

WHAT TRUMP CAN TEACH US ABOUT CON LAW

What Is a War?

ROMAN MARS: So, it is Thursday, November 20th, at 11:15 a.m. What are we going to be talking about?

ELIZABETH JOH: Okay, Roman. Here's a question for you. Was the Civil War a war?

ROMAN MARS: [CHUCKLING] Oh god. Huh. Uh... Whoa, let's see. Declared... I'm trying to think of, like, what I know from Article I at this point.

ELIZABETH JOH: You could just have an off the cuff--

ROMAN MARS: Yeah, I mean, I'm going to say... Yes. Yes, the Civil War was a war. Let's go with that.

ELIZABETH JOH: I think that's right, and it might seem obvious to us now that it was a war. But in 1863, it was an open question and a dangerous question for President Lincoln. And that was because of the *Amy Warwick*, the *Hiawatha*, the *Brilliant*, and the *Crenshaw*--all four ships that were captured by the U.S. Navy. Now, after Confederate troops fired on the U.S. Army garrison at Fort Sumter in April of 1861--that's the start of the Civil War--President Lincoln responded by issuing a series of executive proclamations. He called up 75,000 volunteer soldiers to form what would become the Union Army. And Lincoln also issued a "naval blockade of the South." Now, this was meant to cut off supplies to the Confederacy and to prevent it from selling its goods overseas to raise funds for the Confederate Army. All of this was premised on Lincoln's war power as president. Now, why a naval blockade? A blockade meant that the U.S. Navy could seize private ships that were violating the blockade. And in fact, such a ship and its cargo could be claimed as a "prize of war."

By the 18th century, there existed a complex body of law called "prize law." And prize law worked like this. The Navy would board a ship to determine whether it was violating the blockade. And if the ship appeared to be in violation of the blockade, the captured ship would be sent to a Union court where a "prize court" was located. The prize court would then determine whether the ship would be claimed as a prize of war. Now, prize law has some really wonderful terms. The "prize master" sailed the ship to the prize court and would provide all of the papers found on board the captured ship. And the lawyers involved would "libel the prize." That means asking for an investigation of all of these facts to determine whether the ship and its cargo would be forfeited. After all the evidence was considered, the prize court would then condemn or release the prize.

Now, at this point, you might be wondering what does prize law have to do with the war being a war. A lot, it turns out. And that is because Lincoln chose to impose a naval blockade rather than just close the ports of the South. Now that choice is significant because a naval blockade under recognized principles of international law is allowed only in wartime between two enemy nations. Well, that was a problem for Lincoln, right? Lincoln's position was that the Confederacy was engaged in insurrection, not war. If the Confederacy was engaged in a war with the United States, well, then other nations might recognize the South as a sovereign nation. But if this was not a true war, then the blockade was illegal. You see the problem?

ROMAN MARS: [CHUCKLING] Yeah, it's tricky.

ELIZABETH JOH: Right. So if all of the ships seized during the blockades were unlawfully taken, then the Union might be forced to pay huge sums in compensation. But most importantly, if Lincoln did not have the authority to issue a blockade, then he lacked the authority to call up troops, to direct the treasury to pay for the Union effort, and even to issue the Emancipation Proclamation of 1863. All of these were acts issued under Lincoln's constitutional war authority. So if the blockade was unconstitutional, then these other things were, too. The *Amy Warwick*, the *Hiawatha*, the *Brillante*, and the *Crenshaw* had all been seized separately for violating the blockade. The owners and the merchants laying claim to these ships appealed to the Supreme Court, and their legal claims were heard together in what would be known as the Prize Cases.

In March of 1863, the Supreme Court decided, by just one vote, in favor of the Lincoln administration. Yes, according to the Supreme Court, this was a war. The concept wasn't limited just to a conflict between two independent nations. And yes, Lincoln did have constitutional authority to issue the blockade. And if war was brought to the United States "by invasion or rebellion," as the Court explained, the president was not just authorized but required by the constitution to resist what it called "force by force." In other words, Lincoln did have the authority for the blockage, even though Congress hadn't approved it.

