

War Powers

Roman Mars: The first time Kathy Paul and Wendy Koenig met President Reagan, they cut off the front of the president's pinstripe suit jacket.

Elizabeth Joh: Paul and Koenig were nurses at the George Washington University Hospital, and they were getting Reagan ready for emergency surgery.

Roman Mars: This was March 30th, 1981.

Elizabeth Joh: A disturbed man named John Hinckley Jr. had just shot the president as he had left the Washington Hilton Hotel. Hinckley also wounded White House Press Secretary Jim Brady, a Secret Service agent and a police officer. In the chaos that followed, Reagan was rushed to the hospital. That's where he lost his suit jacket. And for at least a short time, Reagan lost the biscuit.

Roman Mars: That's right. The biscuit. And it was a big deal.

Elizabeth Joh: The "biscuit" is a nickname for a little card that every president carries with him at all times. It has a set of verification codes that the president is supposed to recite after he's made the decision to order a nuclear attack. You see, the president can't just push a button to launch nuclear missiles like you see in the movies. There's actually a fairly bureaucratic process that takes place. Let's say the president learns of an imminent nuclear attack against the United States. That would lead to the opening of the "football." What's the football? That's the nickname for what's officially known as the president's emergency satchel. It's a big black briefcase that contains the nuclear options available to the president. And it has the instructions for contacting top military commanders. The football follows the president everywhere he goes. Everywhere. It's not carried by him, but it has to follow him. So, let's assume the football has been opened. At that point, the president would meet with top military officials. But ultimately, it's up to him to make the decision whether to use nuclear weapons. If the president decides to go ahead, the order is given to the military to start the process of preparing for the attack.

Roman Mars: This is where the biscuit comes in.

Elizabeth Joh: To make sure the order's legitimate, the officers recite a code, like "Alpha Bravo"--something like that--and the president has to respond with a verification code on the biscuit. Assuming that works, the missiles are launched. And once it's started, the process can't be undone. The whole thing is designed to be accomplished very quickly. After all, the idea is that the United States is facing nuclear attack. Some experts have said the whole thing could just take ten minutes start to finish. So, you see why not knowing the whereabouts of Reagan's biscuit, even if it was just for a moment, might have been alarming. It contained the verification codes to launch our nuclear missiles. Luckily, the FBI eventually found Reagan's things.

Roman Mars: That's one national security crisis averted.

Elizabeth Joh: Every president is responsible for carrying the biscuit and the football. It's one of the most powerful responsibilities the president of the United States has. And that's the possibility of getting the United States involved in a nuclear war.

Roman Mars: Now it's President Trump who has the biscuit and the football.

Elizabeth Joh: What does the Constitution say about the president's ability to wage war? And what's Congress' role? President Trump has issued some pretty bellicose tweets. So, it's a good time to learn what the Constitution says about the war power.

Roman Mars: Strap in, kids. This is not a feel-good episode. This is what Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the tweets and the rhetoric of the 45th president of the United States and channel our terror into learning our Constitution like we never have before. Our music is by Doomtree Records. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. So, the Constitution makes a few things clear about the government's war powers.

Elizabeth Joh: Article I--that's the section addressed to Congress--says the Congress has the power to declare war and to organize and pay for the military. Article II--that's the part addressed to the president--says that the president is the commander in chief. That basic system is designed to make sure that the Congress and the president cooperate when it comes to waging war.

Roman Mars: Those parts are clear, but there's a whole lot that is not clear.

Elizabeth Joh: Take this kind of question. What about when the president sends troops abroad to fight in an armed conflict and Congress hasn't declared war? That really matters today because the last time Congress formally declared war happened in World War II, after the bombing of Pearl Harbor.

Roman Mars: World War II was our last formal declaration of war.

Elizabeth Joh: Many presidents, though, have sent troops abroad to fight in conflicts since then. Is that okay?

Roman Mars: Well, I don't tend to think it's okay, but Congress does sometimes provide explicit approval, even if it's not a declaration of war.

Elizabeth Joh: Right after the September 11th attacks, Congress enacted what's called the "Authorization for the Use of Military Force." That law permitted the president, President George W. Bush at the time, to use all necessary and appropriate force against those nations, organizations, or persons that he determined were responsible for or helped in the 9/11 attacks. It's that law that formally allowed President Bush to send troops to Afghanistan in 2001. Remarkably and pretty controversially, this law remains in effect today and has been relied upon long after 9/11 for dozens of military actions around the world. It's been used to justify fighting ISIS, a group that didn't exist in 2001. Another question. What about situations where the president orders troops abroad to fight and doesn't have any congressional approval at all? Congress decided to address this issue legislatively in the 1970s. The Vietnam War was a costly and unpopular war.

Roman Mars: And remember, even though we call it the Vietnam War, it wasn't a formal war declared by Congress.

