Lindsay: Welcome to The Breach. Your deep dive into authoritarianism and corruption in the Trump administration. I'm your host Lindsay Beyerstein. Each week, we bring you an in-depth interview with an expert on a different aspect of Trump being in those role. This week's guest is Zephyr Teachout. She's a constitutional scholar and a rising star in progressive democratic politics. She's known for her analysis of the Constitution as an intricate, anti-corruption system that safeguards democracy by making sure public officials serve the people, not themselves or their patrons.

Zephyr's joined forces with CREW aka Citizens for Responsibility and Ethics in Washington, to sue Donald Trump for violating the Emoluments Clause of the Constitution by assuming the office of president with his undivested business empire intact. Without further ado, please turn to the Foreign Emoluments Clause. That's article 1 section 9 clause 8 in your Pocket Constitution and follow along. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State. Zephyr, welcome to the program.

Zephyr: It's really exciting to be on.

Lindsay: What is the Emoluments Clause?

Zephyr: It's a clause in the constitution. It's not like the Constitution comes with clauses having titles. If you've ever read. It's just a short-handed way to describe a clause in the Constitution that actually prohibits taking four different kinds of things from foreign governments. One is gifts. One is emoluments, the third is offices and the fourth is titles of nobility. What the Constitution says is that, if you're a federal officer, you may not take any of these of any kind whatever, from foreign governments without the consent of congress.

Lindsay: This applies to everybody who works for the federal government? Or who does it apply to?

Zephyr: It applies to people who are federal officers. For instance, we are, as you know, I'm one of the lawyers on the lawsuit suing Donald Trump and there's no question that he is a federal officer.

Lindsay: Why did the Framers put that in the Constitution to begin with?

Zephyr: I actually was interested in this clause some time ago because it's actually quite striking that it's in the Constitution. Because for 18th-century practice, this really flew in the face of the major trading partners and diplomatic partners of the United States. In France and throughout Europe, it was really quite typical to have financial and gift relationships between diplomats and other foreign governments.

For the new Americans, it was in the Articles of Confederation, and then became part of
the Constitution itself. It was really important because the key insight they had about government and about self-government, and the possibility of what we now call democracy, representative-government, Republican government as they talked about it. The key threat was corruption. As opposed to outside invasions, the thing that they most had to protect against was corruption.

This becomes a really important clause, because it protects against a foreign corruption of federal officers. They've, having studied both Rome and then recent European history, had a pretty good sense of human nature in politics and understood that when a lot is at stake like trade policy or military policy, foreign governments are going to try to use their money and power to sway American policy.

There's a lot that's interesting about the clause. One of the things that has always struck me is that, it's an anti-corruption clause. I think a lot of people often think of anti-corruption rules as rules that make you look for the smoking gun. Finding some evidence that the Government of China wrote a love note to President Trump along with a big check. In exchange President Trump agreed to to change his trade policy.

This isn't that kind of clause. Instead it's a clause that says, "We're just a rule. You just can't take any emoluments which are payments, benefits, profits from foreign governments regardless. We don't even want to know the times in which you're influenced. The times in which there was a deal, and the times which there aren't. We know that if there is a flow of benefits going from foreign governments to federal officers, then there's going to be a flow of influence.

Lindsay: Why is there so much interest around this clause now as it pertains to President Trump?

Zephyr: Because the president is violating it. It's really disturbing to see a sitting president directly flouting the rule of law and the rule of our American constitutional law. This is not a hard case in some sense, because the president is so clearly in a position to be made richer and poorer by governments that we are in direct negotiation tension and collaboration with. He is violating the Constitution and I can tell you for my own part, that one of the big threats of the Trump presidency isn't about particular policies that people might disagree with. It isn't about left or right issues. It's about upholding the rule of law. The idea that we have a country of laws not men, and that those laws apply to everybody.

Lindsay: Trump isn't the first rich president or our first businessman president. How did previous presidents get around the Emoluments Clause or diffuse the risk of conflicts under the Emoluments Clause?