The Prize Cases were a turning point in the constitutionality of the Civil War. And the Prize Cases also happen to be the only time the Supreme Court has ever addressed the constitutionality of presidential war power without congressional approval. Yet president after president has claimed that they have independent war authority no matter what Congress might say. Does that include striking fishing boats in the Caribbean allegedly carrying illegal drugs into the United States? Is there an answer? Time to find out.

ROMAN MARS: Let's do it.

This is What Trump Can Teach Us About Con Law--an ongoing series of semi-regular release, where we look at the connection between the naval blockades of the Civil War and the strikes on Venezuelan boats and use it 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.

So what do we know about these strikes in the Caribbean?

ELIZABETH JOH: So remember that, in March, President Trump signed a proclamation that designated Tren de Aragua, or TDA, as a designated foreign terrorist or organization. And TDA, as a reminder, is a criminal gang that originated in Venezuela, but now it's considered kind of a multinational criminal organization. And Trump's proclamation back then stated that TDA was "perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States." And so in our previous episode, we talked about how this proclamation has been used by the Trump administration to detain Venezuelan non-citizens in the United States and then designate them as "alien enemies" and simply deport them. And so there's been a controversy over that, of course. And that designation also leads us to these boat strikes. On September 2, the Trump Administration announced that it had carried out a strike on a drug carrying boat that came from Venezuela and was operated by the TDA. Now, "boat strike" is really an indirect way of saying that the military had blown up the boat. And the people on board--11 of them--were killed. And that was just the first boat strike. So, as of today, we know of at

least 21 U.S. military strikes on boats in the Caribbean that have killed at least 83 people. There are two known survivors that were sent back to their home countries of Ecuador and Columbia. And these strikes have taken place in international waters. And from the reporting, these strikes appear mainly to be carried out by drones that are launched from U.S. naval ships.

ROMAN MARS: So are these strikes legal at all?

ELIZABETH JOH: The simple answer is no.

ROMAN MARS: I would think not, assassinating people like this.

ELIZABETH JOH: Yeah, it seems pretty much like a summary execution. They are not justifiable under any rational reading of any law. And even some of the most conservative legal analysts agree with that conclusion. But why these strikes are unlawful takes a little bit of explanation. And as we go through this topic, I think you'll see why the boat strikes are both shocking but also not entirely surprising at the same time.

ROMAN MARS: Okay.

ELIZABETH JOH: Let's start with the war power. The Constitution splits the war power between the Congress and the president, and we know that from the text itself. Article II designates the president as the Commander-in-Chief of our military. And Article I gives Congress the power to declare war, to raise and support an army, and to provide and maintain a Navy. The only problem is that Congress hasn't declared a formal war since World War II, and yet we have sent troops to armed conflicts many, many, many times since World War II. So, in many of these instances, Congress has formally given the president the ability to use military force by passing a law. And we can call that an "authorization to use military force." And the Supreme Court has generally treated this as an acceptable constitutional compromise. It's not quite a war, but Congress is allowing the president to do this. So Congress grants the president formal approval to send troops. And then the president is essentially acting under that congressional authority. So, for instance, after September 11th, 2001, when the terrorist attacks happened, Congress passed the 2001 Authorization for the Use of Military Force or the 2001 AUMF. And the 2001 AUMF allows the president of the United States to use all necessary and appropriate force against all nations or groups that planned, committed, or aided the 9/11 attacks. It's still in effect actually.

ROMAN MARS: Wow.

ELIZABETH JOH: It's also true that every president has said that, no matter what Congress says, the president of the United States has his own inherent or implied war power under Article II of the Constitution.

ROMAN MARS: What makes the president think that they have this inherent war power? That's not what I read when I read it.

