

Deadly Force

Roman Mars: At 10:45 on the night of October 3rd, 1974, Memphis police officers Elton Hymon and Leslie Wright were dispatched to respond to a report of a break-in.

Elizabeth Joh: Officer Hymon went to take a look at the back of the house. It was dark, but Hymon could see someone run across the backyard. With a flashlight, he could see the person's arms and hands and later said that he figured the person was unarmed. Hymon called out, "Police! Halt!" But the suspected burglar began to climb the backyard fence. Hymon responded by shooting the fleeing burglar in the back of the head with his 38-caliber pistol. The escaping burglar was named Edward Eugene Garner. Garner was 5' 4", weighed about 110 lbs. and was 15 years old. He was an eighth grader. Police recovered \$10 and a purse from his body. Garner was unarmed. He had no weapons at all, and he later died on the operating table. And Hymon was no rogue officer. He was following the law. At the time, Tennessee law allowed the police to use all necessary means to stop someone from fleeing from an arrest.

Roman Mars: Tennessee law allowed police officers to do that even if the person fleeing posed no threat to anyone.

Elizabeth Joh: And there were a number of states at the time that allowed the police to do the exact same thing. Garner's father filed a civil rights lawsuit against the Memphis Police Department. The lawsuit argued that the state law had violated his son's Fourth Amendment rights.

Roman Mars: The Fourth Amendment includes the right to be secure from unreasonable searches and seizure. In this case, the seizure is the taking of life.

Elizabeth Joh: In 1985, the United States Supreme Court agreed with the Garner family. Justice White, who wrote the opinion for the Court, said, "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape." On February 14th of this year, 17 students and school employees were killed at Marjory Stoneman Douglas High School in Parkland, Florida. Lawmakers and the public are asking how best to prevent another deadly mass shooting. One proposal endorsed by President Trump in a tweet includes arming public school teachers.

Roman Mars: What the Constitution says about the rules of deadly force and how that pertains to Trump's idiotic proposal to arm teachers--I'm not even going to pretend here--on this, the final episode of Season Two of Trump Con Law. Let's do it. This is What Trump Can Teach Us About Con Law, an ongoing series of indefinite length, where we take the tweets of the 45th president of the United States and use them to examine our rights and the Constitution like we never have before, like the right of schoolchildren to not be shot by teachers. That's a new Con Law hypothetical for you. Our music is from Doomtree Records. Our neighbor and professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

Elizabeth Joh: On August 9th, 2014, a police officer in Ferguson, Missouri, fatally shot Michael Brown, an unarmed civilian. Brown's death drew protests and national attention to the police use of lethal force against civilians, especially when they are unarmed. But the topic of lethal force by the police isn't new, and it's not an aberration. The power of the police to use force is basically what policing is. A firearm is a standard piece of equipment

issued to American police officers. So even though only about a quarter of police officers ever fire their job-issued guns while on the job, the fact that police officers carry them means that lethal force is always a possibility. And so, the Supreme Court has had a lot to say about that. And this is why police rules on deadly force come from the Fourth Amendment. The Fourth Amendment of the Constitution prohibits the government from conducting unreasonable searches and seizures. So, when you think of a search or seizure, you might think of a search as when the police look through your car and a seizure as an arrest. And you'd be right. But lethal force is governed by the same rules. A police officer using deadly force and actually killing someone is the ultimate governmental seizure. That's why the Supreme Court has decided to rely on the Fourth Amendment to think about what the police can and can't do when it comes to deadly force.

Roman Mars: Let's return to the fatal shooting of 15-year-old Edward Garner that we mentioned in the beginning of the episode.