Zephyr: Yeah, the reason that there hasn't been litigation around the Emoluments Clause up till now is because presidents have gone out of their way to not be anywhere close to it. The practice has been twofold. One is for all business matters to fully liquidate, divest and liquidate. Because if you have fully liquid assets then, unlike with the assets like the Trump Organization, you’re not going to be aware of the gifts and the benefits flowing.
They've all had a divestment policy. Then when it comes to gifts, the policies you take the gifts to Congress and the Congress actually has a set of rules regarding gifts, and has a de minimis rule about minor gifts. Other gifts have to run through the ringer of Congress. What Thomas Jefferson called when he was referring to this clause, the gridiron of Congress. Which is a really important constitutional protection. Because it means that Congress then typically suggested this, the gifts to go to the national archives treasury.

These interchanges between foreign governments and the president, when there's a gift interchange which is different than the emoluments interchange. Although, there may also be some gifts which I can talk about in a second, that the president is receiving, but then it breaks the relationship. You don't want, and what the founder said was unconstitutional, is for foreign governments to directly give gifts without the consent of Congress.

Lindsay: What are some aspects of Trump's business that have people most worried? Which concerns and which foreign governments seem to be rubbing up against each other in terms of businesses?

Zephyr: Yes, so there's four really and in the complaints that CREW, I'm again one of the lawyers in the case, that CREW brought against the president. We lay out four different flows of benefits that violate the Emoluments Clause. Again, just to push back on your question, that there's a whole bunch of things that we should be concerned about because there's possibility of finding if there's a special deal going on. You're in violation of our Constitution, a sacred document, not this deeply sacred document, whether or not there's a secret deal.

When you ask what the greatest concern is, the greatest concern is that there's a destabilizing constitutional violation going on. Let me just walk through some of them. The first one which you probably heard the most about is the diplomats staying in Trump Hotels. That's foreign money going to Trump's pockets. The second is Trump Tower in New York City. Few of the tenants are foreign governments. The UAE and the Government of China.

The way that works is that the Government of China controls the Commercial and Industrial Bank of China, which is then one of the largest tenants in Trump Towers. That means that every time you see China in the news, every time that Trump is thinking about changing our trade relationship with China, or thinking about how we're considering pressuring China to deal with North Korea situation, it also calls to mind that the president is getting richer off of rent payments from the Chinese government to the president. In 2019, that lease will be up for renegotiation.

The third flow comes from royalties for the apprentice and spinoffs like The New Celebrity Apprentice, Celebrity Apprentice. In two countries, those royalties are paid by foreign governments. Then the fourth category is these Trump Organization projects which are around the world. Again, I'm going to mention China just because our relationship with China is so sensitive and was so essential, in fact, to Trump's campaign
insisting that we needed to have a new relationship with China. Certainly on the front of a lot of people's minds both in military and trade policy.

There's a Trump Organization project. There's Trump organization projects in Saudi Arabia, Turkey, India, around the world. In those places, the flow is a little different. It's that governments, as any developer will tell you, governments have an incredible capacity to give permits or not give permit. Give permits quickly or give them slowly. All of those are benefits that flow to the Trump Organization. Now, I earlier mentioned that it may be, remember there was these four categories?

Lindsay: Mm-hmm (affirmative).

Zephyr: Within the clause itself, what we call the Emoluments Clause. It also had been called the Gifts Clause, Your Titles of Nobility Clause. One of the other categories is gifts. Or as the clause itself says presents, forbids presents. Something is a present if it is above fair market value. It's also possible that Trump ...

Lindsay: If somebody's paying $80 for a cocktail at the Trump International Hotel, which could actually happen since his inauguration they've been throwing cocktail prices. Does that mean the difference between the $15 it used to cost and the $80 that it now costs is a present?

Zephyr: Well, what we would have to look at is what the fair market value is. What you'd want to know, for instance with the recent rash of Trump trademarks getting approved in China, is are those Trump trademarks getting approved that would not otherwise be approved? Or is our payment being made that would not be made in the normal course of business? In that case, it's basically a gift. It's a bonus. Which is by the way, a sort of corruption 101, is padding fair market transactions with unfair additional transaction. Maybe that President Trump is also violating the present part of the Emoluments Clause with these projects.