ELIZABETH JOH: Well, it's just an assertion, right? So, there's that problem. But we can also return to the Prize Cases. There the Supreme Court endorses the idea that the president has the constitutional authority to defend the country from an armed attack--an armed invasion--even if Congress doesn't provide formal authorization. So I think there's definitely agreement among all three branches that the president has some kind of

inherent war power. The problem is that it's not clear what the limitations of this inherent war power is. Presumably there's some limit, otherwise that would upend our understanding of the federal government's idea of limited authority. So there has to be some limit, but it really hasn't been defined.

ROMAN MARS: So then who gets to define what a war is?

ELIZABETH JOH: Well, there's no definitive answer to that question. Both Congress and the executive branch have asserted their own primacy over who gets to make the final call. So there are some hints about the extent of war authority in some Supreme Court decisions. But in general, the United States Supreme Court just doesn't wanna get involved in making this essentially political determination--who gets to make the **final** call in deciding when a war is a war. And so there's always a back and forth between the Congress and the president.

ROMAN MARS: I love that they get to just decide, "We just don't want to get involved in this. This seems too messy." And that's what they do, yeah.

ELIZABETH JOH: Exactly. And it's not... I mean, they certainly get involved in other highly charged decisions, but war making they generally don't.

ROMAN MARS: Fair enough. Okay.

ELIZABETH JOH: So, let me give you an example. In 2013, the Obama administration considered military intervention in the Syrian civil war after reports that chemical weapons had been used by the Assad regime against its own civilians. So Obama went on TV in 2013, and he announced that he would actually ask Congress if they would authorize military action in Syria. Now, what's interesting about Obama's speech is at the same time that he's telling the public, "I'm going to ask Congress for authorization," he also said this: "I believe I have the authority to carry out this military action without specific congressional authorization." So, you see, Obama's sort of having it both ways. He's saying, "I don't need Congress' permission. But I'm going to be cooperative, and I'm gonna do it anyway." And that's been essentially the position of every single modern American president. "I don't have to ask Congress for permission. But, you know, when it's convenient, I will ask Congress for permission, although I don't have to." And so that's where the War Powers Resolution comes in. The formal name of the "War Powers Act" is the "War Powers Resolution," but it's actually a formal law that was passed over Nixon's veto in 1973.

ROMAN MARS: Okay, so what does the War Powers Resolution do?

ELIZABETH JOH: So the resolution doesn't actually give the president any powers at all. Instead, you can think of the War Powers Resolution as a kind of a way for Congress to step in and ask for some coordination from the president anytime the president wants to use military force and the president doesn't ask Congress beforehand. So, the Resolution has several provisions, but here are the key points. Section 4 of the War Powers Resolution requires the president to tell Congress within 48 hours any time that American armed forces are sent into--and here's the specific language, which will be important for later--"hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." That notification to Congress is supposed to explain the legal authority the president is relying on to use military force. So this is a formal "I'm telling Congress what I'm doing and why I'm using the military." And the president is also supposed to estimate how long and extensive the military involvement will be. So, when

these things happen, of course Congress knows in this world of media, but it's a formal notification.

ROMAN MARS: Got it. Got it.

ELIZABETH JOH: Okay. So the second part of the War Powers Resolution that's important here is that within 60 days after that military action, the president is supposed to stop using the military, unless Congress declares war--it's not going to happen--or gives the president some other formal authorization or there's some kind of national emergency because there's an ongoing attack on the United States. Of course, that doesn't happen either. Now the president can extend this by another 30 days if he declares that there's some unavoidable military necessity. So the War Powers Resolution has three important numbers, 48 hours, 60 days, and 90 days. And this is all meant to ensure that Congress and the president work together whenever the president decides, "Hey, I'm going to send troops abroad for some reason."

ROMAN MARS: Yeah, yeah, yeah.

