent domain, and what does it have to do with the Constitution?

Elizabeth Joh: Both the federal and state governments have the power of eminent domain--the ability to seize private property. That means even if you don't agree--even if you don't consent to the government taking your private property--the power of eminent domain is considered an inherent characteristic of government. The Constitution puts an important limitation on this power, though. You can find the restriction in the Bill of Rights, specifically in the Fifth Amendment.

Roman Mars: The Fifth Amendment of the Constitution says that people cannot be "deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Elizabeth Joh: The second part of that phrase--"nor shall private property be taken for public use without just compensation"--is usually referred to as the "Takings Clause." What the Takings Clause means is that the government can take your property but with some limitations. The government has to pay for that seizure, and it has to be for a public purpose. Both of these ideas come just from the text of what the Fifth Amendment actually says. The Supreme Court's cases about the government's ability to take your private property today cover a lot of really complicated questions. So, for example, a taking of private property doesn't have to be the government literally bulldozing your house. At least in theory, every government regulation on your property might go so far that it interferes with your ability to use your property. So that might count as a taking. That would require the government to pay you for it. So, for example, in a 1922 case, the Supreme Court said that a Pennsylvania law that limited companies from exercising some of their mining rights was a taking, even though it didn't literally take any physical property.

Roman Mars: The other part of the Takings Clause that it has to be for public use--well--that interpretation has been controversial, too.

Elizabeth Joh: So, requiring that a taking be for a public use kind of sounds like it means the government shouldn't take your property and just turn around and give it to someone else, right? But that's not how it's turned out exactly.

Roman Mars: You don't say.

Elizabeth Joh: The Supreme Court has interpreted the public use limitation so broadly, that it's fair to say that nearly anything qualifies as a public use so long as there's some possible public benefit to the taking of the property. In one especially controversial and infamous case, the economically distressed city of New London, Connecticut, decided to acquire private property for economic development. What did this mean? This meant that the city wanted to buy up a whole lot of property because they wanted to transform a blighted neighborhood into a new and fancier area of town with a conference center,

hotels, shops, and restaurants. Most of this was to support the new headquarters of a big pharmaceutical company that had just come to New London. One of the homeowners who didn't want her home taken was Susette Kelo. Her little pink house became iconic. Another homeowner, Margherita Cristofaro, also objected. These women and a group of other New London property owners took their case all the way to the Supreme Court. Here's what the Supreme Court had to decide. Did the City of New London really have a public purpose, as the Constitution requires? In a 2005 case called *Kelo versus City of New London*, the Supreme Court said, "Yes. Even what New London had in mind was a public purpose. No violation of the Constitution's Takings Clause." Even in cases where the legal issues aren't as complicated, the entire process of the government taking private property is really hard for both sides. When the government wants to acquire private property, it first has to make an offer to the property owner. If the offer is rejected, that begins a really long and complicated back and forth between the government and the property owner, which usually ends up in court for a really long time.

Roman Mars: So, a big part of President Trump's campaign revolved around building a wall.

Elizabeth Joh: A wall along the entire roughly 2,000-mile southern border of the United States. We already have some kind of a barrier on about a third of the border already. But Trump, the candidate, promised to make it from end to end. But here's the problem. The border is enormous. It cuts through farmland, desert, and mountains. It even cuts through some Native American lands. And a lot of the details about this wall aren't that clear. Like, who was going to pay for this wall? Trump tweeted in September of 2016 that Mexico would pay for it. After he was elected, Trump tweeted in April that, quote, "eventually, but at a later date so we can get started early, Mexico will be paying in some form for the badly needed border wall." But it's looking now more like that Congress will pay for it--or at least authorize the spending of federal money for it. And of course, that's because Trump, as president, doesn't have what's called the "spending power" under the Constitution. It's also not clear what the wall is going to look like. The government's design specifications for the wall so far say that the wall has to be, quote, "physically imposing and at least 30 ft high." The specifications also say that the wall has to withstand "a good, solid effort by a sledgehammer, carjack, pickax, chisel, or torch." And the north side of the wall--the part that's facing us? It should be, quote, "aesthetically pleasing in color." It doesn't say what the other side has to look like.

Roman Mars: And it gets even stranger.

Elizabeth Joh: President Trump told reporters on July 12th that the wall might have to be transparent because drug dealers would launch their drugs over the wall. It is true that some drug dealers have used sometimes what are called "drug trebuchets." You know, these are those medieval era catapults used to hurl things over walls. If you watch *Game of Thrones*, you've seen one.

Roman Mars: Or been to Burning Man.

Elizabeth Joh: But this part is clear: just like it did with the Interstate Highway system, if the government is going to build a wall in places where a wall hasn't been before, it's going to have to build some on private property.

Roman Mars: And it's going to have to seize that property by eminent domain.

Elizabeth Joh: Take Texas. Most of the land along the U.S.-Mexico border there is private property. Building a continuous border wall there--it's just not going to be possible without the government resorting to eminent domain. And that could tie up any wall construction in court for years. The Secure Fence Act of 2006 authorized the construction of 700 miles of fencing to be put up at the border. That led to about 400 eminent domain cases as a result. About 90 of them are still in court. These cases have amazing names, like United States versus 1.5 acres of land, more or less, and United States versus 12.22 acres of land, more or less, and my favorite United States versus 0.02 acre of land, more or less.

