

## The Spending Clause

**Roman Mars:** Let's start with a little fact about beer that will be important later, I swear. This is constitutional law professor and my neighbor, Elizabeth Joh.

**Elizabeth Joh:** But the center of one of the key constitutional law cases about the so-called "Spending Clause" actually originates out of something sort of banal. It's about South Dakota's desire to sell what's called "three-two beer" to 19-year-olds.

**Roman Mars:** If you, like me, have never heard of three-two beer, it's beer with 3.2% alcohol--makes sense--which is more alcohol than near beer but less than the usual 5 to 8% of regular beer. The reason why three-two beer is significant in the U.S. is because it was the highest alcohol percentage that beer was allowed to have at the end of prohibition in 1933.

**Elizabeth Joh:** Before prohibition ended, Congress changed a federal law called the Volstead Act to allow the selling of what's called three-two beer--so low alcohol beer. So, prohibition ended, and so it kind of became irrelevant to have the separate category. But a lot of states continue to recognize this distinction.

**Roman Mars:** So, what does three-two beer have to do with the Spending Clause, the ACA, sanctuary cities, and Trump? We're about to find out together. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the actions and tweets of the chief executive of the United States and channel that into learning our Constitution like we never have before. I'm your fellow student and host, Roman Mars. We are spending time with the Spending Clause right after this.

**Elizabeth Joh:** So, in January of this year--on January 25th--President Trump signed an executive order that basically threatened to cut off federal funding for local governments that he deemed were so-called "sanctuary cities" or counties that had sanctuary cities.

**Roman Mars:** So, what is a sanctuary city?

**Elizabeth Joh:** There's no precise definition for what a sanctuary city or a sanctuary jurisdiction is. But when people use that term, they usually mean a city or a county with policies that limit cooperation with federal immigration officials. Generally speaking, federal officials would like to rely on local police to help them enforce federal immigration law.

**Roman Mars:** The feds can't force the local police to do what they say, but they can ask them to.

**Elizabeth Joh:** So, for example, federal officials can request that counties hold arrestees in jail because of their immigration status, but they don't have to. So why wouldn't law enforcement agencies help the federal government in this way? Well, if you're a local police department and you have a lot of undocumented persons in your county or in your city, you might be worried that people--if they fear that their coming to you will result in their deportation--then that has consequences for controlling crime in your area. You might lose some valuable information from people who are fearful about reporting crime that they saw or even when they've been crime victims. So, it makes sense for some local police departments to say, "You know what? We don't want to help out in these actions because the federal government can take care of it by themselves." So, in California, both San

Francisco and the county of Santa Clara have sued over this threat on the part of President Trump.

**Roman Mars:** Whoo! Bay Area represent!

**Elizabeth Joh:** They asked a federal court to declare the order unconstitutional. So, this is really a claim about Congress' spending power.

**Roman Mars:** Article I, Section 8 says that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises,"--you just have to remember the word tax is there--"to pay the Debts and provide for the common Defence and general Welfare of the United States."

**Elizabeth Joh:** So, we generally refer to this as Congress' "taxing and spending power." They have the ability to tax and to spend, as we all know. So, what's interesting is that prior to the late 1930s, the taxing and spending power was interpreted by the Supreme Court, or at least a majority of the Supreme Court, very, very narrowly. The Court said in some of these cases, "Well, you can use the spending power, Congress. But you can't use it to regulate behavior."

**Roman Mars:** So, for example, in 1919, Congress wanted to limit child labor, but they couldn't ban it outright because it was considered a states' issue. I know, right? Anyway, they got around this by passing a law that taxed the profits of the companies that employed children. But the Supreme Court decided that this law was unconstitutional and that Congress couldn't use its taxing and spending power to effectively regulate child labor laws.

**Elizabeth Joh:** From today's perspective, that seems kind of absurd because that's the whole point of spending the money in the first place. They usually want to spend money because they want states to do things, right? It's kind of incentive.

**Roman Mars:** But this narrow interpretation of the Spending Clause really shifted over the 20th century.

**Elizabeth Joh:** Under the modern Supreme Court cases, the Supreme Court has said it's perfectly okay to have what's called "conditional spending" or "conditional appropriation." And so probably the best example of that is a case from 1987 called South Dakota versus Dole. So, in Dole, Congress passed the National Minimum Drinking Age Act. And the act basically says, "You know, states, we'd like all of you to raise your drinking age minimum to 21. If you don't do it, you lose 5% of your federal highway funds." South Dakota wanted to keep selling 19-year-olds 3.2 beer. So, they sued. And the Supreme Court said, "You know, this is something that Congress can do. They're allowed to spend money to make the states do things. And it's okay because states have a choice." So, you can think of the Spending Clause as a kind of... Instead of incentives, Congress can say, "Come on, states. Do you want to behave this way? Do you want to get this money? Then please do it. And then you can have the money." And that sounds like a good set of incentives. And under the modern system today that we have, actually it's arguably not even just a system of incentives because states plan on receiving these moneys. You know, they know in the future they're going to get these federal moneys. They want the federal moneys. So, a lot of the times they do, in fact, comply. So, what's interesting about the South Dakota case from 1987 is that the Court sets out a set of legal tests about how we know when Congress is toeing the constitutional line for the Spending Clause. And then there's this

kind of throwaway line at the end. They say, "Well, at some point, maybe Congress could use its spending powers in a way that's too coercive. Yeah, that didn't happen here. Don't worry about it." And so, for a long time, most people and most courts ignore that line. They say, "Well, sure, at some point it will be constitutionally uncoercive, but most of the time Congress can use its spending power to do whatever it wants."

