

**Elizabeth Joh** [00:00:00] In the summer of 1932, 20,000 World War I veterans and their families set up camp along the Anacostia River in Washington, D.C. This was close to Capitol Hill.

**Roman Mars** [00:00:10] And they were angry.

**Elizabeth Joh** [00:00:12] Because when these soldiers returned home from a war that ended in 1918, they were promised a cash bonus for their service. But there was a catch. The bonus wouldn't be paid until 1945. In the meantime, the Great Depression had struck the United States. Millions of people were out of work and hungry, including these desperate veterans of the war. The plight of these vets was summed up in the lyrics of a song called The Forgotten Man from a 1933 Busby Berkeley musical.

**The Forgotten Man** [00:00:42] Remember my forgotten man? You put a rifle in his hand. You sent him far away. You shouted hip hooray! But look at him today.

**Elizabeth Joh** [00:01:02] These men did feel forgotten, and they were inspired by an out of work former Army sergeant named Walter W. Waters. And on March 15th, 1932, Waters had stood up at a veterans meeting in Portland, Oregon. He called for every vet to get on a freight train to Washington to claim the money that was rightfully his. Eventually, Waters's message spread, and the soldiers did go to Washington by freight train, hitchhiking, and walking.

**Roman Mars** [00:01:32] And they called themselves the Bonus Army.

**Elizabeth Joh** [00:01:34] And in the summer of 1932, the members of the Bonus Army found themselves camped out in Washington, D.C. They lived in homemade shelters they cobbled together from scrap metal packing boxes and abandoned lumber. But if their shelters were a mess, the camps were highly organized. The vets distributed meals, built toilets, registered members, and they even had daily parades. Now, the Bonus Army was hoping for the passage of a bill that would move up the timing of their promised payments. But when the Senate defeated the bill on June 17th, the plight of the Bonus Army worsened and pretty fast. Many bonus marchers went home, but many thousands did not. The three commissioners for the District of Columbia were worried that violence would break out. And the D.C. police failed when they tried to evict the vets. Instead, for the very first time in the country's history, tanks rolled through the streets of the capital. President Hoover had sent in the Army led by General Douglas MacArthur. About 200 mounted cavalry and 300 infantrymen arrived to drive out the Bonus Army. And, of course, they weren't a real army at all. They were unemployed and hungry civilians. But on July 28th, 1932, these soldiers drove out the vets and their families with tear gas. They set fire to the Bonus Army camps. One eyewitness said, "The sky was red, 54 people were injured, and three died, including a baby." If you were in a movie theater that year, the newsreels you watched showed veterans of the Great War, their wives, and their children fleeing armed soldiers. People booed at the screens. Three months later, FDR would defeat Hoover in the presidential election by a substantial margin. The Constitution says that the president of the United States is the commander in chief of the armed forces. But did President Hoover have the legal authority to send in soldiers against civilians inside of the United States? Why does the question matter? Because President Trump likes to tweet about sending in the feds.

**Roman Mars** [00:03:46] It's time to learn about the president, the military, and what's called the Posse Comitatus Act. This is What Trump Can Teach Us About Con Law--an

ongoing series of indefinite length, where we take the tweets and not fully considered utterances of the 45th President of the United States and use them to examine our Constitution like we never had before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