Elizabeth Joh: So, in 1973, Congress passed the War Powers Resolution over President Nixon's veto as a way to check the president's powers. It's easy to think that this isn't a law because it's called a resolution, but it's a regularly passed federal law. The law is pretty complicated, but there's a couple of important parts. The president is only supposed to

send troops abroad in situations of armed conflict, either when Congress has declared war, when Congress has given some kind of okay in another way, or when there's a national emergency. So, the president is supposed to consult with Congress in every possible instance before he sends troops. But at a minimum, if he can't, he's supposed to tell Congress 48 hours later after he sent troops abroad. And the law also says that the president has to withdraw troops 60 days after, unless Congress says, "It's okay. You can keep sending them."

Roman Mars: So, the War Powers Resolution is a way of Congress saying to the president, "Hey, you're supposed to check with us whenever possible when you send troops abroad to fight."

Elizabeth Joh: But the legality of the War Powers Resolution is a little bit weird. Every single president since 1973 has taken the position that the War Powers Resolution itself is unconstitutional. The idea here is that Congress is interfering with the president's powers as commander in chief by making him check with them. But presidents have also complied with the law dozens and dozens of times. So, they kind of have it both ways, saying, "Well, Congress, I'm telling you I'm sending troops abroad like the law says. But I don't have to because, you know, Constitution."

Roman Mars: "Article II says I can do it. But you--Congress--I like to let you feel like you matter."

Elizabeth Joh: The Supreme Court has never directly answered the question of whether the War Powers Resolution is constitutional, and it probably never will. Why? Because some matters like this are things that the Supreme Court considers political questions. And so, they don't want to get involved. So, it's all a bit of a murky situation. It's really up to Congress to decide how strictly they want to hold the president to follow the War Powers Resolution. They could say, "Well, we're cutting off funds and denying you further approval." But that's really hard to do when the troops are already abroad.

Roman Mars: And then there's the possibility of nuclear war.

Elizabeth Joh: With nuclear weapons, the president has total responsibility over the country's nuclear arsenal. That happened when President Truman signed the Atomic Energy Act of 1946. Why does the president get to do that? Well, there's the practical aspect of it. You really can't have a congressional debate if nuclear missiles are headed to the United States within 30 minutes. As a legal matter, the Constitution doesn't say so explicitly, but there's a pretty solid argument that the president of the United States has the power to defend the country in a nuclear attack. So, the basic idea here is if someone is sending nuclear missiles to the United States, the president has the inherent authority to fight back.

Roman Mars: So, what does that have to do with Trump?

Elizabeth Joh: Well, take North Korea. There's a lot of speculation that North Korea is developing its own nuclear weapons with long range capabilities that could reach the United States. Since President Trump took office. North Korea has test launched some long-range missiles. And President Trump? He's spoken and tweeted about North Korea a lot.

Roman Mars: Here's what Trump said on August 8th, 2017.

Donald Trump: North Korea best not make any more threats to the United States. They will be met with fire and fury like the world has never seen.

Elizabeth Joh: On September 22nd, President Trump tweeted, "Kim Jong Un of North Korea, who is obviously a madman who doesn't mind starving or killing his people, will be tested like never before!" And then on September 23rd, President Trump tweeted about the North Korean leader, "Just heard Foreign Minister of North Korea speak at UN. If he echoes thoughts of little rocket Man, they won't be around much longer." North Korea's foreign minister told reporters that he considered Trump's tweet itself to be a declaration of war against North Korea, which, of course, Trump doesn't have the power to do. Only Congress does. So, this was probably a lot of overheated rhetoric, but it definitely freaked people out. So, what does any of this mean? Could President Trump use the football and the biscuit if he learned that North Korean missiles were heading to the U.S.? Presumably, yes. The Constitution allows the president to defend the country. Could he turn to non-nuclear options, like sending more troops abroad in an armed conflict with North Korea? Presumably, yes. Again, Congress could declare war. Maybe they could authorize President Trump to do so. Or in some other way, Trump could comply with the War Powers Resolution. And you bet, like every other president, he would deny its constitutionality. And if Congress didn't want Trump to send troops abroad, well, it's really hard to think of a lawsuit that could be filed to stop President Trump.

Roman Mars: So that's why control over the biscuit and the football matter.

Elizabeth Joh: President Trump has the sole legal authority to launch nuclear weapons, if he chooses, in about the time it takes to compose and post a tweet.

Roman Mars: So, this is not a feel-good chapter of Trump Con Law, is it?

Elizabeth Joh: No, it's the terror edition.

Roman Mars: Oh, Jesus. I found one little silver lining in this story that I'll share with you after the break. So even though the North Korean foreign minister said that he considered Trump's tweet a declaration of war, we can state very clearly while pointing to our Constitution that not only can Trump not declare war with a tweet, Trump can't even declare war itself because he's not Congress.

Elizabeth Joh: That's right. He doesn't have the power to declare war at all in any form. And the only question is whether Congress could tweet declare war. And presumably they can't because they don't have a collective verified account.

Roman Mars: It's only a matter of time. 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 in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. The music in this specific episode for the second week is from Dangerous Jumps, the forthcoming full-length album from SHREDDERS, a new group consisting of P.O.S., Sims, Paper Tiger, and Lazerbeak. It is the album of the fall. Get it on November 3rd. You can find out all about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, the best podcast in all the world, supported by the Knight Foundation and donors who are listeners just like you.