ELIZABETH JOH: So, every president since Nixon--and of course Nixon tried to veto the resolution and it didn't work--has raised doubts that the war powers resolution is actually constitutional. But every single president since Nixon has also complied with the resolution in varying degrees.

ROMAN MARS: More of our conversation when we come back...

[AD BREAK]

ROMAN MARS: In terms of the boat strikes, is Trump engaging with the War Powers Resolution at all or just ignoring it completely? What's going on?

ELIZABETH JOH: Well, yes and no. So, let's get to the yes. So, after the first boat strike in September, Trump actually sent a formal letter to Congress within 48 hours on September 4th. And the letter to Congress confirms that the U.S. military did, in fact, strike a vessel at a location beyond the territorial seas of any nation. Now the letter also says that the boat was "assessed to be affiliated with a designated terrorist organization and to be engaged in illicit drug trafficking activities." Now, it doesn't say anything about TDA. But Trump announced at the time of the boat strike that this was an action against TDA. He announced this on Truth Social. How long will this last? The letter says, "Well, we don't know. It's not possible to know at this time the full scope and duration of these military operations." So, Trump's letter to Congress says, "I'm writing to Congress because this is to comply with the War Powers Resolution." But the letter also says that Trump directed these strikes under his constitutional authority as Commander in Chief and Chief Executive to conduct United States foreign relations--so, again, having it both ways. "I'm complying, but I actually don't have to seek any kind of approval here, right?" Very similar to what all other modern presidents have said in their own 48-hour notices, anytime that they've complied with the War Powers Resolution.

So, let's step back for a moment and think about what this means. Trump is saying, "I've used military force against these boats, at least some of which actually appear to be fishing boats. But what is this use of military force?"

ROMAN MARS: So is he asserting that this is actually a war? Or is he even engaging with that level of argument at all?

ELIZABETH JOH: Well, you know, if you look at the letter to Congress, the Trump administration says that "it is acting under the nation's right to self-defense." But if this is in some sense a war, let's go with that idea for a moment. How are the people in these boats combatants in armed conflict with the United States? Even if we assume that there are people in these boats who are bringing illegal drugs into the United States--and remember the administration hasn't offered any evidence supporting this yet--then the usual manner of dealing with drug runners would be as a matter of law enforcement, not war making.

ROMAN MARS: Yeah, of course. Yeah.

ELIZABETH JOH: So, presumably you'd have something like the Coast Guard who would stop the boats and arrest the crew and bring them in for criminal prosecution. But these weren't prosecutions. They simply blew up the boats. These were executions without any process at all. And so if you bring illegal drugs into the United States, that's certainly a crime. But is it really an attack on the United States? That's not really the way we think about armed conflict. And there's no sense that the TDA is engaged in any sustained or organized campaign against the United States as a sovereign nation, right? And a basic principle of armed conflict means that you distinguish between combatants and civilians. So even if we assume that these are drug runners--that they are, in fact, bringing illegal drugs into the United States--they're still civilians. They're not wearing uniforms. They're trying to pretend to be soldiers in any sense. But the administration told Congress in September that essentially we are in an armed conflict with non-state actors. And they called the people that they had killed in these boats "combatants." So that's really a stretch, but you see they're trying to assert that this is some kind of war that the United States is engaged in. But they aren't. They're civilians. And the United States can't simply kill civilians because they're allegedly importing illegal drugs into the United States, right? That's problem number one and maybe the easiest one to think about--this isn't a war at all, period.

ROMAN MARS: So Trump used the military to do this at this point, where it's two months after September 4th-- So, that 60 days where they have to stop using force unless Congress says so--we've reached past that point. What has happened in regards to that?

ELIZABETH JOH: Well, this is the trickier part. Remember the three numbers of the War Powers Resolution? You just brought up one. 48 hours, 60 days, and 90 days. So it's very clear contemplation in the resolution that the president can't just go it alone if he orders the use of military force. He needs the cooperation and approval of Congress, right? When the military first blew up the first boat on September 2nd, that triggered not just the reporting requirement, but the 60-day clock that you just mentioned. So, remember, the president is supposed to withdraw the military force unless Congress authorizes the military action. But remember, the Trump administration has continued to strike these boats and kill people--dozens of people at this point. So, the Trump Administration--what are they doing? Did Congress approve? No.