Lindsay: Because for the longest time, he didn't get the copyright for Trump toilets and then suddenly upon his inauguration, it was bestowed to him.

Zephyr: That's right.

Lindsay: The way with Trump Escorts and a bunch of other brands that he'd been ...

Zephyr: One of the things that's going to be really important in this case is discovery as part of the case as it is true of it, part of any case. We certainly know he is violating the clause and we know some of the ways in which he is violating the Constitution. The suit, by the way, just asks for him to stop. Just stop. It's asking for injunction. There's no request for money. He's been so untransparent, so opaque about his business dealings that we actually have a lot more to learn. About precisely where and how he's getting money from foreign governments. This again, how do I say outrageous?

Lindsay: You have to keep coming up with new synonyms.
Zephyr: Right. The idea that there's a shameless open violation of the Emoluments Clause, but just the shameless open violation of the Constitution itself would be disturbing. Also, even if there weren't an Emoluments Clause and thank goodness there is, but even if there weren't an Emoluments Clause, the idea that our president is negotiating on our behalf, well himself, undoubtedly subject to financial pressures and promises, and treats from these other countries is really disturbing.

Lindsay: Does the Constitution give us guidance as to what the penalty could be or should be if the Emoluments Clause, when the Emoluments Clause is disregarded?

Zephyr: With most unconstitutional violations, the key thing is you try to get it to stop. That is just true of law in general. Not the Constitution itself, but certainly in the discussion around the Constitution, one of the framers mentioned that the Emoluments Clause was a possible reason that there might be an impeachment proceeding. As with any unconstitutional violation, whether you're talking about the Due Process Clause, the Equal Protection Clause, the key thing that the role of judges is to say, "You are not allowed to violate the Constitution." Just as judges have done with the travel bans.

Lindsay: How would that work in terms of impeachment? If there were a majority of members in the house today who just listened to our interview and said, "Hey, this is outrageous. We got to do something. We can vote to impeach him." Could that happen just on the congress, people's opinion that he's violating the Emoluments Clause? Could he be voted to be impeached in the house instantly?

Zephyr: I'm going to focus more on the lawsuit itself, but I will tell you that there's broadly, three different legal scholarly approaches towards impeachment. Different people are going to give you different answers on when a president can be impeached. One is to say that it needs to be tied to something in a criminal law statute. People who believe that would say, "There's no criminal law statute attached the Emoluments Clause and therefore it's not an appropriate subject of impeachment."

The other on the other poll, some would say, "This is a purely political decision. Congress can impeach regardless of the reason, just because they don't like the way he looks at them." There doesn't need to be a deep reason. Then the third category which I ascribe to, is that impeachable offenses are not solely circumscribed by a criminal law. In fact, at the time we're generally associated with fundamental violations of public trust which are violation of the Emoluments Clause is one of. It's right in that ...

Lindsay: It seems like the violation of the Constitution, given that it has the sanctity as a document, should be an impeachable thing.

Zephyr: Yeah.

Lindsay: Or at least some violations of the Constitution.

Zephyr: In those three categories, I tend to fall in the third count. I suspect that if you're doing a
show on Trump and the law, you might end up doing another full show on these different theories of impeachment. Certainly around the time of the constitutional convention, the language of impeachment was most often used around violations of public trust.

One way to think about it is, the word high. I don't know if you've noticed that there's word high in high crimes and misdemeanors. The high in that case refers, there's both high crimes and high misdemeanors. What that means is, crimes and misdemeanors that are violations of the public trust. That gives a strong signal that that's a kind of category that impeachment is meant to deal with.

Lindsay: Trump says that he's in the clear because he's resigned as an officer of his companies, and put his wealth into a trust run by his sons and a conflict of interest officer. Why is that, in your opinion, not good enough to get out of the Emoluments Clause?

Zephyr: It's pure nonsense. It's not even not good enough suggests that it's taking steps towards being good. Basically, the benefits and money are still going to his pocket. That's the core question here. Just because my sister is running the gas station I own and somebody comes and is making payments to the gas station, that doesn't mean the money isn't still going to my pocket. The who is managing the day-to-day questions is not the question here. He's still the owner and that's what matters.

