Transcript: Down With Broccoli! Executive Orders

Announcer: Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American government and offer context around the effect of government agencies in your everyday life. And now your host, Nia Rodgers, public affairs librarian, and Dr. John Aughenbaugh, political science professor.

N. Rodgers: Okay, so Aughie (Aughenbaugh) is not here today because he's off wrestling a polar bear, but fortunately for me, I have Dr. Bill Newmann, who is a professor in the political science department here at Virginia Commonwealth University and he's going to talk to us today about executive orders. Welcome Bill.

B. Newmann: Thank you. It's great to be here.

N. Rodgers: So you don't know this about me, but I'm pretty aspirational and so far on this podcast, I've wanted to be a Supreme Court justice, I've wanted to be the Secretary of Defense and then I think I settled on President because it seems like the president gets to do a whole lot of cool stuff and I thought that would be a good job. That would be a fun thing to do in my off hours when I'm not being a librarian because it doesn't seem to take up a whole lot of time. There seems to be a lot of golfing involved.

B. Newmann: A lot of deer.

N. Rodgers: A lot of standing around next to the flag saying, "Isn't the flag great?" Which it is. I think it's a great flag. It's very distinctive. We have a very distinctive flag. So I'm thinking about executive orders. I was thinking can I ban something with an executive order like broccoli? If I was Bush, could I just ... Bush Sr., who I know is famously rather sort of not fond of the little green trees. Can I do something like that with an executive order?

B. Newmann: The neat thing about executive orders is you can probably do just about anything you want for a short period of time until ...

N. Rodgers: A short period of time like 10 minutes or a short period of time like my presidency? Are we talking glacial short periods of time or are we talking human or are we talking attention span?

B. Newmann: It depends on the legal system. So it could be a couple days. It could be a couple weeks. It could be months. It could be years until somebody turns around and says, "No, Mr. President. You don't have the authority to do that."

N. Rodgers: Ms. President thank you very much.

B. Newmann: Yes. That's right. I just ...
N. Rodgers: I will be ...

B. Newmann: Officially.

N. Rodgers: Well yeah currently for the 45 so far, you're right mister. So let's say that I did this banning broccoli. I by the way would not ban broccoli. Just so our podcasters know, I actually love broccoli. But I'm just saying. I'm picking something out of the air. So if I ban broccoli and the Broccoli Association of America, which I feel certain there is one, Broccoli Growers of America or whatever, would bring a lawsuit saying, "Hey, you can't ban broccoli. Not only is broccoli healthy, but it's our business." Right? You can't just go around doing that.

B. Newmann: Right.

N. Rodgers: So that's what you mean by the legal system, right?

B. Newmann: Right.

N. Rodgers: They're going to bring some sort of hey put an injunction on that so she can't ban broccoli until we get this settled in court.

B. Newmann: Right. And a judge could turn around and have an injunction within 24 hours and say, "No. You can't do that." Or they may allow the executive order to go through and then it has to go through the regular court system. So it's got local courts and then circuit courts and then maybe up to the Supreme Court. So it could take a while to do this.

N. Rodgers: I would love for the Supreme Court to hear a case on broccoli. Just really, of the 80 cases they hear a year and all the things they turn away, that would be awesome. But anyway ...

B. Newmann: I would protest it because I really like broccoli in garlic sauce, so I would be on the front line of that one.

N. Rodgers: See, okay. And there would be a lot of people against it. There'd be a lot of people who love broccoli. There would be people who just on principle don't think that executive powers should include banning ...

B. Newmann: Vegetables.

N. Rodgers: Vegetables. I mean there's a whole bunch of people who would ... The ACLU would be on their side. The whole other side of that argument would be pretty much against me. Which would be fine. Presidents don't actually do executive orders like that, though. They do serious orders. Do they write their orders? Do they have teams that write their orders? How does it even get started?
B. Newmann: They have White House Council’s Office, which is basically a staff of lawyers just for the President of the United States. And so in theory, you hope that executive order comes out of there because underneath an executive order is a law. So Congress has passed a law and the President believes I have the authority to do this based on that law.

N. Rodgers: Oh, so there would have first had to have been a law that came out of the Congress that said something about vegetables.

B. Newmann: Right. Or something about agricultural products or something about ... The President could decide that broccoli was dangerous to public health and ban it on that.


B. Newmann: Right. It's a security issue. Broccoli is being smuggled across the southern border and you've got to go in there. And that's why we're building a wall is to keep that Mexican broccoli out.

N. Rodgers: Okay, to protect American broccoli.

B. Newmann: Right. Protect American broccoli.

N. Rodgers: To protect American broccoli. Okay.

B. Newmann: So it could be under a trade legislation.

N. Rodgers: So do those have to be justified? I mean in some way you can usually point to the thing that they're saying no I'm not in favor of or are they narrowing the scope or are they going against the law? Or are they doing one or the other or both?

B. Newmann: They're interpreting the law.

N. Rodgers: Okay.

B. Newmann: All right. Now ...

N. Rodgers: So they're playing the part of a Justice.

B. Newmann: Right. Well the hitch in it is that members of Congress write laws and get legislation and it may be 500 pages long and it may be 1000 pages long, but no matter what it is, it's vague.

N. Rodgers: Really? Always.
B. Newmann: Always. There are things in it that are open to interpretation and so we think of the courts as the thing that interprets. But before the courts even get a chance to interpret most of this stuff, the President has to execute the law, right? And there's the faithfully execute the law.

N. Rodgers: Okay.

B. Newmann: But, the President looks at and says, "I will interpret this the way I want to interpret this."

N. Rodgers: Because I hate broccoli.

B. Newmann: Because I hate broccoli.

N. Rodgers: So it may say all vague ... Vaguely, it says all vegetables. We are banning all vegetables from import across the border and I say, "Especially that dang broccoli because no trees for me." And so I write an executive order specifically saying, "I interpret this to be a broccoli trade issue." Or you have a real one, I think.

B. Newmann: I have a real world example. But let me give the thing that I sent you over email, right? So Congress says that we believe that everyone should have a nutritious lunch at an elementary school and we want to pay for a nutritious lunch at elementary school.