Roman Mars: So, let me just break in here. Why is the acreage of the parcel of land part of the name of the case? It doesn't make any sense to me.

Elizabeth Joh: They're trying to acquire the property.

Roman Mars: Of course, but why isn't it the name of the property owner or anything else?

Elizabeth Joh: That's how it's named. The government--they're trying to seize your property. You might have, like, you know, a bunch of gold bricks. You know, you could have U.S. versus 100 tons of gold bricks.

Roman Mars: So that's how it's named for everything that when it gets seized, the thing that's being seized is the name.

Elizabeth Joh: So, it depends, like, how the case begins, like if the property owner is really saying, "I'm going to dispute you over how much I'm getting from it or whatever."

Roman Mars: Okay. We can get back to the subject at hand.

Elizabeth Joh: Trump's proposed wall probably isn't going to raise complicated constitutional questions about eminent domain... Probably. I'm not really sure at this point. When the government wants to condemn your actual house for a public works project, there's nothing iffy about that. It's definitely a taking. Also, building a wall to address illegal immigration--whether or not you think that's a good idea--it seems like a no-brainer of public purpose just like seizing property to build a bridge, a dam, or an interstate highway system. Trump, from his life as a private citizen, is familiar with this process. In the 1990s, Trump wanted to build more parking for the Trump Plaza Hotel and Casino in Atlantic City. He was able to buy all the properties he wanted, except three. One of those places was the home of Vera Coking. She was an elderly widow who just didn't want to sell her house to Trump. Coking's house was so close to Trump's Plaza that you could supposedly feel the spray from the hotel's sprinklers at her front door. So, Trump turned to a government agency, the state Casino Reinvestment Development Authority, and convinced them to buy Coking's home. But when she refused, the agency turned to its eminent domain power and tried to take her to court. But the widow won. In 1998, a state judge sided with Coking and rejected the state's eminent domain claims. Vera Coking stayed in her house until 2010, when she moved to a retirement home. But her three story house was later sold and demolished in 2014--the same year that the Trump Plaza Hotel and Casino itself shut down. And Donald Trump? In 2005, Trump was asked about Kelo. That's the Supreme Court case about the little, pink House.

Roman Mars: That's the case where the homeowners lost and the state won.

Elizabeth Joh: He agreed with the idea of eminent domain here, quote, "100%." In other words, he really didn't see any problem with the idea of the government taking private property to build some grand project. And in 2016, he'd run for president and win. One of the big promises of his campaign was his own big project: building a wall.

Roman Mars: Here's a little addendum.

Elizabeth Joh: Guess what happened in Kelo. So, what happened in the Kelo case? The homeowners in Kelo lost, right? The Supreme Court said, "Nope. The City of New London can take your homes." They were kicked out. And the Kelo case was Supreme Court law. It becomes a case that every law student reads at some point in their property law class. But the actual Kelo incident provoked such a backlash that the city never actually went through with its economic development plan. One of the plaintiffs, Margherita Cristofaro, died before the Supreme Court finally issued its decision in Kelo. And what's really weird here is that the Cristofaro family had already lost another home to eminent domain in the 1970s because the city wanted to take that other home for a seawall. So, when she died, her family asked the City of New London for a plaque to honor her. Today, it says that Cristofaro and her family "made significant contributions to the Italian-American community, sacrificing two family homes to the eminent domain process."

Roman Mars: That's a bittersweet plaque. That's like the Alamo plaques.

Elizabeth Joh: Well, the original plan was that the mayor at the time had this proposal that they would turn it into an eminent domain memorial park. But that never happened. You were like, "What?"

Roman Mars: It's like Irony Park. Oh, awesome. Thanks. I have a follow up question about the Takings Clause and the wall right after this. I mean, the reason why I find the Takings Clause and the wall interesting is because my assumption is that a lot of people who support the wall and are anti-immigration are also of the political bent that wants to see a limited government role in all of their lives. And so, when these two ideologies butt up against each other in the creation of this wall, I expect it to be really interesting.

Elizabeth Joh: That's right. I mean, I think that there are probably people who supported the president during the election and maybe still do, but in this one respect, I think it's quite likely, especially if you live in Texas, where most of the border is unsecured, that you don't want the government just saying, "Well, we're going to take your property and put up a wall right in your backyard and there's nothing you can do about it." Especially in a place like Texas, where there's a real cultural ideal of individual rights and this idea that the government should be limited in lots of ways, those two things don't square with one another. And so, what is very interesting here is that Trump's idea of a wall is appealing to a lot of people, but as a practical matter, it's very hard to do. You know, it butts up against a lot of people's ideas of "the government should not take my private property, period. For any kind of reason." People really feel quite emotional about that, and I think for good reason. These are people's homes. These are people's ranches and lands they've had for years--and in some cases in Texas generations. The government would say, "Nope, we're going to take it for a wall." And so, there's the practice of putting the border wall in. And then there's just the idea. And these two things are pretty far apart. And because of the way Takings procedures go--and this is really to protect the interests of individual private property owners--these things can drag on for years. And so, it's not just simple as Trump, the president, says, "Let's just build a wall and just do it." This starts a process that will go

on and on and on and on. And, you know, you can imagine that the idea is appealing, but the implementation is nearly impossible.

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 on Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. That gets me through the day when the news and life in general are conspiring to destroy me. Find them at doomtree.net. We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and donors who are listeners just like you.