

Released Wednesday, May 24, 2023. This transcript has been lightly edited for clarity.
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Ken White:

Hi, it's Ken White.

Josh Barro:

And it's Josh Barro and this is Serious Trouble. Ken, we told listeners last week that we would talk this week about Rudy Giuliani being sued and a lot of people have questions about this lawsuit against Rudy Giuliani and so I think it is time that we discuss it. And of course, I refer to the lawsuit brought by Daniel Gill of Staten Island, New York, who was an employee at a ShopRite Supermarket on the South Shore of Long Island who had an encounter with Rudy Giuliani last summer.

Ken White:

Of course that's what you mean, Josh, and we wouldn't torment our listeners by ignoring their wishes to hear about anything else.

Josh Barro:

No, everyone has all these questions about Daniel Gill. So I think, Ken, it's important that we discuss this case. So, Ken, Daniel Gill was working at the supermarket. Rudy Giuliani came to the supermarket when he was campaigning for his son who was running in the Republican primary for governor of New York. His son ended up losing that Republican primary to Lee Zeldin, but so Rudy Giuliani is campaigning on the South Shore of Staten Island in the supermarket. Daniel Gill taps Rudy Giuliani on the back and then tells him that he's a scumbag. Rudy calls the police. Daniel Gill gets arrested and held for almost 24 hours, charged initially with a felony assault on Rudy Giuliani, which Rudy Giuliani did this media tour talking about how gravely harmed that he was by this, that he was hit very hard on the back, that I believe he said it felt like getting shot. Is that correct?

Ken White:

Yeah, basically verbally speaking, he flopped like a French soccer player. He genuinely expressed it as if he had been brutalized by this tap on the back.

Josh Barro:

Yes, but there was surveillance video showing that it was in fact a light tap on the back, which is why the charges got reduced to a misdemeanor and then dismissed and now Daniel Gill is suing. He's suing Rudy Giuliani. He's also suing the NYPD and certain NYPD officers for violating his civil rights for false arrest and he's also suing Rudy Giuliani for defamation.

Ken White:

Right, and he's represented by Ron Kuby, who's a somewhat famous crusading defense attorney who used to be a partner of William Kunstler and that generation of muck-raking, crusading defense attorneys who take on usually far more unpopular people than Mr. Gill. And yeah, he's suing everybody. He's suing the cops involved for violation of civil rights and conspiracy to violate civil rights and false arrest. He's suing Giuliani for all the normal defamation-related causes of action and he's got some issues though, Josh. And some of them are that, were the cops probably too deferential to Rudy Giuliani? Yeah, probably. Were they too willing to arrest somebody when this guy obviously had not injured him? Yeah, but likely, they had probable cause to arrest him at the time based on Giuliani giving them the story? So I think it's something of an uphill battle for him suing the police officers.

Josh Barro:

So it's a probable cause because simply hitting someone on the back is a crime?

Ken White:

Well, yeah, nonconsensual touching is assault and battery. So if Giuliani tells them, "This guy came up behind me and hit me on the back," that's an assault and battery. Now he will argue that they should have, before arresting him, gone to the video and checked all that, but that's not required by the Constitution. That doesn't make it a false arrest or lack of probable cause if they didn't immediately do everything that they could

do in an investigation to make it a complete case. So I think he's got something of an uphill battle here against the cops. Against Giuliani, it's not so clear. Giuliani did go out and describe the tap on the back in a way that is from the video pretty manifestly not true.

Some of the statements are just trash talking the guy, as Giuliani will. Some of the statements are, you could say, exaggerations or rhetorical license about the incident, but some of them are probably false statements of fact saying that he hit him forcefully or something like that. So he can take a piece out of Rudy here and it's probably something that survives the initial stages of the case and that he can keep going after Giuliani for defamation. Bear in mind that New York now has an anti-SLAPP law. So if Giuliani is smart and prudent and makes good decisions in this lawsuit, one would assume he'd file an anti-SLAPP motion.

Josh Barro:

But so anti-SLAPP laws are designed to stop people from using lawsuits to prevent people from engaging in public participation, commenting on matters of public concern. Whether Daniel Gill slapped him really hard on the back, is that a matter of public concern? Usually, we're talking about political statements. Because it's an allegation of a crime, is that inherently a matter of public concern?

