

Contempt Power

Roman Mars [00:00:00] When William McCracken showed up at Chesley Journey's apartment on the night of February 11th, 1934, he only wanted one thing.

Elizabeth Joh [00:00:09] He wanted to be arrested. And Journey was a law enforcement official. But Journey didn't want to arrest McCracken. You see, McCracken was in some legal trouble. The Senate was investigating what the newspapers called "The Air Mail Scandal." This involved the awarding of lucrative government contracts to airlines under some shady circumstances. William McCracken was a fancy Washington lobbyist for the airlines and a former member of the Hoover administration. The Senate first ordered McCracken to hand over documents relating to the scandal. He refused. Then the Senate discovered that he had allowed some other documents requested by the Senate to disappear. For all of this non-cooperation, the Senate committee in charge of the investigation ordered McCracken to be arrested. Chesley Journey, it turns out, was the Senate's sergeant at arms.

Roman Mars [00:01:03] That's the Senate's chief law enforcement official.

Elizabeth Joh [00:01:06] The guy who might arrest you when the Senate orders it. And here's where things get weird. The Senate did not want McCracken to be arrested when it wasn't in session. If that happened, McCracken might run to a judge and argue that the arrest was illegal. And that would delay what the Senate wanted to do. If McCracken was arrested when the Senate was in session, he could be brought to the Senate chambers immediately. And that's how the cat and mouse game of Journey and McCracken happened. McCracken's lawyer told his client to hide when the Senate was in session and try to get arrested when it wasn't in session. And Journey had orders not to arrest McCracken unless the Senate was in session. Otherwise, don't look for him.

Roman Mars [00:01:53] And that's how McCracken ended up knocking on the door of Journey's apartment that February night in 1934.

Elizabeth Joh [00:02:01] But Journey wouldn't play along with McCracken's scheme and instead called Senator Hugo Black. Black was leading the Senate investigation. He'd later join the Supreme Court. "Give him a drink," Black said, "but don't put your hands on him. And leave your door unlocked." So Journey did let McCracken into his apartment, let him have dinner with him and Mrs. Journey, even let him sleep in his bed that night while Journey took the couch. Don't worry, the Journeys slept separately "because I snore," he later said. The following Monday, the Senate was in session. And so, the Senate sergeant at arms formally arrested William McCracken and immediately brought him to the Senate chambers. And there the Senate promptly commenced a trial against him. Then there was another problem. The Senate trial would take more than a day. And what were they supposed to do with McCracken in the evenings? The Senate doesn't have a jail; it still doesn't. And Journey didn't want an overnight guest again. So Journey and his prisoner spent their nights at the Willard Hotel in Washington, D.C. One witness called it "probably the most luxurious jail in the history of the United States." The newspapers reported all of this with delight. Journalists dubbed the back and forth "a French farce," "a legislative burlesque," and an "opéra bouffe." Eventually, the Senate found McCracken guilty for his non-cooperation with the Air Mail Scandal investigation. The punishment? A ten-day sentence. It was then that McCracken took his Senate case to court. In 1935, the United States Supreme Court ruled against him. McCracken had to serve his sentence, and he was a good sport about it. He called Journey after his Supreme Court loss and asked,

"Hello, Ches, old timer. Would it be convenient for you to lock me up in jail at 3:45 this afternoon?" They arranged to meet in the District of Columbia jail on February 26, 1935. Unlike the other men serving time there for offenses like disorderly conduct and public intoxication, McCracken was there for failing to comply with the Senate's orders. His first meal as an inmate was cold beef shoulder, cheese, fried pineapple, creamed potatoes, fruit Jell-O, and coffee. He turned out to be a popular guy in jail. "McCracken was darn good at bridge," one inmate said. "He'd be hard to replace." And why did the Supreme Court rule against McCracken? For this simple reason: Congress--that includes the Senate and the House of Representatives--is allowed to act as police, prosecutor, judge, and jury because of what's known as their "contempt power." Congress has the power to punish those who refuse to appear before them or to hand over documents. Why should we care about William McCracken's story today? Because the House of Representatives now has a Democratic majority with a keen interest in investigating the Trump administration, and President Trump has made it clear he's not willing to play along. What power does Congress have to get the executive branch to comply with its orders?

Roman Mars [00:05:18] Time to find out. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length and sporadic or least we take the norm breaking tweets and the norm breaking actions of the 45th President of the United States and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. Congress frequently investigates a wide variety of topics. You're probably familiar with some of the more famous ones.