N. Rodgers: Which is an excellent idea anyway.

B. Newmann: Right. The President turns around and says, "Great. Banana splits for everybody."

N. Rodgers: Bananas are fruit.

B. Newmann: Right.

N. Rodgers: And chocolate is good for your heart.

B. Newmann: And strawberry is a fruit.

N. Rodgers: And ice cream is made of cream and milk and [inaudible 00:07:14].

B. Newmann: And chocolate comes from a bean and so does vanilla and so therefore, this is perfectly good.

N. Rodgers: I'm down with that.

B. Newmann: The Regan administration actually did something seriously like that in which they declared ...
N. Rodgers: Oh, is this the infamous ketchup?

B. Newmann: Yeah, that ketchup was a vegetable. You know, so they said you have to do vegetables. Now that wasn't an executive order, but that was just plain old implementation of the law and presidents have leeway to do that until Congress turns around or someone who has been hurt by this or believes they've been hurt by this brings it to the legal system and says, "This is not what the law intended."

N. Rodgers: The law did not intend for ketchup to be a vegetable. The law did not intend for a banana split to be a nutritional lunch.

B. Newmann: Right.

N. Rodgers: No matter how hard you stretch that, it doesn't qualify because it doesn't meet sort of the basic standards of what we believe to be nutritious, especially for growing persons in schools and that sort of thing.

B. Newmann: Yeah. And there are obviously worse cases than that in reality. When Donald Trump first came in office, one of the first things he did was he said, "Okay, we're going to ban immigration and visits from people from certain countries and it just happened to be a handful of Muslim countries, Muslim countries that didn't have any greater role in terrorism than other countries that weren't on the list.

B. Newmann: And he had said during the campaign that he wanted a complete Muslim ban. And he said, "I'm going to do this." And his lawyers did a horrible job because the President does have the authority to go ahead and say people from this certain country are dangerous to the United States for whatever reason. And it's usually because of war.

N. Rodgers: I was going to say, it's usually they cite Homeland Security, right? They cite some sort of security issue.

B. Newmann: Right. Or even before that, a national security threat and a lot of this stuff goes back to World War 2 and being worried about German and Japanese spies.

N. Rodgers: Which makes sense.

B. Newmann: Right.

N. Rodgers: If you're at war with somebody, you know, you would want to limit their access to your nation.

B. Newmann: Right. Right. So he was using that authority, but he did it in such a bad way because his lawyers were so bad that court slapped an injunction on it and said no. This can't take effect.
N. Rodgers: Because we have separation of church and state in this country. There are other underlying issues, constitutional issues that would make that problematic. They didn't just say that because we don't like you. They can't just say that about the President. We don't like you, therefore we're going to have an injunction against your executive order. There has to be a counter-argument that they can point to and say, "Here's why that's not an acceptable ..."

B. Newmann: And here's what you've done with the law is you've turned around and taken something which is your authority, but you're using it as essentially a Muslim ban, which you said you were going to use it as and you cannot do that.

N. Rodgers: So he was honest. I mean at least he was up front. One can argue in fairness to Donald Trump that he regularly as president fulfills his campaign promises or attempts to fulfill his campaign promises.

B. Newmann: Yeah.

N. Rodgers: He's trying to do what he said he was going to do, which you can interpret that however you choose. And we here on the podcast do not tell you how to think about the President, except that we would like for you to note that we try to be as fair and balanced as we can. But some of the things he's done have been problematic is what you're pointing out there. The writing of that was problematic. The underlying premise of it was problematic. And so the courts did what the courts do, which is they acted as a balance to the executive power and they said, "No. No. No. We don't think so. We don't think that's a good idea."

B. Newmann: Right.

N. Rodgers: But eventually they did rewrite it sufficiently that there has been some ... I don't know if one would say a ban, but there has been some limits. There have been limits because they went back and said, "Oh, turns out we're just going to rewrite this and fix it."

B. Newmann: They rewrote it. They tried to look back at the laws that would actually allow you to implement these types of things and they, I believe they threw in Venezuela, as well, as a country.

N. Rodgers: Oh my.

B. Newmann: And said, "Okay, so therefore it's not a Muslim ban." And they changed it a little bit. And so therefore, it passed authority and said the President does have the power to do this. Whether it's a good idea or a bad idea is irrelevant because that's not the court's job.

N. Rodgers: Right.
B. Newmann: The court's job is not to say we like it or we don't like it, but just to say does the President have the authority?

N. Rodgers: That's the electorates' job.

B. Newmann: Right. We have a chance to turn around and say whatever we want at a midterm and then at a re-election, but until then it's just a matter of did the President do something that is legal for the President to do?

N. Rodgers: So executive orders, that's all the court is deciding. It is not deciding an ethical issue. It is deciding a legal issue and those are two very different things.

B. Newmann: Yes.

N. Rodgers: The ethical issues I assume come later with media and voting and Congress and the difficulty of the President to do other things because people get irritated.

B. Newmann: Yeah. The last thing courts want to do is get involved in politics. They do not want to do that.

N. Rodgers: I mean I totally can understand that in the sense that they are theoretically supposed to be the neutral party that you can go to and say, "Okay, who's right here?" And if they are clearly partisan, then you would have difficulty with doing that, which I assume is where you get onto the problems with the Supreme Court and finding justices that can rule in a neutral manner and the questions they could ask of them.

N. Rodgers: We talked about that in a previous episode, the questions that get asked of them are occasionally a little pointed because there is an attempt to find out if they are going to be able to be neutral on the court.

B. Newmann: Right. And during some of the nomination hearings, you have people asking specific questions about religion, which is very clearly something you should not do. The Senate cannot, should not ... Shouldn't say cannot, but should not say to someone who might be a Supreme Court justice tell me about your religious beliefs.

N. Rodgers: Well it's a job interview. It's not legal to ask that question in any job interview. If you were interviewing me to work in the political science department, you couldn't say, "So Nia (Rodgers), tell me about your faith and how it ..." You know and how it underpins your views of political science. Right. First of all, I'd be so shocked, I wouldn't be able to answer, which would not reflect well on me. But also, I can see where if it's a job interview, even if it's the Senate to a Supreme Court justice, it's still a job interview.