Lindsay: It doesn't matter that he's promised to cough up all the profits from these foreign transactions to the treasury and not keep any of the profits?

Zephyr: There's so many things that are surreal about that. First of all, any time you say Trump promises, you should just count that as a series …

Lindsay: Trump isn't, Trump won't.

Zephyr: Right. There's no reason to think that he follows through on his promises. Even if he did, I was really struck by that. Because it's weirdly almost an admission that there's something wrong. Which is interesting, that you don't unilaterally give up some category of profits unless you're disturbed in some way about the morality or legality of that. That was quite striking. Second, he doesn't tell us how he's defining profits. Third, it doesn't look like he's doing it.

Then fourth, I think actually most important, absolutely most important is that Trump saying, "What I want to do in situations where I'm getting foreign payments, at least in this subcategory, it's only dealing with the hotel profits. Not dealing with Trump Tower that we talked about. Not dealing with the Trump Organization projects or the Celebrity Apprentice. He's saying, "I have a different solution on the Constitution for what looks like a conflict. My solution is that I'm going to unilaterally give it to the treasury." You don't get to rewrite the Constitution. You don't get to sin against the Constitution and then say, "I'm paying a penance." Which in some ways, is what it feels like.

Lindsay: Even if it were an adequate solution, wouldn't that be up to Congress to decide under
Emoluments Clause?

Zephyr: Absolutely. What it seems like he's trying to do is say, "In the past, gifts have been given to Congress, and then Congress has either allowed the president to keep it or given it to the treasury, or National Archives." Then, skipping that step is not skipping something trivial. The thing that I think about is, what if you had Judge Gorsuch? The Constitution requires the advice and consent of the Senate and that Trump said, "Well, he's just going to be on the Supreme Court. He's on the Supreme Court. I decided. He's on the Supreme Court."

Skipping the advice and consent of the Senate part, and then said, "But later I'll send in a report about what he cares about just so you guys know." That's essentially what he's doing here is, he's skipping a key constitutional protection. Which he doesn't have the authority to do. He certainly doesn't have the authority to rewrite the Constitution to suit his own idea about how we should be dealing with conflicts.

Lindsay: Can we talk a bit about Trump's lawyer's theory as to why the Emoluments Clause doesn't apply to him? They've got this very narrow definition of emoluments. If I understand your view correctly, you're defining emoluments in a very broad way in which, it's any kind of payment for something other than a gift almost. I think if I understand ...

Zephyr: Yes, they have two, actually they're somewhat inconsistent theories. We are going to get their reply to the case on April 21 and we'll learn more. At least their preliminary response was, one is, emolument is only a payment that comes along with an office. If I'm a postmaster and I get paid for my postmaster duties, that is an emolument of the office. In this case, these are not payments that are like that. It's certainly true that emoluments did include that kind of category at the time of the founding. They just weren't exclusively that kind, but they did include that kind.

Then a second, really separate theory, is that emoluments, and does not include payments made in the course of business transactions. When you're looking at understanding the meaning of the Emoluments Clause as any decent constitutional lawyer will tell you, what you want look at is a whole range of things. You want to look at how it was defined at the time. How it was used at the time. What was the purpose of the clause, and all of those show that it was used in ways that it did encompass business transactions. It was defined in ways that included the kinds that they're talking about, but also included these other kinds.

Then really importantly, the purpose of the clause. The purpose of the clause is to protect against officers of the United States being either explicitly offered payments in order to influence them. Or being influenced even without some kind of explicit deal. It's just basic common sense to ask anybody on the street whether a business relationship where you have the opportunity to make a profit is going to have some influence over your decisions. Of course it will. It defies both history and the historical, the words itself, but also the historical purpose of the clause to suggest that it wouldn't apply to these business transactions. Otherwise you have this huge avenue for foreign
influence, a runaround and around the purpose of the clause.

Lindsay:  Is there a domestic counterpart to the Foreign Emoluments Clause?

Zephyr:  It's funny. It's not that it's a counterpart in that they're not parallel clauses. Does that make sense?

Lindsay:  Yeah.