**Elizabeth Joh** [00:04:41] So the term "posse comitatus" comes from Latin. And it means force or power of the country. You can trace this idea back hundreds of years in English law. In a world without police, the sheriff could and really had to compel ordinary people to enforce the law--you know, help chase down lawbreakers and keep the peace--things like that. When that tradition carried over to the United States, the idea of a posse comitatus also began to include the use of the military to enforce the law. In one sense, using soldiers or citizens to enforce the law made sense in our early history. There simply weren't enough law enforcement officials--period--in many parts of the country. But our actual experience with the Posse Comitatus has been a troubled one. 19th century fugitive slave laws are a good example. These laws allowed owners of escaped slaves to secure arrest warrants with the help of federal marshals. What this meant was that a federal marshal could force you, an unwilling citizen--let's say you were living in a free state--to help arrest fugitive slaves. And during the period after the Civil War known as Reconstruction, federal troops helped shore up the newly Republican rule of the former Confederate states. Federal troops were also given the power to help enforce new civil rights laws. Southern Democrats in Congress--remember, they were a very different party than they are today--were not at all happy with this military rule. In 1878 then, their concerns led to Congress passing the Federal Posse Comitatus Act. The law says that it is a crime for anyone to "use any part of the Army or the Air Force as a posse comitatus unless the Constitution or the Congress explicitly authorizes it." What does that mean? Well, for people who've heard of it, the Federal Posse Comitatus Act sounds like it makes the use of the military for law enforcement purposes within the United States illegal. And it does sort of. But the law has a huge exception. It's okay to use the military if the Constitution or Congress permits it. So, the Constitution itself seems to recognize that we might sometimes need to use the military in domestic affairs. Article I, Section 8, says that Congress can authorize the use of the militia to execute the laws of the union, suppress insurrections, and repel invasions. Article IV of the Constitution guarantees that the state shall be protected against invasion and, by request of the state legislatures, protection from what the Constitution calls "domestic violence." And Congress has passed many laws that allow the President of the United States to respond when there is the potential for insurrection or domestic violence. Remember, if Congress passes a law permitting military force in a particular situation, that use isn't barred by the Federal Posse Comitatus Act. The best examples of Congress using this kind of exception is what is known as the Insurrection Acts. This is a long list of federal laws that allows the president to call out the military to protect the states or to protect federal interests. Many presidents have invoked the provisions of the Federal Insurrection Act. They have done so to help states when there have been threatened or actual violence or sometimes even just to protect the federal government's own interests. Presidents McKinley, Wilson, and Harding all responded to state requests for military help when labor strikes led to violence. In 1967, President Johnson sent troops to Detroit at the request of the Michigan governor after a race riot. Maybe most famously, in 1957, President Eisenhower ordered the National Guard of Arkansas, under Federal Command, and Army paratroopers into Little Rock, Arkansas. They were there to help enforce a court order to let nine African American students attend what had been an all-white high school. And let's not forget the Bonus Army. In 1932, the commissioners of the District of Columbia formally asked President Hoover to help with the, quote, "unlawful acts of large numbers of so-called bonus

marchers." Hoover, of course, responded by dispatching General MacArthur. Hoover's formal response said, "There is no group--no matter what its origins--that can be allowed either to violate the laws of this city or to intimidate the government. Yours faithfully, Herbert Hoover."