Ken White:

Well, it's a matter of public concern when he, as you said, goes on a publicity tour about it. So when he goes on all the talk shows and starts saying how he's been brutalized and beaten up, that makes it an issue of public concern. He made up one. So I guess you could make an argument that if he was someone obscure and this was a completely obscure incident that it wouldn't be a matter of public concern, but Rudy inescapably made up one.

Josh Barro:

I see. And then there's the matter of both that Rudy made these statements publicly. There's also the matter that Rudy made these statements to the police and caused him to be arrested. So I assume the defamation regards both of those things.

Ken White:

Yes, although statements to the police are more complicated. Generally, there is some level of privilege for statements made to law enforcement or the government. I'm not sure what that is in New York. Maybe one of our listeners can tell us. In California, for instance, that would be absolutely privileged from a defamation claim, although it could be a claim for malicious prosecution and false arrest. So we'll have to see how that turns out in New York.

Josh Barro:

What kind of damages would Daniel Gill have here?

Ken White:

Well, he'd probably have the arrest and the initial prosecution until it was dropped, all the costs and emotional distress damages from that. He could talk about having distress and harm to his reputation from Rudy going out and trash talking him. Maybe even has some sort of economic damages. He can show that other ShopRites wouldn't hire him, I don't know and I don't want to be an about this, but I don't know what kind of economic damages he would have. Maybe you can show he couldn't get a job afterwards. So it's not likely to be gigantic damages, although getting arrested on bullshit is, to someone like Daniel Gill, maybe something traumatic and unusual and to many other people in America is fairly routine.

Josh Barro:

I was surprised by some of the texts in this complaint because it notes, for example, it's describing the ShopRite on the South Shore, Long Island, which is in fact an extremely heavily Republican area of New York City. And the complaint says, "This area is a bastion of White conservatism and Trump supporters. It's one of the vanishingly small venues in New York where the fabulous election-denying disbarred attorney and late night talk show punchline former Mayor Rudy Giuliani could expect to find a mostly affectionate audience." So what's the point of trash talking the public in the area around this supermarket when you are filing a lawsuit?

Ken White:

Well, it's Ron Kuby. So that's what he's like. He's a trash talker. He's a trench fighter. He takes it to you and he makes extravagant claims like that. So that's very much par

for the course for lawyers like this and increasingly par for the course in American litigation.

Josh Barro:

There is one more lawsuit against Rudy Giuliani. I know that this is not the lawsuit that people were looking for us to discuss, but it's important that we note that there is a second lawsuit against Rudy Giuliani. This one brought by a woman named Noelle Dunphy. She alleges that Rudy Giuliani hired her in 2019 to run his business development to drum up business for Rudy Giuliani and she was developing ideas like that he should have a podcast. And she says that he hired her on the promise of \$1 million a year salary, but told her that he could not pay the salary or even document the existence of the salary until his divorce from his third wife was finalized.

She says Giuliani ultimately did not pay her for her work. She says that Giuliani agreed to represent her pro bono in exchange for her work, which by the way, that's not how that works. If it's an exchange for your work, it can't be pro bono and there could be some tax issues there, but she says that Giuliani agreed to represent her in a lawsuit that she had against her ex and she alleges that in the course of set employment that Rudy Giuliani sexually assaulted her and pressured her for sex. And she's suing for a variety of claims, sexual abuse, sexual harassment, nonpayment of her \$1 million a year salary and other such claims. This is a pretty strange wild lawsuit here.

Ken White:

Yeah, Josh, your description is pretty sanitized. It's a really grotesque complaint and it really seems as if you had a team of writers together to come up with a complaint that made Rudy look the way the people who hate Rudy the most thinks he acts. This is the way it would come out. It seems awfully on the nose where he's a aggressive drunk, habitual alcoholic, someone who is consistently sexually abusing people, arrogant, crazy, just everything bad anyone ever said about him. It's taken up to 11 in this complaint, which is why it is odd.

Josh Barro:

Yeah, we both looked at this complaint and had this reaction about needing to treat it cautiously. Why did you have that reaction?

Ken White:

Well, it's too easy in this day and age where there's all this very high-stakes, high-emotion political stuff going on to accept the most terrible things people say about political opponents and people you really don't like. And I really don't like Rudy Giuliani. I think he's terrible for America. I think he's a terrible lawyer and has disgraced the legal profession. So when someone comes along with a lawsuit that is the most grotesque array of things that you could possibly think about him, it makes me a little suspicious. I was waiting for him to strangle a kitten or something midway through the complaint because it's on that level. I don't have any problem thinking he is dishonest or that he's a sexual harasser and a sex pest in general, but there's something about this complaint that to me just comes off as too on the nose.