B. Newmann: Yeah.
N. Rodgers: So executive orders. So you have one.

B. Newmann: I have one. Okay. So ...

N. Rodgers: Is it a good one? Is it juicy?

B. Newmann: It's a very juicy one and we'll never know how juicy it is until I get my glasses on.

N. Rodgers: Awesome. So I will waste time by saying look a pterodactyl in the corner of this building.

B. Newmann: Oh, hi Nia (Rodgers).

N. Rodgers: I look completely different now that I'm not so blurry, huh?

B. Newmann: When did you get here? Okay. So ...

N. Rodgers: Okay, so it has a public law number.

B. Newmann: Well it has a public law number. So here it is. This is ... I've got the joint resolution, but let me bring out the executive order first.

N. Rodgers: Okay. For the listeners, we are going to put links to this in the research guide for this podcast so that you'll be able to click on those and read them for yourself. We do that with every document. We always attach a document to these podcasts and we'll do that with both the underpinning public law and with the executive order.

B. Newmann: Right. Yeah. And these are all public. So after September 11th and this is something everybody knows at least a little bit about, the United States actually started to detain people as unlawful enemy combatants and put them in Guantanamo Bay. And the exact number of people was never really defined by the United States government, which was kind of unnerving because at times, they implied that we're not sure exactly how many people we are holding right now or have held. Which is scary because you might lose some.

N. Rodgers: Right. How can we not know that, also, because don't we feed them? Wouldn't you just be able to go by meals? We gave this many meals and we think that's probably this number of people? I mean ...

B. Newmann: There were a lot of problems there.

N. Rodgers: That's distressing.

B. Newmann: And what it came down to is it was they were holding certain people, but it was unclear where they were holding certain people.
N. Rodgers: Oh, so not all at Guantanamo.

B. Newmann: Not all at Guantanamo and people were being moved and so they were trying to fudge it because someone may be in Guantanamo when the question is asked, but maybe out of Guantanamo when the question is answered.

N. Rodgers: Oh my.

B. Newmann: Right? So they'd be moved somewhere else for different interrogations and sometimes those were overseas. So there was a lot of clandestine stuff going on and that was to keep all of those specific numbers secret.

N. Rodgers: So let me make clear or ask a question real quick. So these are enemy combatants from other countries that we have brought to the United States in order to detain, except that sometimes we detain them in other places. We don't detain them here. So there are sort of rendition ... Is it similar to rendition sites and that sort of thing where you ...

B. Newmann: Right. That's part of the process.

N. Rodgers: Where you have a third party that will hold onto a person for you so that you can ...

B. Newmann: So we have prisons in Thailand ...

N. Rodgers: So that you can gently ask them questions in a polite and positive manner.

B. Newmann: Yes. And there were other people who ...

N. Rodgers: We are not going to make accusations here.

B. Newmann: ... who you felt you wanted what they referred to as enhanced interrogation and occasionally, the United States would say, "We don't want to do this so we will take someone that we have under our authority and we will ship them to Jordan or Egypt or Saudi Arabia where the rules are different. We will get the information, but we will in theory keep our hands clean." And I say in theory.

N. Rodgers: Because we handed them off.

B. Newmann: Right.

N. Rodgers: Which is, I mean we might as well have done it ourselves if we knew what was going to happen at the end of that.

B. Newmann: Exactly.
N. Rodgers: Not that we're opinionated, but we are. So there we go. I'm opinionated on this particular topic by the way in the sense that ... And I'm going to be straight up with our podcast listeners. I don't think that torture is ... I don't think it's effective. I think there have been studies that have shown that it's not particularly effective. I know that there are arguments on the other side. But I don't believe it's effective and therefore, I'm not a fan. I think that torture also ... The whole point of having a judicial system is that we don't torture people.

B. Newmann: Right and up until September 10, 2001, a lot of the things that we did starting on September 12, 2001, were considered to be illegal, considered to be torture.

N. Rodgers: Oh really.

B. Newmann: Yeah. Absolutely. Under U.S. law. And then we sort of went, "Ah but we really, really need this information," so we kind of said, "Whatever." And then that was debated really for the next eight years over whether what we were doing was legal or not legal. And it wasn't really until the Obama administration that was settled. And during the Obama administration, we stopped the things that we had traditionally considered to be torture like waterboarding and slapping and things like that. We stopped those things under Obama.

B. Newmann: When Donald Trump came in office, he said, "I'm going to get back to torturing. We're going to do this again." He was explicit. He didn't say enhanced interrogation. He said torture. We want to torture people and we're going to do it again. And when he got into office, he hired James Mattis as his Secretary of Defense and Mattis, a Marine general said, "The United States Military has studied this for year and years and years and years and torture is (1) not effective. It doesn't work. And (2) we torture people, that means we have no moral authority to tell people they can't torture U.S. soldiers."

N. Rodgers: Right. I mean it's a reciprocal thing.

B. Newmann: It's a bad idea and it violates the Uniform Code of Military Justice to do it.

N. Rodgers: And just our ethos as a nation, we perceive ourselves I would hope better than that. We don't torture people. That's just not what we do here. And I heard a rather impassioned speech by John McCain on that topic and it moved me from sort of a neutral position to an anti position because he was a person who had suffered deeply under torture. And you know, it just is not ... He couldn't raise his arms above his shoulders for crying out loud. That's not something we as a nation should get behind. But anyway, that's completely off topic. Sorry about that.

B. Newmann: Right. So Mattis eventually told Trump, you know, this is a bad idea and Trump said okay. That's it and dropped the idea.
N. Rodgers: Oh good. Excellent. So presidents can be moved by their secretaries when they're given sufficient evidence and given sufficient, you know, information. They can be moved from one position to another.

B. Newmann: Oh yeah. Absolutely.

N. Rodgers: Which is why you need somebody in the secretary position who's pretty cool and pretty calm and sort of knowledgeable.