**Roman Mars** [00:09:04] So let's turn to Trump.

**Elizabeth Joh** [00:09:05] As President, Trump has been known to refer to "my military" and "my generals." He's even asked for a military parade that will take place on November 11th, 2018--Veterans Day. Trump first referred to a Posse Comitatus issue just after he took office. On January 24th, 2017, he tweeted, "If Chicago doesn't fix the horrible "carnage" going on, 228 shootings in 2017 with 42 killings (up 24% from 2016), I will send in the Feds!" Now, that tweet sounds like Trump was planning to send in somebody--maybe the FBI, although there aren't that many of them, maybe the military--to respond to the crime problem in Chicago. Now, if Trump wanted the military to act like the police making arrests, for instance, well, we can presume that would be barred by the Posse Comitatus Act unless Congress allowed him to do so. He didn't say what authorization he had to make that tweet, but he never carried through with the threat either. Now, Trump's fondness for his military has come up again with the border. Remember that building a wall on the southern border was a key part of his presidential campaign. But the president doesn't have what's called the "spending power." Only Congress does. And thus far, Trump's been unable to convince Congress to pay for an entire border wall. And Trump's been pretty angry about it and made that clear when Congress agreed on its \$1.3 trillion spending bill in March. On March 23rd, Trump tweeted, "I am considering a veto of the omnibus spending bill based on the fact that the 800,000+ DACA recipients have been totally abandoned by the Democrats (not even mentioned in Bill) and the BORDER WALL, which is desperately needed for our national defense, is not fully funded." Hours later, Trump signed the bill. On April 3rd, Trump surprised some of his advisers by announcing at a news conference that, quote, "We have horrible, horrible, and very unsafe laws in the United States. We are preparing for the military to secure our border between Mexico and the United States." Now, there's already a federal agency that's in charge of securing the country's borders. It's called U.S. Customs and Border Protection. But Trump claimed he would send the military to secure the border. Now, in theory, the Federal Posse Comitatus Act says that the military can't be used for domestic law enforcement unless the Constitution or Congress says so. What actually happened was not quite what Trump's remarks suggested. On April 4th, Trump signed a memo that formally requested the help of the National Guard of the border states. So, in the United States, the National Guard is a military force shared by the states and the federal government. Most of the time, the Guard operates as a state organization commanded by the state governor. Sometimes the federal government can decide to fund the National Guard but keep it under state control. Or sometimes the federal government can fund it and control it as well. Trump's request to the governors of the southern border states wasn't all that different from what his predecessors had done. Both Presidents Obama and George W. Bush used the state commanded National Guard to help in border security. This helping involves things like surveillance and training. But this is Trump, so things didn't quite work out in the same way as they had done in the past. The governors of Texas, New Mexico, and Arizona all quickly agreed to participate. In California, though, Governor Jerry Brown did not respond immediately. Now, remember, since Trump became president, California has had an unusual relationship with the Trump administration. There have been lawsuits filed by California cities and counties over the administration's threat to pull federal money from so-called "sanctuary jurisdictions." Attorney General Jeff Sessions visited Sacramento in March only to announce he was suing California over its sanctuary

jurisdiction law. And the California attorney general has sued the Trump administration over the decision to include a citizenship question on the 2020 census. And during this very same year, Trump has called California's governor "Governor Moonbeam." So, you get the idea of the relationship. Governor Brown tweeted out a response to Trump's request for the National Guard on April 11th. Brown wrote to Secretary of Defense Mattis and said that California would accept federal funding for Guard members. But here's what the governor also said: "Let's be crystal clear on the scope of this mission. This will not be a mission to build a new wall. It will not be a mission to round up women and children or detain people escaping violence and seeking a better life. And the California National Guard will not be enforcing federal immigration laws." Trump tweeted back on April 17th, "Looks like Jerry Brown and California are not looking for safety and security along their very porous border. He cannot come to terms for the National Guard to patrol and protect the border. The high crime rate will only get higher. Much wanted wall in San Diego already started." And the next day Trump tweeted, "There is a revolution going on in California. So many sanctuary areas want out of this ridiculous, crime infested, and breeding concept. Jerry Brown is trying to back out of the National Guard at the border, but the people of the state are not happy. Want security and safety now." And on April 19th, Trump tweeted yet again, "Governor Jerry Brown announced he will deploy up to 400 National Guard troops to do nothing. The crime rate in California is high enough, and the federal government will not be paying for Governor Brown's charade. We need border security and action not words." Now, in the end, California agreed to the president's request for National Guard troops at the border but on the terms that Governor Brown has set, and they remain under state control. That's Title 32 of the U.S. Code for you sticklers. The Federal Posse Comitatus Act doesn't bar any of this.

**Roman Mars** [00:15:25] Here's a little postscript.

**Elizabeth Joh** [00:15:26] As for the Bonus Army that was driven out by Hoover's troops? In March of 1933, a second Bonus Army arrived in Washington. By May, about 3,000 of them were living in another tent city. But this time it was the first lady, Eleanor Roosevelt, and not the military that showed up at the camps. The first lady joined the vets in a singalong. No tear gas, no fires, just singing. And by June of 1933, about 2,600 vets accepted offers to work in FDR's new Civilian Conservation Corps. The Corps would go on to build hundreds of miles of roads, create structures for public parks all around the country, and plant 3 billion trees.

**Roman Mars** [00:16:10] I always knew Roosevelt was better than Hoover. Follow up questions about Posse Comitatus right after this. So, I just want to make this clear--the Posse Comitatus Act is about the restriction rather than the right.