Zephyr:  They both address emoluments. There is a Domestic Emoluments Clause. The Domestic Emoluments Clause has to do with the president not being ... It applies specifically to the president in this case. It has to do with the concern of the framers that the president not play favorites with states or get payments on the side from the federal government. Then prohibits the president from getting states or federal government payments as well.

Lindsay:  Is that also part of the bulwark against corruption?

Zephyr:  Yes, absolutely. In fact, the more you dig into the Constitution, the more you see the entire thing as a bulwark against corruption. The clauses, they may not have come up so much recently. Many of them were concerned with corruption, but also the other ones that you might know. Even just a minor little aside, even the Electoral College votes all being on the same day was, at the time, seems a bulwark against corruption because it would prohibit ... because the roads were so bad and the distance was so long, so it prohibits somebody from going around and bribing all the electors everywhere.

Lindsay:  The bases of philosophical idea that they're trying to preserve, is the idea that if people with money, if people with power can influence the government, then it's no longer really a democracy because votes aren't supreme anymore right?

Zephyr:  That's exactly right. Madison, in The Federalist Papers, talks about the elaborate lengths to which they went to basically, you know there's always going to be efforts to corrupt. That's always going to be around. In particular, they're worried about foreign corruption. The job of crafting a Constitution is to erect all these barriers. What Hamilton said was, we put in every practicable obstacle to corruption in the Constitution.

Yes, these two clauses are part of a larger framework. Which is, that the framers were actually really worried about honestly about moments like we have in our country right now, where there is a deep fear that people's voices are getting pushed aside in favor of those who have the money and influence. Then also, the Trump emoluments violation is part of a piece about the concern about foreign influence in our elections.

Lindsay:  Who has brought forth this lawsuit? A lot of people have raised questions about CREW standing to sue. Can you talk a bit about what basis CREW has for bringing this action?

Zephyr:  Sure, but I think just first to explain to your listeners. Along with the emolument
standing is a word that recently entered the public lexicon. The basic question and standing is, when there is a wrong, what individuals or entities are capable of bringing a lawsuit to right that wrong? Just because there is a wrong, like if you get punched, that doesn’t mean that just anybody can bring a lawsuit for, I guess, the person punched you.

In CREW's case, there's a long line of cases which show that when a nonprofit entity like CREW is affected and harmed by unconstitutional action, by having to divert and shift its resources, then CREW or organizations like CREW can bring a suit. The line of cases for the lawyers listening is known as the Havens Realty line of cases. It's a very alive doctrine. For those who are hearing about this for the first time, I think the easiest way to think about it is, or just think about a small business that has to divert or change its practice because of unconstitutional behavior.

Lindsay: Is that a harm? Has CREW been harmed? I mean, it's an ethics organization right? I mean, that's its bread-and-butter. Is it really being harmed when an unethical thing happens out in the country according to its mission and CREW goes after that aggressively?

Zephyr: It has definitely had to divert its resources. You'll see in the lawsuit the detailing of ways in which the resources had to be diverted. Understanding doctrine, not understanding. Understanding doctrine. This is the kind of harm that is long recognized for nonprofit organizations.

Lindsay: Could any organization that diverted resources claim to have the same amount of standing? If the ACLU did this, if a nonprofit organization that dealt with HIV decided they wanted to divert resources?

Zephyr: They would strain credulity if you had organizations that has not been dealing like CREW, which is a watchdog group that is really focused on ethics and conflicts of interest. It would string credulity to say their group that wasn't dealing in this area, was affected in the same way. That's what you see in these Havens Realty series of cases, is that the nonprofit organizations which are within the issue cluster are the ones that can bring lawsuits.

Lindsay: That's all the time we have for today. Zephyr, thank you so much for coming on the program.

Zephyr: It's absolute wonderful. Congratulations and thanks for having me.

Lindsay: The Breach is produced by Rewire. Our executive producer is Marc Faletti. Our theme music is Dark Alliance performed by Darcy James Argue's Secret Society. I'm your host Lindsay Beyerstein. Tweet your suggestions, comments and questions to @beyerstein. B-E-Y-E-R-S-T-E-I-N on Twitter. See you next week.