ROMAN MARS: No. But they've declared a national emergency?

ELIZABETH JOH: Not quite that. That would be like an alien invasion. But Trump is claiming that the War Powers Resolution doesn't constrain him at all. Right? So the War Powers Resolution does recognize that the president has some inherent or implied

constitutional authority to use military force. And the War Powers Resolution essentially says, "Fine, but Congress does get to play a role here by authorizing that force at some point." Now, here's where the OLC is relevant.

ROMAN MARS: What is the OLC?

ELIZABETH JOH: Right. The Office of Legal Counsel.

ROMAN MARS: Oh, yeah, yeah, yeah, yeah.

ELIZABETH JOH: Yeah, yeah, yeah. The Office of Legal Counsel is a part of the Justice Department that provides legal advice to the president. Now, let's go back to 2011. In 2011, the Obama administration's OLC looked at the history of presidential action and concluded that the president has constitutional authority that doesn't need any approval whenever military action would serve what it called "important national interests."

ROMAN MARS: "Important?"

ELIZABETH JOH: Yeah, very important.

ROMAN MARS: That's not enough! That's not a strong enough word! Okay, continue on, I'm sorry.

ELIZABETH JOH: That's okay. And when the military action doesn't rise to war in the constitutional sense... So the OLC wrote the memo to justify whether Obama would have constitutional authority to use airstrikes in Libya. So remember in 2010 and 2011, there were pro-democracy movements spreading across the Arab world in places like Egypt and Tunisia and Libya. In Libya, this led to a violent crackdown against civilians. And as a result, the U.N. Security Council had passed a resolution for military intervention in Libya. And the United States was to lead the NATO coalition, establishing a no-fly zone over the country. This was to protect civilians who are being targeted by the Gaddafi regime. That's a very specific objective, right? But the OLC is saying, "Well, we can do this because it serves important national interests." That's a pretty broad standard supporting presidential authority.

ROMAN MARS: For real! Oh my god. It's like, "I want to murder these people." "No, that's illegal." "But it's important." "Well, if it's important, I mean, then I guess so..." Crazy! Okay. Keep going.

ELIZABETH JOH: So, there you have a pretty specific objective. And then the OLC says that's where we can do it. It's serving important national interests, and it's really not war in the constitutional sense. Okay, that's 2011. But then you see this very same two-part test from the OLC being used by the first Trump administration to justify airstrikes in Syria. And then we get to the boat strikes. According to reporting from the New York Times, the Justice Department has written a document justifying the boat strikes as lawful because Trump has inherent constitutional authority to order these strikes, number one, because these boat strikes are in the national interest, and two, these strikes are not war in the constitutional sense. That's the same two-part test that we've just talked about. So, that means, in one sense, the American military blowing up fishing boats in the Caribbean is shocking and unprecedented, but the legal pathway the Justice Department is using isn't wholly new, even if we couldn't have predicted it would be used in this particular and very extreme way.

ROMAN MARS: Again, we're running into this thing where language fails us because it can't stop a bad actor interpreting these as broadly as possible to sort of just do whatever they want.

ELIZABETH JOH: Exactly. I mean, we sort of think, "Well, with a good faith president, that's a broad standard, but maybe..." You could differ on whether that's appropriate in a policy sense, but we never would have thought we'd get to the boat strike situation.

Unfortunately, it gets worse. There's another significant interpretation of the War Powers Resolution that's important here, too. So, Roman, remember that the War Powers Resolution applies whenever the president sends armed forces into hostilities or into situations where imminent hostility is clearly indicated by the circumstances. So, what's your general sense of what we mean when we say "hostilities?"