Josh Barro:

The thing that strikes me as strange about this complaint is this starting idea of the secret million dollar a year salary, this extravagant salary for the sort of work that's described there and this extremely suspicious arrangement for it where not only you're not getting paid on the books, you're not getting paid at all, she's giving him, she describes, a few thousand dollars at a time. And then you have a bunch of documentary evidence in this claim. You have text messages, you have emails, that sort of thing, but it's odd what the text messages do and do not reflect. For example, she claims that she had certain business expenses for business travel and that sort of thing that he didn't reimburse, but then you have text message exchanges about some of the specific business travel where she describes it as the Valentine's Day trip. And the manner in which Giuliani was taking her around and the description of being on the phone with him at all hours of the night and describing the nature of her work as being discussing current events with him, it's all consistent with the idea that they were having an affair rather than that they had a business relationship.

Ken White:

Yeah, and the other thing is she says that, "There's proof of all this because I recorded almost everything and he knew I was recording and told me it was okay to be recording everything," even though he's constantly saying all these terrible things, which to me just comes off as very weird. Was she recording everything? Maybe. But the whole thing where not only is she recording everything, but, "He previously consented to me recording everything while he did these things doesn't really make sense to me."

Josh Barro:

So the set of claims that are in this suit that described both of the existence of all of these recordings and the existence of this business relationship, which presumably would've produced certain work product, I assume, as this lawsuit proceeds, those are things that, if they exist, we'll eventually see them through the discovery process, right?

Ken White:

Yes. They will demand documents, they will take her deposition, they'll do everything they can to attack the case. The question is, does Rudy have the money for a good defense? Does he have the bandwidth to handle it sensibly? Is she going to go for a settlement here to try to make this go away? How is he going to handle it? He seems kind of out of control recently, frankly, and so there's no reason to think he'll handle it smartly.

Josh Barro:

And he's filed pro se in this litigation.

Ken White:

He initially filed pro se. It's not clear if he will remain pro se, but really Giuliani defending himself in this case would be quite a spectacle, something that crosses the line twice. So we'll have to see. But yeah, I get just weird vibes off the whole thing. I don't have any difficulty thinking that he treated her badly and that he's a sex pest and a liar and a fraud, but when you turn it up this high, I start to think, "I'm not sure about this."

Josh Barro:

But if he doesn't have the money for a good defense, presumably he also doesn't have the money for a settlement, right?

Ken White:

Well, that's true. And of course, we don't know where he's getting his money and he's griped before about how a lot of his activity should have resulted in funding his defense from the Republican Party or Trump campaign or things like that. So who knows what collateral effects this can have on his relationships in politics?

Josh Barro:

Yeah, there are a number of clues both in the things that look substantiated in this claim and other things that we've been seeing over the last few years that do suggest that it's plausible that Rudy Giuliani is having money problems.

Ken White:

Absolutely. And the complaint seems not just calculated to say terrible things about him. It also seems calculated to say somewhat gratuitous things about Trump and other political figures. It claims that he was bragging and telling her, "If you know anyone who can pay \$2 million for a pardon, I can get it for you from Trump and we keep a million and Trump gets a million." Yeah, I'm not sure if I'm buying that. Actually, I could buy that Rudy would say that in sexually harassing a woman. I don't really know that I buy that it's true.

Josh Barro:

Let's talk about Mark Pomerantz. Mark Pomerantz was formerly detailed on a special duty as a prosecutor in the Manhattan DA's Office running this investigation into Donald Trump and his business activities and whether there were crimes there. And he had done that under DA Cyrus Vance. Alvin Bragg took office, and initially, it appeared that Alvin Bragg was tapping the brakes on that investigation that had been going under Cyrus Vance. Mark Pomerantz resigned in a huff. He's written a book about his time in the DA's Office. One sort of odd thing that's happened after Mark Pomerantz left is that whether Alvin Bragg changed his mind or whether it was really true that he was just taking more time with the investigation rather than shutting it down.

Alvin Bragg now has indicted Donald Trump on a business-related matter, maybe a somewhat more narrow one than Mark Pomerantz would have pursued. But in any case, Mark Pomerantz had gone public with a bunch of his complaints about how the DA's Office had handled this. And Republicans in the House of Representatives are very interested in talking to Mark Pomerantz about the Manhattan DA's Office and they subpoenaed him. He went down to Washington DC and I thought this was strange.