B. Newmann: Which I'll give you one of my pet peeves. I think one of the dumbest things we do as a nation is that we elect a president and we'd have no idea who his advisors are going to be, which is incredibly foolish. We should know what the cabinet is going to look like before we vote because those are the President's biggest decisions. Other than that, the only decision we've really seen him make as a presidential candidate is choosing the Vice President and we know they choose the Vice President for all kinds of political reasons related to the Electoral College. But we want to know who is whispering in the President's ear.

B. Newmann: And so if I was in charge, if I was in Congress, I would have a bill that says by September 1st, cabinet choices, all of them.

N. Rodgers: Really?

B. Newmann: Because we should be able to know that. And if someone says, "Well, that's not fair to me because I have to put all this time into basically now running for Secretary of Defense or Secretary of Homeland Security and what if I lose?" My answer is, "If you can't spend three months doing that, then you don't deserve to be a cabinet officer."

N. Rodgers: It's true. I see. So by September the primaries are done so you would know who the two candidates are. Sorry. The two candidates and the third potential candidate, depending on whether we have somebody run in the Green Party or the Libertarian Party. But so you would require that of all the parties? All the parties who are putting up a viable candidate would need to have at least what, all of their secretaries or the top four or five?

B. Newmann: I would say all of them. Why not? I mean this is a serious thing, right?

N. Rodgers: Well and it shouldn't be a shock to the person who's going to be asked to do that, that you're going to be asked to do that. The FBI could get a head start on the vetting, the background checks and all that kind of stuff if you did that.

B. Newmann: Right. And then you'd get an idea of if someone chooses out of, let's say we have to do 10 cabinet members and they do 10 of them. And five of them wind up having all kinds of difficulty. That's nice to know before you start voting, right? Why not?
N. Rodgers: That's true. Your friends are mildly criminal or whatever.

B. Newmann: Right.

N. Rodgers: Or your friends just aren't prepared to be secretaries. As we've discussed earlier, you don't know, but you even heard this podcast, but we actually called them 15 unicorns because the skill set they have to have. They have to be able to advance public good. They also have to be able to manage a huge bureaucracy. They have to do all these different things and they have to talk to the President in a way that is useful to the President and useful to the rest of the cabinet. So we think they're pretty much unicorns in the sense that they have to have this really special skill set. So yeah, that's an interesting idea.

B. Newmann: And put them in the debates.

N. Rodgers: Oh, well that's true. I mean have them ... Maybe not have them debate, but at least be able to bring up questions about ... It goes to a President's preparedness if they understand who they're asking to do jobs and why they're asking to do that, if it's a matter of friendship versus this is person I think would be really good at this job or I think is really likely to do a good job.

B. Newmann: Yeah. I would even go further. I would actually put them in the debates. Because I think our debate formats are completely useless in which they say okay, candidate whoever, you've got problems in the Middle East and we'd love to see how you're going to solve the Middle East conflicts and your approach to the Middle East peace process. You have two minutes. And then candidate B, you have 30 seconds for rebuttal. There's nothing we're ever going to learn from that, so to me, you'd be much smarter to say we're going have a debate on foreign policy. We have two hours on foreign policy. You both can bring your Secretary of Defense designates, your Secretary of State designates and the questions are going to be asked of people as a group.

N. Rodgers: Oh that's interesting.

B. Newmann: Then we'd actually know something about them and how they think about things and their approach to the world. Because the idea that the President of the United States is an expert on everything that ... Well everything on the planet is ...

N. Rodgers: It's ridiculous.

B. Newmann: It's just dumb.

N. Rodgers: There's no way that any one person can know that. And that's not what you want. You wouldn't want a person who could know all that stuff because their ability to communicate would probably be very poor. I'm just saying that experts do a better job
of communicating at multiple levels, experts in one topic versus a person who has a shallow knowledge of a lot of things because that's what that would be and not be an expert in knowledge in a lot of things. [crosstalk 00:24:09].

B. Newmann: And these people are politicians. That's who we elect generally. We elect politicians.

N. Rodgers: Barring the current President.

B. Newmann: Right. So we elect a politician, though Trump to a certain extent has always been a politician. He really is.

N. Rodgers: Well public performers, I think, are in some ways. They have to learn how to navigate other people's emotional reactions to them.

B. Newmann: And he's always been in the political arena in New York and New Jersey forever, arguing with people or working legislators, so he's got a lot of political experience in that environment for decades. So he's not as much of a novice as everybody thought he was and he had a lot of really, really good connections down the line. He's got a really good legacy going back. He's got connections to McCarthy.

N. Rodgers: Right, through Cohn.

B. Newmann: Through Roy Cohn and Roy Cohn taught him everything he knows. And you can tell that when you see Donald Trump's style of politics.

N. Rodgers: But Roy Cohn was very successful.

B. Newmann: Yeah.

N. Rodgers: In what he did.

B. Newmann: Yeah. And that's, well, that's a different ...

N. Rodgers: That's a podcast for another day.

B. Newmann: Yeah. Okay so ...

N. Rodgers: You have the executive order.

B. Newmann: I have the executive order. So this is a military order of November 13, 2001. Detention, Treatment and Trial of Certain Noncitizens in the War Against Terrorism.

N. Rodgers: And that would be for anybody who's doing the math, 43. That would be President Bush.
B. Newmann: Yes. This is George W. Bush.

N. Rodgers: George W. Bush.

B. Newmann: Right.

N. Rodgers: President Junior Bush.

B. Newmann: 43. So in my classes when we talk about presidents, we'll talk about Bush the older one and then Bush the younger one. And after a while, it was just so hard to keep saying George Herbert Walker Bush versus George Walker Bush, that we just started calling them 41 and 43.

N. Rodgers: Right.

B. Newmann: And that was the easy part about it.

N. Rodgers: I think that seems to be the way that people are shorthanding all of the 40s.

B. Newmann: Right.

N. Rodgers: We didn't used to do that, but we're doing that now.

B. Newmann: You always think that Jeb Bush has a little 44 or 45 hat that Barbara Bush got him. He's got it in the closet and he can't use it. So I feel bad about that. I was rooting for Jeb Bush. Anyway, so the military order and this sets up the detention system and it sets up a lot of other aspects about it. In theory, gives the Secretary of Defense the authority to create a military tribunal system so that the people who are detained as suspected terrorists will eventually be put on trial by the United States Military. So this was all within the executive order. And it's about three or four pages of the executive order.