ROMAN MARS: That they are attacking the United States. That would be my sense of what hostilities are. Yeah.

ELIZABETH JOH: Yeah. I mean, that's pretty reasonable. The problem is that the War Powers Resolution does not define what hostilities are. But the underlying presumption is that the War Powers Resolution only applies when there are hostilities. Then the president has to tell Congress and then later ask Congress for permission to keep using the military force. But because the act doesn't define the term, that's become contested, too. So let's go back to 2011 and Libya again. So, Obama did notify Congress in March of 2011 about the military campaign. And the airstrikes kept going. And they kept going on after the time allowed by the War Powers Resolution, and Congress had not authorized it. Well, in June of 2011, President Obama sent a report to Congress, and the gist of it was: "Well, the military is not engaged in hostilities, so the War Powers Resolution doesn't apply."

ROMAN MARS: So, why not? What was the justification here?

ELIZABETH JOH: Well, according to the Obama administration, the use of American military force was "not sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops." So remember this was part of a NATO coalition to enforce a no-fly zone from the air. There were no U.S. troops on the ground. And Obama administration lawyers argued, like, Libyan forces couldn't realistically fire back. So this wasn't a hostility!

ROMAN MARS: So, you know, these Venezuelan fishermen or Ecuadorian Caribbean fishermen are not firing back at the drones either. So, does that apply here, too?

ELIZABETH JOH: Yeah, that's essentially what they're saying. In early November, the Justice Department told Congress that Trump was going to continue to order lethal strikes on boats that were suspected of bringing illegal drugs into the United States. And they said, "What? Well, these don't count as hostilities under the War Powers Resolution." I guess the idea seems to be that these aren't hostilities because the people in the boats can't shoot back. Because they aren't armed, possibly, would be the reason.

ROMAN MARS: Yeah, or, you know... I mean, this is so infuriating because the pretense of doing it at all is that these people are combatants that are shooting or shooting back. And then when confronted with the fact that if people are shooting back, you need to

behave this way, they're like, "No, they weren't shooting back." It's so... That is so infuriating. In both cases, it's infuriating.

ELIZABETH JOH: Right. And remember, why is the Trump administration doing this? They're trying to avoid being restrained by that 60-day clock that would require Trump to stop the boat strikes or to have Congress approve of what he is doing, which I think seems unlikely.

ROMAN MARS: Yeah. Yeah.

ELIZABETH JOH: So these boat strikes are definitely unprecedented. I mean, Trump is ordering the execution by the military of people who are allegedly bringing drugs into the United States, rather than apprehending them and arresting them. That is unprecedented. But Trump's attempts to legally justify what's happening--that by itself is not completely a surprise. So, if you go back to 2011, the Obama administration interpreted the Constitution and the War Powers Resolution so that the United States could participate in part of this NATO coalition effort. And we could raise questions about the wisdom of that specific intervention, but it was backed by a U.N. Security Council resolution. And the reason this happened or the reason why the Obama administration took the direction it did was because there were a lot of Republicans who objected to this particular intervention. It was not realistic that he was going to get congressional authorization, so it crafted a legal interpretation to try to justify its use of military force. But even if you disagreed with what the U.S. was doing, I don't think we'd really call it the actions of a rogue president. We might say, "Well, you know, maybe the U.S. shouldn't have intervened to the extent that it did or to the amount of time that it did." But it's not exactly a rogue president in this way.

But I don't want to just dump on Obama here. We can go back further to 2001. Now, the country's response to the terrorist attacks on 9/11 was to pass the 2001 AUMF. And again, that AUMF has not expired. It is still in force today. In fact, the 2001 AUMF has been used to address terrorist organizations that didn't even exist in 2001. And so, for that reason, the 2001 AUMF has been called the "beginning of our forever wars" in part because it's just not clear how the objectives of the 2001 AUMF that stretches from the Bush administration to today will ever be completed. How will we know that those objectives are done? And even before 9/11, presidents have long argued that their constitutional authority to exercise the war power is very, very broad--so broad that Congress can't really impose any checks on it. But of course, it takes Trump--a president who's not fond of any limits at all--to really force us to ask what kind of limitations there should be on what the president's war-making authority is.