**Elizabeth Joh** [00:16:27] That's right. You know, there's nothing in the Constitution that says you can't use Posse Comitatus. And in fact, the Constitution seems to refer to the fact that sometimes we'll have to use the military if there's an insurrection within the country. But given what actually has happened historically, it was an attempt by Congress and not really for the best reasons--actually, it was passed by basically Southern Democrats saying, "we want federal troops out of the South"--to say we should restrict these circumstances. So, when you read the law at first, it sounds like, "Wow, you really can't use the military domestically." But actually, the except is a huge hole.

**Roman Mars** [00:17:04] Yeah. Except the Constitution or Congress.

**Elizabeth Joh** [00:17:07] Right. So, Congress has recognized all these different circumstances where basically, you know, a very common one is for a state governor to say, "Can we please have some federal help here?" for any reason. You know, insurrection and domestic violence is a pretty broad concept. So, you know, the presidents have sent in troops for all kinds of aid. You know, as I mentioned, like, race riots, labor strikes--which isn't a great use of the military--to suppress the violence there. So, yeah, I mean, as long as that exception exists, it's kind of a more of a symbolic thing more than anything else because a president can always say, "I'm relying on this exception." And remember, the funny thing about the Federal Posse Comitatus Act is it's actually a criminal statute. No one's ever been prosecuted under it, though. It remains more of a symbol. Like, "You're not supposed to do that."

**Roman Mars** [00:18:00] So yeah. Like, who would you prosecute?

**Elizabeth Joh** [00:18:03] It's not clear. We've never actually had a successful prosecution. So that means we don't really know how it would work. So, it remains largely symbolic and not even necessarily as strong a symbol as many people would think.

**Roman Mars** [00:18:14] I mean, presumably the president, right?

**Elizabeth Joh** [00:18:17] Well, that's a different problem.

**Roman Mars** [00:18:20] The other one. Episode four. I don't know. It was...

**Elizabeth Joh** [00:18:23] Right. And if you look at the particulars of the congressional laws that permit these exceptions, presidents have played pretty fast and loose a lot of times. You know, what's generally supposed to happen, for example, is that a governor would ask the president, "We need help," formally. They would send a letter. And then the president's supposed to, like, issue a proclamation, like, "Yes, you actually cannot do this on your own." And we have lots of instances where they didn't really issue the proclamation, but they kind of went with the spirit of the exception. And so again, what is this all about? It's about our basic historical experience with norms. Like, we feel uncomfortable when soldiers come into the domestic United States and do what looks like law enforcement. It should be really an extreme measure for a true emergency. So, in that sense, it does mesh with what we think is our American values about we don't want so much military entanglement with law enforcement. But the reality is, as a technical matter, that there are lots of times when the president can call out the military. And the best probable limit on that is just public reaction. The Bonus Army is a good example because people watch this stuff. You know, today it would be on the internet. But people watched the newsreels in the theaters, and they were outraged. "How could you send in troops against their own people?"

**Roman Mars** [00:19:43] That makes sense. So, if it so happened that Trump wanted to act on the homicide rate in Chicago using the feds, how would that work?

**Elizabeth Joh** [00:19:54] So presumably, if he wants to act lawfully, he'd have to abide by the Posse Comitatus Act, which would mean he'd act upon a request from the governor of Illinois. "We need help for the city of Chicago." But I don't think it is going to happen. So, if that were to happen, then he would formally issue a proclamation. "Yes, you are helpless by yourselves. We'll send in the military." But it kind of sounded like Trump was just saying, "We're just going to send in some military to do the business" of what he felt the Chicago

Police Department was failing to do, which is pretty much contrary to the spirit and the letter of the federal law.

**Roman Mars** [00:20:33] Yeah, there are so many exceptions to the Posse Comitatus restrictions, but he found the one.

**Elizabeth Joh** [00:20:39] "Let's just send the military there to take care of business."

**Roman Mars** [00:20:44] He found the one thing that the exception does not cover.

**Elizabeth Joh** [00:21:03] Right.

**Roman Mars** [00:21:03] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at [trumpconlaw.com](http://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](http://doomtree.net). We are a proud member of Radiotopia from PRX, supported by listeners just like you.