B. Newmann: But when you look at it, the thing that matters is when you think about what authority does the president have? It's right in the first paragraph if the executive order. And I'm going to read it.

B. Newmann: "By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the Laws of the United States of America, including the authorization for use of military force, Joint Resolution Public Law 10740." It says, "It is hereby ordered as follows." So here's the law.

N. Rodgers: Aha. [inaudible 00:27:15].

B. Newmann: Yeah. And they all say that, here's the law.
N. Rodgers: Oh, okay. So they all mention which one they're getting ready to either redefine or ...

B. Newmann: And then it says, "Here's how I'm going to execute the law."

N. Rodgers: Okay.

B. Newmann: And then the question after all of this when you read any executive order is does the president really the authority under that law to do these things? So under this law, it created a detention center. It also allowed the United States to do the enhanced interrogation program according to the Bush Administration. It also allowed the Obama Administration to use drone strikes to assassinate ...


B. Newmann: Americans yeah. In a couple of cases ...

N. Rodgers: Yeah. I have some bitterness about that.

B. Newmann: ... of American citizens who were brought ... Who were involved in terrorism.

N. Rodgers: Right. Clearly not nice people.

B. Newmann: Right.

N. Rodgers: But I'm not entirely certain that we want to be killing people in other countries rather than bringing them home and having a trial.

B. Newmann: Right. Right. And Obama made those decisions and said, "I will make those decisions by myself, but I have the authority to do that because of the authorization to use military force, Public Law 10740." So all of that. And when Donald Trump got in office and he launched 59 cruise missiles in Syria ...

N. Rodgers: Oh, in Syria. That's right.

B. Newmann: He said, "I have the authority to do this based on that same Public Law."

N. Rodgers: When did that public law come into effect?

B. Newmann: That was and I've got it right here. I'm prepared. That public law is, September 18, 2001, Public Law 10740. And here's what is amazing about this one. Here's where I say laws are vague. So I'm going to give you a law. Yeah, this was from the first week after September 11th, all right.

N. Rodgers: Wow. That's really reactive.
B. Newmann: They passed a resolution and what's amazing about this is the vagueness. And most laws, when you read laws some of them are very, very long. But this was short and sweet, to the point. But laws start out with a short title for it. It was the Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States. And it's got a bunch of whereas'; whereas we were attacked on September 11th, whereas we have the right to self-defense, whereas we still think that the threat is out there, whereas the President is the one who leads us in foreign policy and national security issues. You know, a bunch of whereas'.

B. Newmann: And then it says okay, so we resolve this. All right? And section two says and this gives you an idea of how vague these things can be. Authorizations to use military force are vaguer than other ones because it's the President's job as Commander in Chief and that's not really defined at all. Congress is the one that's going to say, Mr. President, you're going to have these many troops and these many ships and these many fighters and these many tanks and you're going to spend this much money, but what you do with it is really the President's authority.

N. Rodgers: But you could put the entire U.S. Military into Granada if you wanted to. They wouldn't fit, but I mean if you decided you were going to pick on Belize, Belize a tiny, small country in Central America. If you decided you wanted to invade, they wouldn't ...

B. Newmann: You could do it. But there ...

N. Rodgers: Isn't there a certain length of time you could do it and then you'd actually have to come back to Congress and say here's what the threat was or here's the reasons for that?

B. Newmann: Yeah and there are two things. There's some war powers limits which are also very, very vague, as well, and not always obeyed, as well. But the big thing that Congress has is money.

N. Rodgers: Ah, so they'll just cut you off.

B. Newmann: Yeah. You can't have the money anymore. But that almost never works because as soon as Congress says we're not going to give you the money to do this, the President turns around and makes a speech to the American people and says, "Okay everyone. We need to protect the United States of America, but Congress has decided that your son or daughter out in the field doesn't need ammunition. And there are no bandages to heal their wounds because Congress won't pay for it.

N. Rodgers: Right. And we can't bring them home because there's no planes [crosstalk 00:31:35].

B. Newmann: And we can't bring them home. Teddy Roosevelt did that.
N. Rodgers: Oh, that's smart.

B. Newmann: There was a great white fleet going around the world in 1901. Congress tried to cut off the funding for it. Roosevelt said, "I'm sorry Mr. and Mrs. America, but your children are going to have to live the rest of their lives in the Philippines because the United States Congress won't pay to bring them home."

N. Rodgers: That's really clever.

B. Newmann: Yeah and since then, every president says, "Oh, I'll use that. If it's good enough for Teddy Roosevelt, it's good enough for me."

N. Rodgers: And it apparently worked.

B. Newmann: And full disclosure, I have a life-sized Teddy Roosevelt in my office, a cardboard Teddy Roosevelt.

N. Rodgers: Oh, I was going to say if you say taxidermy Teddy Roosevelt, I'm just going to be completely wiped out on that.


N. Rodgers: Awesome.

B. Newmann: He's black-and-white.

N. Rodgers: Is he wearing his pith hat and he's you know, got his rifle on his shoulder?

B. Newmann: No. No. He's top hat and tails.

N. Rodgers: Oh. He's dressed for the occasion.

B. Newmann: Yes. He is.

N. Rodgers: Oh nice. Okay.

B. Newmann: So anyway, the authorization. So here's how vague this can get. In general, the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. Are there any limits to that?
N. Rodgers: Not that I can ... You can't ... If you're an alien it doesn't include you. I mean alien from outer space. But if you are a humanoid living anywhere ...

B. Newmann: It includes aliens because if you are an organization and an alien group can be considered an organization and you were involved in any of this now or in the future ...

N. Rodgers: Right. It's very Minority Report. We're going to predict what you're going to be doing six months from now and we're going to decide that you're going to be a criminal then and so we're going to stop you from being a criminal then.