Elizabeth Joh [00:06:16] Like the McCarthy hearings of the 1950s or the Watergate hearings of the 1970s. But did you ever stop to think, "Well, why does Congress get to do that?" Why can it order unwilling people to testify or to give up documents just because a Senate or House committee just wants to know? If you look in the Constitution, you'll find nothing there that gives Congress this power. But constitutional law is more than just what the Constitution says. Instead, the Supreme Court has explained more than once that Congress has an implied power to investigate. The reasoning works like this: The power to investigate is a necessary part of the power to legislate. And since the Constitution is clear that Congress can legislate, it can investigate, too. The Supreme Court put things more eloquently like this: "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." Two things about this congressional power. First, the Supreme Court has said repeatedly that Congress' power to investigate comes from its power to pass laws. But that investigative power itself is very broadly interpreted. Second, if you think about it, the power to investigate doesn't mean much if you can only get volunteers to talk about uncomfortable, scandalous, and sometimes possibly illegal things. So, doesn't Congress need some way to force people to do things? Well, Congress has that power, too. The Supreme Court said in a 1927 case that "sometimes, some means of compulsion are essential to obtain that which is needed." Having the subpoena power means that Congress can order people to do things like appear before a congressional committee or produce documents that Congress wants to look at. So, here's the legal thinking. Congress has the power to pass laws, which means it has the power to investigate, which means it has the power to force people to show up or to give up documents. What if people refuse to comply, though? That's where things become much more complicated. First, people often respond to congressional subpoenas, and it's not an issue. Even when people complain very loudly, disputes can be and are resolved through negotiation with Congress. But there are still people who just plain refuse. For them, Congress has another tool--the power of contempt. So today, when we talk about Congress' contempt power, we

usually mean two things. One is a choice for Congress to have the resisting person prosecuted. It's a federal crime, though not a very serious one, to refuse to comply with a congressional subpoena. That's called "criminal contempt." A second choice is for Congress to file a lawsuit to have their subpoena enforced. Basically, this is a way of saying, "Judge, make this person comply with our lawful order." There's a third option, but one that hasn't been used for a very long time. Remember William McCracken? His arrest, trial, and conviction in 1934 were all based upon what's known as "Congress' inherent contempt power." "Inherent" means Congress just has this power. All of these tools are pretty flawed. Take criminal contempt--congressional investigations tend to be pretty heated when the executive branch and the House or Senate are controlled by different parties. Let's say someone in a president's administration is ordered to appear. For a criminal attempt to work against someone who doesn't want to appear, a congressional committee would ask the Justice Department to prosecute. And what branch of government is the Justice Department in?

Roman Mars [00:10:07] The executive branch.

Elizabeth Joh [00:10:08] And that's the problem. Historically, federal prosecutors who receive a criminal referral from Congress just decide they're not going to do anything about it. And that's pretty much the end of that. And what about civil contempt? That is Congress running to court and asking a judge to force someone to comply? The court fight itself could take a very long time to resolve. And time works in favor of the person refusing. Why? Well, here's the thing. Congressional subpoenas exist only for the duration of that particular Congress. Then it expires. And then there's the McCracken option--the theoretical possibility of an arrest, trial, and conviction done entirely by Congress under its inherent contempt power. But there's a reason it hasn't been used for more than 80 years. It's kind of cumbersome and silly, and it's very awkward.

Roman Mars [00:11:09] So let's get to Trump.

Elizabeth Joh [00:11:10] There have always been fights between the president and Congress when it comes to getting people tied to the president to testify or to hand over documents. But with Trump, things feel more openly combative than they ever have before. The Mueller report--or at least a redacted version of it--was released to Congress and to the public on April 18th. And it turns out that Attorney General Bill Barr's four-page summary of the report didn't exactly summarize what was in the 448 pages. Special Counsel Robert Mueller documented several instances which could theoretically meet the requirements of an obstruction of justice charge against the president. Remember that on March 24th, before the redacted Mueller report was released, Trump tweeted, "No collusion, no obstruction, complete and total exoneration. Keep America great." On April 18th, the day the Mueller report was released, Trump tweeted, complete with Game of Thrones motif, "No collusion, no obstruction. For the haters and the radical left Democrats, game over." Then the next morning he tweeted this, "Statements are made about me by certain people in the crazy Mueller report, in itself written by 18 angry Democrat Trump haters, which are fabricated and totally untrue. Watch out for people that take so-called notes because the notes never existed until needed. Because I never agreed to testify, it was not necessary for me to respond to statements made in the 'report' about me, some of which are total bullshit and only given to make the other person look good or me to look bad. This was an illegally started hoax that never should have happened. A big fat waste of time, energy, and money. \$30 million to be exact. It is now finally time to turn the tables and bring justice to some very sick and dangerous people who have committed very serious crimes, perhaps even spying or treason. This should never happen again." Just to