Elizabeth Joh: In 1985, the Supreme Court said that police officers could not be allowed to use deadly force to prevent everyone from fleeing an arrest no matter what. That was constitutionally unreasonable. The decision doesn't prohibit the police from using deadly force. Instead, in the Garner case, the Court said that if a police officer believed that the suspect posed a serious threat--physical threat--to the officers or to other people, it was okay to use deadly force. Garner's case did not fall in that category. And that standard--being able to use deadly force in some circumstances--gives a lot of leeway to the police. It's not hard to understand why a police officer should be able to use deadly force or even less than deadly force when a suspect appears to pose a threat. But the Supreme Court has made it clear that the police also can get the benefit of the doubt when they make mistakes about whether to use force or not. Just four years after the Garner decision, the Supreme Court reviewed the case of a man who suffered a broken foot, cuts, and bruises at the hands of the Charlotte, North Carolina, police. Why? Because when they saw the man run out of a convenience store, they thought he'd been shoplifting. Well, Dethorne Graham did run out of the convenience store, but he'd done so because he was a diabetic and he was having an insulin reaction. He thought he'd go to the store for some orange juice, but the line was too long. When he decided to hurry to his friend's house for help, Graham was stopped by the police. In 1989, the Supreme Court didn't resolve whether the police were justified in doing what they did to Graham, but it did set out the standard. The Court said that police officers in these circumstances should be judged under a legal standard of objective reasonableness. And you measure that based on what a reasonable officer would do at the time, not in hindsight. And the Supreme Court pointed out something else important here, too. Police officers face some very stressful circumstances. "Whether a police officer used a reasonable amount of force," said the Court, "should account for the fact that police officers are often forced to make split second judgments." So, the result has been a pretty deferential standard to the police, and that includes cases where the police have made mistakes, even fatal mistakes. There are numerous legal cases where police have encountered a person and believe that that person has a gun only to find out later that the gun wasn't a gun at all, but a wallet or a shiny object. What matters in the Fourth Amendment sense is was it reasonable at the time for the officer to believe there was a danger there. And mistakes on the part of the police don't necessarily violate your rights. So, in a sense, our system has struck this balance because we know police officers will sometimes be in dangerous situations and we want to allow them to protect themselves and the public when they think it's necessary.

Roman Mars: So, keep that in mind. The law allows for police officers to make deadly mistakes based on whether the force seemed reasonable during the heightened stress of the situation. Now, let's get closer to the present day.

Elizabeth Joh: On February 14th of this year, a 19-year-old former student walked into a high school in Parkland, Florida, with firearms and began to shoot. 17 students and school employees died as a result, and several were seriously injured. Since the shooting, a group of student survivors has taken to social media calling for action. They have argued for stricter regulations on the availability of semi automatic AR-15 rifles, like the one used in the Parkland shooting.

Roman Mars: Trump had other ideas.

Elizabeth Joh: At a White House listening session with parents, teachers, and students on February 21st, Trump stated, "And one possible solution, which may not be very popular, would be to have people in the school--teachers, administrators--who have volunteered to have a firearm safely locked in the classroom, who are given training throughout the year. And if it's not the teachers, you could have people that work on the campus. A custodian could be an undercover policeman. Someone who works in the library or the lunchroom could be an undercover policeman. He serves lunch every day, but he also has a firearm at the ready." That idea was reported widely. The next day, Trump issued a long series of tweets. "I never said give teachers guns like was stated on fake news CNN and NBC. What I said was to look at the possibility of giving concealed guns to gun adept teachers with military or special training experience. Only the best. 20% of teachers, a lot, would now be able to immediately fire back if a savage sicko came to a school with bad intentions. Highly trained teachers would also serve as a deterrent to the cowards that do this. Far more assets at much less cost than guards. A gun free school is a magnet for bad people. ATTACKS WOULD END! If a potential sicko shooter knows that a school has a large number of very weapons talented teachers and others who will be instantly shooting, the sicko will never attack that school. Cowards won't go there. Problem solved. Must be offensive. Defense alone won't work. History shows that a school shooting lasts on average three minutes. It takes police and first responders approximately five to eight minutes to get to site of crime. Highly trained, gun adept teachers/coaches would solve the problem instantly before police arrive. Great deterrent." Two days later, Trump tweeted again. "Armed educators and trusted people who work within a school love our students and will protect them. Very smart people. Must be firearms adept and have annual training. Should get yearly bonus. Shootings will not happen. A big and very inexpensive deterrent. Up to states." And on February 26th, President Trump had a meeting with state governors.

Roman Mars: This is a quote from Trump speaking in the third person about himself.

Elizabeth Joh: "The headline was Trump Wants All Teachers to Have Guns. Trump Wants Teachers to Have Guns. I don't want teachers to have guns. I want highly trained people that have a natural talent, like hitting a baseball or hitting a golf ball or putting." And then there were reports that the Broward County sheriff's deputy assigned to the school had failed to run into the school for several minutes after the shooting had started. Trump responded by saying that he himself would have gone in, quote, "even if I didn't have a weapon. And I think most of the people in this room would have done that, too." Press Secretary Sarah Sanders clarified Trump's statement later in the day. She said, "President Trump, when he said earlier that he would have run into the school, he didn't really mean that he'd run into a school with an active shooter, but rather he'd be a leader." So, what if