B. Newmann: That's pre-terrorism, I guess. That's what they [crosstalk 00:33:34]. Yeah.

N. Rodgers: That's terrifying.

B. Newmann: But basically, presidents have used this to say ...

N. Rodgers: I can do anything because that's what it says.

B. Newmann: Yeah.

N. Rodgers: It says I can do anything. It says the President can do anything. Go ahead with your bad self.

B. Newmann: Right.

N. Rodgers: If you think that it's even remotely related to terrorism in any way ...

B. Newmann: Mm-hmm (affirmative).

N. Rodgers: ... you're authorized to do it.

B. Newmann: Well, it's the necessary and appropriate part of it. It's what is necessary and appropriate.

N. Rodgers: That's kind of like High Crimes and Misdemeanors. What does that mean? Does that ... And I have a whole separate question for you about that because does that mean high crimes and high misdemeanors or does that mean high crimes and misdemeanors like jaywalking? You know what I mean?

B. Newmann: Yeah.

N. Rodgers: But anyway, we'll get to that in another podcast.

B. Newmann: Okay. Well I've got Gerald Ford's definition of impeachment is the best.
N. Rodgers: Okay. So I'm going to ask you about that, but I'm not going to ask you about that right now because we're doing executive orders.

B. Newmann: All right.

N. Rodgers: So now, I see where the executive orders can come from with that. That's so general that anybody who wanted to do anything could justify doing it. I mean even me as a not lawyer, no legal training could probably write an executive order that would fit under that because that's written so broadly. And so that's how they do it. Have there been more executive orders as we've gone along? Did George Washington do executive orders or is that a newish thing?

B. Newmann: Everybody has done executive orders, but we've kind of accelerated the number of them. But most of them are small and irrelevant and nobody pays attention to what they are.

N. Rodgers: So the 926 that 41 did, three of them people know about and remember and were controversial. Is that ... I mean it looked to me when I looked at the Presidential Papers, which I am going to ask you about in another podcast is that you could just write an executive order for just about anything.

B. Newmann: Mm-hmm (affirmative).

N. Rodgers: And it doesn't necessarily carry ... So what's the length of time that it carries as far as does it go from one president to the ... Does it cover presidents in perpetuity of nobody undoes it?

B. Newmann: Right. It has to be undone.

N. Rodgers: Okay. So that's what some of the numbers ...

B. Newmann: So presidents do that.

N. Rodgers: Some of the numbers are just undoing previous Presidential executive orders that they don't want to be held to.

B. Newmann: Right.

N. Rodgers: So I kill all the broccoli, back to our original bad example, and you come in as the next president and you revive all the broccoli because you love broccoli with garlic sauce.

B. Newmann: I rescind that executive order with a new one.
N. Rodgers: Right. And not only do you rescind it, you say and garlic will be ... I mean every broccoli will be eaten every day with garlic sauce because, you know.

B. Newmann: Right. Right.

N. Rodgers: You can also change it to make it something that fits your presidency.

B. Newmann: So you're reinterpreting the law essentially based on the previous president's reinterpretation of the law.

N. Rodgers: Oh my.

B. Newmann: And the only question comes in whether someone brings it to the judicial system and says, wait a second. This is a completely bogus interpretation of it. And in the case of the military order, that's essentially what happened is that over time, the judicial system turned around and said, "Okay, that's a nice little military order and you've based it on the authorization to use military force, but you interpreted that incorrectly." And they smacked Bush down several times over some of this. And it's a story that Aughie (Aughenbaugh) would know all the super level details because he deals with the court systems and I sort of deal with the policy stuff.

N. Rodgers: Yes, but he's wrestling a bear.

B. Newmann: He's wrestling a bear right now.

N. Rodgers: So he can't help us today.

B. Newmann: But the long and short of it is what happened is they detained people and then they said, "But we want to put them on trial and we want to put them on trial by the United States Military." Which is a fuzzy thing to do because they're not members of the United States Military.

N. Rodgers: And military courts by the way for podcast listeners who may not know this, are very different from civil and criminal courts that regular, not regular, civilians go through. I shouldn't say regular people because people in the Army are regular people, too. But the Military has a completely different way of doing courts. There is a completely different ... Somebody mentioned to me that in the Military Court, you can't choose not to answer because you've been ordered to answer. You've been ordered to tell, you know. So there's all these different issues. And we'll get into that at some other time when we can find a JAG officer who will come talk to us about that because I think it's fascinating.

B. Newmann: Yeah. The short version of it is that you are going to take foreign nationals, you are going to put them on trial in which the prosecutors will be members of the United States
Military. Their defense lawyers would be members of the United States Military and the people actually judging them would be members of the United States Military.

N. Rodgers: How is that going to turn out for them?

B. Newmann: Well actually, it turned out the way that anybody who knows the JAG Corps and anybody who knows the United States Military would have expected is that the defense lawyers turned around and said this is unconstitutional. Can't do it. These are civilians. You cannot put them in court in a military tribunal system without a law, without legislation.

N. Rodgers: Oh. I just fell in love with JAG officers everywhere.

B. Newmann: And they said you can't do this. They said not only that, but we, it would be unconstitutional for us really to defend these people because they're not within the United States Military. They need civilian lawyers.

N. Rodgers: Well and one would think they would also need a court of ... I mean the jury would also be affected by the fact that they're serving in the military versus ...

B. Newmann: Well there's no jury. There's just the judges so they decide it.

N. Rodgers: Oh, there's no jury. Oh.

B. Newmann: No jury, so for this system that they were starting so send up. So what happened is that pushed it out. The military defense lawyers pushed it out into the civilian system.

N. Rodgers: Is that why some of them ended up in New York, in the courts in New York?

B. Newmann: Some in courts in New York and a lot of the stuff eventually went to the Supreme Court. And what was going on is ... I'll only talk about one of them, but the issue of habeas corpus. Does a detainee have the right to challenge their detention, to go in front of a court and say hey, why am I being detained? And a judge will say yes that's fair or yes that's not fair. The Bush Administration said, hey, the authorization to use military force means that we don't have to have habeas corpus. And courts just turned around and said yes you do. Yes you do. They said that's not what that law means. It doesn't allow you to do that.