ROMAN MARS: Has there ever been an effort to pass another bill, like, rescinding the 2001 AUMF?

ELIZABETH JOH: Oh, there have been many calls to do this. But they've been unsuccessful, I mean, for lots of reasons. But I think maybe the obvious political reason is politically you wouldn't want to do that as a lawmaker--to say, "We should get rid of this." But as a result, we have this very old authorization that is very broad, allows the president to do all kinds of things, and presidents of both parties have relied on to engage in military actions all over the world that sometimes have kind of just a secondary association with what happened in 9/11.

ROMAN MARS: It still leads us back to this foundational part of the Constitution, which is that it wasn't built around parties. It was built around opposing branches. The loyal

opposition wasn't just the other party. The loyal opposition was the legislative branch because when you see this 1973 act trying to rein in Nixon, a veto-proof majority passed it. And it really takes Congress saying, "No, this is our domain. And we're going to fight back with it." And if they try to work around it, fine. And they pass other laws. But it requires that sort of jockeying to come to, you know, some kind of solution that represents America in some way. And if you don't have that, then you have nothing. You just have a person who can run roughshod over all morals and ethics.

ELIZABETH JOH: I think that's right. And also remember, because of the way the war powers are defined, meaning not defined very clearly, and the Supreme Court doesn't get involved in these kinds of questions, it means that it's just an endless, ongoing, unresolved conversation between Congress and the president. And remember, presidents continue to raise the question, "I don't even think that Congress has the authority to do this--make me report. I will report if I feel like it. But sometimes, if I don't feel like it, I'm not going to comply at all." And Congress' hands are tied. And also, if you think about it, what is the president doing? Any president who orders military force is using our troops, which means paying for the troops--paying for everything they need. One thing that Congress could do, even without the compliance of the President, would be: "Fine, we'll withdraw the funding. But Congress is never going to do that--never gonna do that."

ROMAN MARS: Sometimes it's okay to have things be undefined in words so that it forces negotiation. And that negotiation is part of the ongoing conversation of what it is to make a society. Like, I'm okay with that. You know, having a discretion and discussion and negotiation, instead of a wall, for example-- You know what I mean? Having not a hard solution, but a negotiation solution so, as things develop, that's fine. But this one seems particularly messy because so many lives and so much awful activity can happen underneath the vagaries of trying to work this stuff out.

ELIZABETH JOH: I think that's right. And also, even if there is an emergency power that we want to keep in reserve for the president of the United States, the problem is when everything is an emergency, as the Trump administration keeps asserting, then this expansive power is never going to end. And we can't always point to the Civil War as our precedent because that was the national emergency. The nation almost split apart. But that's not the way we think of ordinary uses of military force.

ROMAN MARS: Yeah. As soon as you read some part of the law that says "emergency," I'm like, "Oh, well, this is the end." This is a huge problem for us because... Just emergency here, emergency there, emergency... "I ran out of milk." Emergency. Everything is an emergency. And no one anticipated that. We maybe need a new, stronger word than "emergency." I don't know what it is, but we maybe need something else to put into our laws.

Well, this was really fascinating stuff. Thank you so much for talking me through it.

ELIZABETH JOH: Thanks, Roman.

ROMAN MARS: This show is produced by Elizabeth Joh, Isabel Angell, and me, Roman Mars. It's mixed by Martín Gonzalez. Our executive producer is Kathy Tu. You can find us online at learnconlaw.com. Our theme music is provided by Doomtree Records, the midwest hip-hop collective. You can find out more about Doomtree Records, get merch, and learn about who's on tour at doomtre.net.

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