we armed all or just some of the more than 3 million public school teachers in the country? What if? Well, even though we usually think of the police when we think of the Fourth Amendment, that part of the Constitution applies to all government action. So, for instance, that's why the Supreme Court has decided a number of Fourth Amendment cases involving schools--such as drug testing in public schools and backpack searches--these are all forms of government action. So, if public school teachers were officially carrying guns as a part of their job, they'd be subjected to the Fourth Amendment, too. So, let's consider the best-case scenario. Assuming there was a person posing a deadly threat at a school, an officially armed teacher might be able to stop that person with deadly force. And that may well be a reasonable action under the Fourth Amendment. But remember, the Supreme Court has also said, "Let's not second guess police officers too much. That flexibility has meant that police officers have made deadly mistakes without violating the Constitution." So, what's the worst-case scenario? A teacher who sees a student with something that the teacher can't confirm is a gun. But in a split second, the teacher believes mistakenly, that it is a gun and fatally shoots the student. If it's an objectively reasonable judgment at the time of the shooting, then presumably no constitutional wrong has happened, even if the student was, say, just reaching for a shiny looking wallet. Whether or not arming public school teachers is the right policy debate, it's clear that if we decide to arm public school teachers, their decisions to use deadly force raise the same kind of legal questions raised in Edward Garner's death and Dethorne Graham's unfortunate insulin reaction turned forceable stop. We'd have to decide whether those risks, borne already by public police officers, are worth extending to our public schools. And as for Garner's case, it took a decade to reach the Supreme Court. And it took yet another decade to finally end the case when "the city of Memphis agreed to pay the Garner family \$300,000. Hyman, the officer who shot Garner, eventually retired as a captain of the Memphis Police Department.

Roman Mars: I have some follow up questions for Elizabeth right after this. Is any of this--arming teachers--is this in Trump's control at all? Is this a thing that he can actually do anything about?

Elizabeth Joh: So, remember that Trump said in his tweet, you know, we could arm teachers up to states. And so that actually is insightful in that he seems to recognize in that tweet that the president actually can't just tell public school districts what to do. So that goes back to this basic idea that the federal government can't force state and local governments to adopt things according to federal objectives. That's based on the 10th Amendment's so-called "anti-commandeering clause." But what's clear is that if Trump were to convince Congress to pass a federal spending bill, Congress could incentivize states to say, "We would like you to arm your public-school teachers, and we'll shower you with federal money to do so." That would be allowed.

Roman Mars: Giving schoolteachers guns seems, by definition, commandeering a force. Like, that is so strange to me. Like, the most commandeering you can commandeer anyone is to turn your teachers into a police force.

Elizabeth Joh: That's true. But the commandeering in this case would mean... You know, it would just be a choice that public school districts could decide, "Yes, we would like the millions of dollars to arm our own public-school teachers, to turn them into a security force in every school." So, yeah, it does seem very strange. And I also think it's important to understand that we always do think of the police and the Fourth Amendment. But these rules would really... Unless the states would restrict public school teachers further in the circumstances in which they could shoot people in schools, those same rules would apply.

And so, you know, does it matter at the actual scene of any possible--and let's hope it doesn't happen--mass shooting. No. But what it does do in terms of the law is that it reduces the likelihood that people who have been shot in error and people who believe they've been victims of excessive force can file successful civil rights lawsuits against the people who have shot them. And it makes it exceedingly unlikely that public school teachers, for instance, might be criminally prosecuted if people believe that their use of force was justified in the same way that it's very uncommon for public police officers to be criminally prosecuted for their use of deadly force. And it's often a big hurdle for plaintiffs to win civil rights lawsuits in these excessive force cases against the police.

Roman Mars: If the teachers are acting as a security force in this scenario, does it matter that they are not police officers?

Elizabeth Joh: So, for Fourth Amendment purposes, the answer, generally speaking, would be no. Because they're public school teachers, they are governmental officials. And the Fourth Amendment really is saying that whenever the government is engaging in a search or seizure, which can happen when you use deadly force, it doesn't matter what your official title is. You're a government official. So that's why even though we think of police officers as doing things like searching for evidence, the Supreme Court's made it clear that if a school administrator goes through a kid's backpack looking for, you know, contraband--cigarettes--which aren't allowed in school, then that is something that is regulated by the Fourth Amendment. Even though the schoolteacher or the principal is not a police officer, it's the same basic idea in terms of, you know, why the Fourth Amendment should regulate this action.

Roman Mars: This show is 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. The theme music at the top is from SHREDDERS. And this instrumental right here that you're listening to right now is from the new Dessa album, Chime. Get it, people. You need it. You can find all 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. This is our last show for a while. We're going to take several weeks off and see if Trump says anything outrageous on Twitter. Oh, my God. This is real life. Talk soon.