B. Newmann: And so trial after trial after trail would go up to the Supreme Court and the Supreme court essentially all told basically said that you know, it's nice that you went ahead and had this law, but the law is talking about force. The law is not talking about a judicial system and the law doesn't have the ability to turn around and say we passed this law so therefore, the constitution is irrelevant now. You have to abide by the constitution.
B. Newmann: So if you're holding someone, you're detaining them and you’re accusing them of something, the United States must behave like the United States. It must follow its own laws period. That's the way it works. And it took eight years, it took them until 2009 to actually get a military commissions act, which was not ... you know, constantly having pieces of it struck down by courts over again. They passed one in 2006 and the courts were going, "No. No. No." To this part and that part 2009.

B. Newmann: So Bush starts something in November 2001 and it's not ironed out by the United States political system and judicial system until 2009.

N. Rodgers: And the next president.

B. Newmann: Right. And the next president.

N. Rodgers: And at that point, we've had ... Bush has served both of his terms and we are now into President Obama's term.

B. Newmann: Right. And people who had been detained, some of them had been held for five or six years and then released with a sorry.

N. Rodgers: Oh yeah. See, that would make you angry and want to do harm to other people. I mean come on. It would make me angry and I'm not generally an angry person. But I have to admit, I'd be pretty PO'd if I was held, you know, four, five, six years in Guantanamo in a cage and then told sorry about that.

B. Newmann: Told didn't have the authority to do it.

N. Rodgers: Our bad.

B. Newmann: And now we don't feel like we can actually put you on trial because we don't have enough evidence.

N. Rodgers: And I'm not going to even return you to your country. I'm going to return you to a country that's willing to take you. Because didn't that [inaudible 00:42:04] happened?

B. Newmann: Right. Because your country said no thank you.

N. Rodgers: There were several times they ended up in ... So not only do you spend an all-expenses paid vacation in Guantanamo, not under anybody's view of vacation, but then you end up in a country that's not even your country.

B. Newmann: Right.

N. Rodgers: And then you have to try to get yourself home from there. That would be aggravating.
B. Newmann: Yeah. And there are a lot of beefs about it in which people say that the people released from Guantanamo, they all went back to terrorism and they have killed people and things like that. And there were a couple of cases where people did, you know, come out and say, "Okay, you didn't convince me not to be a terrorist when you held me, you know, for five years." But other cases in which people were released.

B. Newmann: And during the 2016 campaign, Donald Trump brought up a handful of people who were from Qatar who he said were released by the Obama Administration and then went back to terrorism. And there were only a couple of problems with that statement. They were released by the Bush Administration, not by Obama, and when they were supposedly back into terrorism, Qatar said, "No they're not. They're here under house arrest and we know exactly where they are and they're not doing anything at all. They can't because we have them." So things like that.

B. Newmann: But the bigger thing was in one case, there was an attempt by Al-Qaeda in the Arabian Peninsula to bomb a synagogue in Chicago by putting bombs in printer cartridges and then shipping those printer cartridges across the world.

N. Rodgers: Like FedEx or something.

B. Newmann: Yeah.

N. Rodgers: Here, deliver this to this synagogue. Nobody will think that's suspicious.

B. Newmann: And the thing was caught because someone who had been in Guantanamo had been turned by the Bush Administration and then released and went back and joined Al-Qaeda in the Arabian Peninsula and was an informant. And apparently, he walked in somewhere and said this is going to happen, grab this plane. The plane landed somewhere in Europe, I don't remember where, the plane landed and they searched it and they found the bombs. So everything imaginable is there.

N. Rodgers: Right. Because the Bush presidency argument would then be see, it's a good thing.

B. Newmann: Right.

N. Rodgers: It's a good thing for us to detain people because if we wear them down or we re-educate them ... I hate to use that phrase because that's been used to terrifyingly.

B. Newmann: Deradicalize.

N. Rodgers: There we go, deradicalize.

B. Newmann: It's the official phrase now.
N. Rodgers: If we could deradicalize them, then they might actually be informants and so they would say look, it's a good thing we did this.

B. Newmann: Yeah. Or we find out that actually they were never radicals and they were just in the wrong place at the wrong time.

N. Rodgers: Because that never happens, never happens that, you know ...

B. Newmann: There was one guy who said ...

N. Rodgers: ... you're just walking down the street and somebody yanks you off the street and throws you in a truck and does something terrible to you. I mean hello.

B. Newmann: This is in the battlefield in Afghanistan. One guy, an Algerian citizen, [inaudible 00:44:56]. I don't remember his first name, but he brought a case up to the Supreme Court related to habeas corpus. But this guy when he was picked up said, "Yes. I was in Afghanistan. Yes. I was out on the battlefield. I'm a member of the Red Crescent. I'm a relief worker."

N. Rodgers: Okay, so he was a health worker. Okay.

B. Newmann: Right. And I happened to be in a situation where somebody was injured and okay, yeah. They're Taliban. They're a bad guy, but that's not my job to sit there and say who gets health care is based on their political beliefs. Who gets health care is who needs it.

N. Rodgers: Right. And just as a side note, the Red Cross works the same way.

B. Newmann: Right.

N. Rodgers: In our wars with anybody, they were serving both sides because it's not their job to pick the political side of it. It's their job to save lives and help people as much as they can. And then everybody else has to work out who's worthy and who's not worthy.

B. Newmann: And the United States Military just nabbed me with a group of people and I was there to deliver relief services to them.

N. Rodgers: Yeah. See me with these bandages and with no gun? I'm probably not ... You know. Well but also, in fairness to the military, making a split decision, you have a few seconds to decide whether this is a person who is going to kill people in your platoon or your brothers in arms. You're going to err to the side of caution 99% of the time because you don't want to get shot in the face or have anybody you love shot in the face.

B. Newmann: You picked them up because just, for example, the reasons you've mentioned, but at a certain point in time, you sit there and go, "Okay, somebody else at a higher level when
you hand them off is going to say, 'Okay, these people are dangerous and this person just got caught up in a sweep.'"