**Roman Mars:** So fast forward to the Affordable Care Act case.

**Elizabeth Joh:** This is formerly known as National Federation of Independent Business versus Sebelius, but most people call it the "Obamacare case" or the "Affordable Care Act case." So, one of the key challenges in that case--legal challenges--is the Medicaid expansion. So, in the Affordable Care Act case, one of the provisions of the health care law was Congress saying to states, "Look, we already give you funds for the Medicaid program," which states generally administer. But the federal government gives them a huge portion of the money, right? So, you're already getting all this money to provide healthcare for low-income Americans. We want you to increase the number of people who are eligible. As a policy matter, whether you're for or against it, that's what they want, right? But it turns out that there's a little trigger here. And Congress says in the bill, "Well, if you decide you're not going to expand the Medicaid rolls, we're going to cut off all of your Medicaid funding--even the stuff that you already had relied upon all this time." So, this becomes part of the constitutional challenge. Can Congress do something like this? Can Congress say to states, "If you don't change your behavior in the way that we want, then we are going to cut off all the money regarding this program--period--not just the additional bit we're offering you." So, is this a carrot, or is it just a big, old, heavy-handed stick? That's the question.

**Roman Mars:** And this is a test of the Spending Clause.

**Elizabeth Joh:** So Chief Justice Roberts writes the majority opinion in this section, saying that, actually, here is this case where Congress did actually cross the line. They did act in unconstitutionally coercive ways. And so, what's very interesting about the opinion is that you don't Associate Chief Justice Roberts or really any of the Court's Justices as using this type of colorful language. But basically, he starts to describe Congress as if Congress were a group of gangsters or the Mafia. He says, "Look, you know, Congress cannot engage in this kind of economic dragooning of the states." And he actually uses the word--"This is like Congress putting a gun to the head of states." This is a normally sober, quiet, you know, modest writer saying that "this is like putting a gun to the head of the states."

**Roman Mars:** So, the Affordable Care Act case becomes the first time the Supreme Court has ever held that Congress has used its spending power in a way that was unconstitutionally coercive.

**Elizabeth Joh:** So that little throwaway line from the 1987 case about the 3.2 beer actually becomes a real test with teeth. Congress can sometimes go so far that it goes too far, and it violates the Constitution in its appropriations. So, practically speaking--for the Affordable Care Act case--what that meant there was that states didn't have to do this. They didn't have to expand their Medicaid rolls. They could just decide to do so or not. And practically speaking, that's what many of them did. So, for example, California expanded its Medicaid rolls. Texas didn't. And there's a pretty significant number of states that have decided not to do so. Why? Because essentially, the Supreme Court is saying, "Look, Congress can provide money as a carrot, but it has to be a real choice. It can't be compulsion."

**Roman Mars:** So, to sum up, Congress using its spending power to regulate behavior becomes more and more accepted over the 20th century. This is tested in a case where the federal government uses highway money to entice South Dakota to raise its drinking age to 21. This was considered allowable because the federal government wasn't being too coercive--just coercive enough. But the specter of the federal government being too coercive was raised in that South Dakota versus Dole case. And that language was used to strike down the Medicaid expansion in the Affordable Care Act. It was considered to be a gun to the head, forcing the states to do something they didn't necessarily want to do. Now that brings us to sanctuary cities.

**Elizabeth Joh:** So, Santa Clara comes back into the story because they say, "Look, if the president's going to threaten to cut off federal moneys to our county because our law enforcement agency is providing what's called a sanctuary service or has an attitude which says, 'We're not going to have an active role in helping federal immigration officials,' this is the same problem. This is a gun to the head," which is what they literally say in their complaint. So, the county receives about \$1 billion a year in federal funds. And they say, "Look, this funds all kinds of stuff--social services, everything you can think of in the county... And you are targeting all of our funds that we get from the federal government just because we are a sanctuary city here." So, the lawsuit essentially says, "This is no different than what's happened in the Affordable Care Act case. You can't threaten to lop off everything just because you don't like the sanctuary city stuff. That's not a choice. It's a gun to the head, and it's a spending clause problem."

**Roman Mars:** You're going to want to listen to this next announcement. Trump Con Law continues after this. So here we are, about to find out how coercive is too coercive because of a line in a Supreme Court opinion about weak-ass beer.

**Elizabeth Joh:** But that's one of the interesting things about constitutional law--that, you know, you got to read everything every portion of a Supreme Court opinion, including the dissents and the concurrences, later on in time can be really, really significant because coalitions on the Supreme Court change. You know, there are historical changes. What we think about certain topics change. And so that one throwaway line in Dole--which no one thought was particularly important at the time and for a long time wasn't--becomes, for the Affordable Care Act case, one of the two key subjects in the opinion.

**Roman Mars:** After we recorded this episode, a federal judge granted San Francisco and Santa Clara's request to temporarily block Trump's executive order on sanctuary cities. In a 49-page ruling, the judge quoted the language from the Affordable Care Act case by describing Trump's order as, quote, "a gun to the head." Trump responded on Twitter the next day, quote, "First, the Ninth Circuit rules against the ban, and now it hits again on sanctuary cities. Both ridiculous rulings. See you in the Supreme Court." Will cutting off federal money to counties and cities that declare themselves sanctuaries be considered an unconstitutional overreach of the Spending Clause? Well, we'll find out. But thanks to Elizabeth Joh, at least now we know what the Spending Clause is and what they'll be arguing about. 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 on Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. You should be spending your Spending Clause money on Doomtree Records. This week we had tracks from Sims, Mike Mictlan, and Dessa. We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and listeners just like you.