be clear, that doesn't count as treason. On Monday, April 22nd, the House Judiciary Committee issued a subpoena to former White House counsel Don McGahn to testify in May and to hand over documents relating to a number of things, including anything he knows about the president's potential obstruction of justice. Why McGahn? Because in the Mueller report, McGahn is described as saying that Trump ordered him to do, quote, "crazy shit," including persuading the Department of Justice to fire Mueller. McGahn didn't do that, nor did he agree to publicly deny that Trump wanted to fire Mueller as Trump asked him to do, according to the Mueller report. And on April 25th, Trump tweeted, "As has been incorrectly reported by the fake news media, I never told then White House counsel Don McGahn to fire Robert Mueller, even though I had the legal right to do so. If I wanted to fire Mueller, I didn't need McGahn to do it. I could have done it myself. Nevertheless, Mueller was not fired and was respectfully allowed to finish his work on what I and many others say was an illegal investigation (there was no crime) headed by a Trump hater who was highly conflicted and a group of 18 very angry Democrats. Drain the swamp. Despite the fact that the Mueller report was composed by Trump haters and angry Democrats who had unlimited funds and human resources, the end result was no collusion, no obstruction. Amazing." McGahn was the first former White House employee to receive a subpoena from Congress for anything related to the Mueller report, but he's not likely to be the last. And other House committees have begun to issue subpoenas, too. For instance, the House Oversight Committee has ordered the person who used to be in charge of White House security clearances to testify. The same committee has subpoenaed Justice Department officials about the controversy over introducing a citizenship question in the census. The Justice Department said it would not be complying. We can say a couple of things about this battle between Trump and Congress. First, even if the congressional committees are upset the Trump administration officials refuse to comply with their subpoenas, none of their legal tools are great options for them. They could try and use the criminal contempt power--that's referring someone for prosecution--but remember, there's no chance that a prosecutor in the Justice Department would say that they would prosecute this person. It's just never going to happen. Congress could go to court and sue to have the subpoena enforced. But that takes time. And the Trump administration could just slow walk things until the 2020 election. Also, a civil case might have some complicated legal issues in it that Congress would want to avoid. In fact, during the Obama presidency, the Republican led House Oversight Committee chose both options for Eric Holder. Holder was Obama's attorney general, and he refused to fully comply with a request for documents over a botched ATF investigation. Pretty predictably, the Justice Department said--nope--they weren't going to prosecute the attorney general, their boss. And the civil case dragged on for years. And, of course, there's what happened to William McCracken--the last time Congress used its so-called inherent contempt power. The way it played out was messy in the 1930s. Now that we have 24-hour cable news and social media, it's hard to imagine someone like the house sergeant at arms chasing a Trump official around the streets of Washington, D.C. Or maybe not.

Roman Mars [00:17:09] I mean, it's fun to imagine.

Elizabeth Joh [00:17:13] Right. Uncomfortable, too.

Roman Mars [00:17:13] And I guess it's uncomfortable for you. Well, I'll just enjoy thinking about it over here while you continue.

Elizabeth Joh [00:17:19] Second point, battles between the president and Congress over subpoenas aren't a new thing. It's hardly a new thing. But what feels different about President Trump is his approach. He isn't treating each subpoena on a case-by-case

basis. There doesn't seem to be much in the way of trying to negotiate with Congress. Trump is treating Congress' oversight function as an all-out war. On April 23rd, Trump had this to say about congressional subpoenas and the Mueller report. "I don't want people testifying to a party because that is what they're doing if they do this." On April 24th, Trump told reporters, "We're fighting all the subpoenas. These aren't, like, impartial people. The Democrats are trying to win 2020." And on April 29th, Trump and his three oldest children sued their bank, Deutsche Bank and Capital One, to try and prevent them from responding to a congressional subpoena about releasing information about the Trump family finances. Remember, there's no serious dispute that Congress has what the Supreme Court calls "the power of inquiry." They are a co-equal branch of government to the executive branch, not the president's subordinates. William McCracken died in 1969 at the age of 81. The American Bar Association published an obituary for him. McCracken had been their secretary in the '20s and '30s. He was remembered as a pioneer in the field of aviation law and a member of Hoover's administration but not a prisoner of the Senate.

Roman Mars [00:19:03] I've always been amazed by--on the whole--how quickly people appear in front of Congress when asked to testify in front of Congress. Like, the Cambridge Analytica scandal happens. Mark Zuckerberg--probably one of the more busy CEOs that exist in this world--shows up, like, two days later. Clears his schedule, you know?

Elizabeth Joh [00:19:25] Right.

Roman Mars [00:19:26] That's pretty amazing, actually.

Elizabeth Joh [00:19:27] It's not that amazing because if you think about it, the people in those corporations want to have friendly legislation. They want to have good dealings with these committees--or their lawyers certainly do. So, they absolutely want to cooperate to the extent that doesn't get them into other kinds of trouble. But, you know, there's not a kind of interbranch dispute-level crisis if Zuckerberg doesn't testify. But there is if Congress says, "You know what? Let's get the attorney general to testify," and the attorney general says, "Make me."

Roman Mars [00:19:58] Right. "Yeah, because my boss is the president."

Elizabeth Joh [00:20:13] Exactly.

Roman Mars [00:20:13] This story was produced by Elizabeth Joh 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.