N. Rodgers: We hope.

B. Newmann: Right. And eventually the guy was released with a sorry.

N. Rodgers: But how long was he a guest in Guantanamo or wherever?

B. Newmann: I think it was five or six years.

N. Rodgers: Yike! Okay, that's a long time to oh, our bad.

B. Newmann: Yeah.

N. Rodgers: Oh my. Okay, we don't have very much longer so I want to ask a last question about this and then I'll ask you some other things later. So can they sue?

B. Newmann: They've tried.

N. Rodgers: Can they sue and ask for money for ... You know, because I know that if you go to jail and you were improperly jailed, you can often sue the prosecutor's office or the state where that happened if it happens to you in criminal court and you end up being sort of railroaded you can get money.

B. Newmann: Right.

N. Rodgers: Sometimes. Not always, but you can get money. Can they do that?

B. Newmann: A couple of them have tried and I have to say I don't know where those went. As far as I know, could probably look that up, but as far as I know the United States government has just said, you know, that's interesting. And it's not interesting at all.

N. Rodgers: Well you know, I suppose their argument would be if you were in that situation, then you knew that there was a potential to be swept up in these issues. So to finish out with the executive orders, executive orders are incredibly powerful, very short-term, potentially short-term.

B. Newmann: Potentially.

N. Rodgers: Or potentially eight years.

B. Newmann: Yeah.
N. Rodgers: You might be able to make this stick for a while, but the courts are going to ultimately decide if your executive order is bonkers or not.

B. Newmann: And the courts will and I guess there's another avenue, as well. Let's say you have an executive order and most people or I should say and a significant minority in Congress says this is unconstitutional, but if your own political party is controlling the House and the Senate, then your executive order might stick because your party doesn't want to take you down. And if somebody else doesn't have cause to bring it to the legal system, it may just last for four or eight years. And then when you leave office, when a new president comes in and says ... And maybe a new party is in control of Congress and turn around and say this is all garbage and gets rid of it the first day.

N. Rodgers: Oh, okay.

B. Newmann: So it can be just overturned politically if it doesn't get into the courts.

N. Rodgers: So the midterms, if President Trump had lost both the House and the Senate, then potentially some of his executive orders could have been overturned because there would have been an opposition party.

B. Newmann: Right. It's national emergency right now. It's a national emergency that he's going to use to take money from other Department of Defense accounts and switch it over to building a wall, right? And this is going on right now in which he says this is a national emergency and Congress can essentially turn around and say okay, we're going to actually pass a specific law that says no, Mr. President. You can't. So we're going to actually write a law to reinterpret the other law to say yes, you have the authority in a previous law that says you can take money from one place and put it in another place related to a national emergency, but we're going to specifically pass a law today that says the wall, the immigration problem right now is not one of those national emergencies. You cannot do this.

N. Rodgers: But they can't take away his power to declare an emergency.

B. Newmann: Right.

N. Rodgers: Right? They just can say this is not one.

B. Newmann: This is not one.

N. Rodgers: But they can't say to the executive office itself you cannot declare anything an emergency, right? That's still a presidential power that you can say ...

B. Newmann: Actually, that's a piece of legislation which allows the president to declare a national emergency. They could ...
N. Rodgers: They could rewrite that.

B. Newmann: They could rewrite that legislation and eliminate it completely and take that power away from the president and say that Congress declares a national emergency.

N. Rodgers: Oh my goodness.

B. Newmann: So they could do that. That would be harder to do because in other cases ...

N. Rodgers: Because of the split Congress, too. I mean, they'd have a heck of a time doing that.

B. Newmann: And there are times where you might say there is a need to declare a national emergency, right?

N. Rodgers: Right. Not sure you want to remove that from the executive office altogether because you may do it to the opposition party, but then it will also be true for you when your president is in the opposition.

B. Newmann: Right.

N. Rodgers: So that's the other thing that one has to be cautious about as far as all of these kinds of machinations is this can eventually come back to hurt your party eventually because your party will probably be the party of power at some point.

B. Newmann: And there are some times when you have national emergencies that you don't realize. It's like the balanced budget amendment. People say you have to have a balanced budget and you can't run any yearly deficit at all. And there are a whole lot of people who are nervous about that because all of a sudden, you have a war. The President needs to spend money right away and he's got to have a deficit right away because we need to spend money to protect the United States and that might run afoul of a balanced budget amendment to the Constitution.

N. Rodgers: Oh.

B. Newmann: So you say you need wiggle room to do things quickly because what we do know about Congress is it's very difficult for them to do things quickly even if ... Well, it used to be Republicans could do things quickly and Democrats couldn't because Democrats were this coalition that no matter what, even if they controlled the House and the Senate, they'd wind up fighting each other all of the time. Now Republicans have replaced the Democrats in that way, in that Republicans are always at each other's throats and the Democrats seem to have a little bit more solidarity. And then actually, weirdly Donald Trump came along and unified most Republicans to where he's got better approval ratings among Republicans than Ronald Regan did.
N. Rodgers: Yeah, which is amazing.

B. Newmann: Which is amazing and Democrats have turned around and said Trump has got a 40% approval rating, so we’re definitely going to within 2020. Let’s have a civil war among the Democratic Party. That’s sort of the solution the Democrats came up with. And now the liberals and the more moderates are just at each other's throats over the past week and a half, so pretty amazing.

N. Rodgers: I love it. I love all of it, but it's sometimes exhausting I have to say.

B. Newmann: Yes.

N. Rodgers: Because there's some times when I sit back and say why can't people just be nice to each other and work together? What ever happened to civility? One of the reasons we called this podcast Civil Discourse is because we wanted to be able to talk about things and disagree civilly. We wanted to be able say, well I don't really ... I'm not seeing it. I'm not feeling it. And not have it be and so I hate you and I think you're a horrible person and I want to set you on fire. It's not ... It shouldn't be like that. You should be able to disagree respectfully and still get stuff done or at least try to [inaudible 00:53:39] get stuff done.

N. Rodgers: But there is my soapbox for the end of this episode. And I shall climb down from this soapbox and say thank so much for talking to us about executive orders.

B. Newmann: Thank you.

N. Rodgers: And I hope you'll come back and talk to us again.

B. Newmann: Sure. Probably pretty soon.

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