Mark Pomerantz apparently didn't answer questions and he took the Fifth in order to avoid answering the questions, which was really striking. Why would Mark Pomerantz be able to invoke a right against self-incrimination here?

Ken White:

Well, his theory as far as we can tell from statements by his attorney is that he's been threatened with potential criminal liability for the disclosures he made in his book that Bragg and Bragg's office have said that he violated confidentiality and other laws in writing this book about the inner workings of the DA's Office. And certainly, he violated attorney-client privilege in his professional obligations by writing the book and disclosing internal client deliberations. But it's probably plausible there might be a crime out there. So he's basically saying, "I can't, despite having written a book about this, which amounts to a public confession, now that you're questioning me under oath, these answers could incriminate me."

So they're two things going on here. One is that you're really not allowed to just make blanket assertions of the Fifth without connection to the subject of the particular question. So probably you can't take the Fifth to, "What's your name?" or something like that. Once they get around to stuff that could be a link in the chain to convicting you of something, then you can take the Fifth. But judges really don't like it when you just take the blanket Fifth to every single question whether or not it could be incriminating. The other thing going on, of course, is that the status of taking the Fifth in Congress in congressional proceedings is a little weird. So it's been done certainly historically, but Congress has always reserved the idea, "Hey, maybe we can compel you to do it anyway. Maybe we can go to a judge and so forth." So it's a weird thing, it's certainly weird to write a book and then take the Fifth about the book.

Josh Barro:

Well, I think that Mark Pomerantz clearly does not care for Donald Trump, feels that Donald Trump should be prosecuted and imprisoned. And so I understand why he would not want to be helpful to House Republicans who are questioning him in an effort to broadly defend Donald Trump from these sorts of charges. So I think that would explain why he doesn't want to testify. That doesn't establish that he has a Fifth Amendment right not to testify. So as you referenced there, you said judges don't like blanket assertions of the Fifth, but there is no judge here. This is a congressional proceeding.

Ken White:

No, but if Congress, if they tried to compel him to answer and went to court over it, the fact that he took a blanket Fifth would be a factor, that the judge would probably look at in thinking that maybe he doesn't have a good faith basis.

Josh Barro:

So Congress has an ability to grant immunity for criminal prosecutions, but that immunity extends only to federal prosecutions, right? I assume the concern that Mark Pomerantz here would be a prosecution in state court.

Ken White:

Right. So Congress couldn't grant him immunity with respect to state court proceedings.

Josh Barro:

Because I know that, in some past cases, the way that Fifth Amendment assertions get resolved in Congress is they give people immunity against prosecution and then they're able to be compelled to testify. So here, you would have a federal judge, assuming the Republicans in Congress decided to go to court and try to force Mark Pomerantz to testify, you'd have a federal judge who would make some determination about whether he was at risk of incriminating himself and that judge might order him to testify despite not gaining that immunity, right?

Ken White:

Conceivably, although if he has any basis, then it's very unlikely that a judge is going to compel him to testify about everything, even about the core array of things that are potentially incriminating. And ironically, that order compelling him to testify could be the best defense against a prosecution. Because when you compel someone to testify, the resulting testimony becomes radioactive, and basically, the DA, if they wanted to prosecute him, would have to make an affirmative showing that none of the prosecution are derived out of anything he said that was compelled. So that would be bad for everybody basically.

Josh Barro:

Isn't there an issue of attorney-client privilege here? Mark Pomerantz was an attorney for the government. If you want to question him about his representation of the government, can't he assert attorney-client privilege to the client to answer questions?

Ken White:

He could, although he would basically be asserting attorney-client privilege over something that he has previously disclosed in violation of attorney-client privilege. Now, it's not his privilege to waive. He doesn't get to make that decision for the DA's Office, but yeah, he could still make that argument, but he didn't and I think he thinks the Fifth Amendment argument as the stronger one.

Josh Barro:

Because, as you note, he would be admitting professional misconduct and he conceivably would also be admitting to a crime if he asserted that the matters that he's already written about in his book are attorney-client privilege.

Ken White:

Exactly. So if he asserts the privilege, then he basically highlights that what he did was inappropriate.

Josh Barro:

Could the Manhattan DA's Office assert that privilege? Could they intervene in any litigation like that?

Ken White:

They could assert it, but bear in mind that this would be likely the Congressional Republicans evaluating whether or not they decide to accept the attorney-client privilege. If there is then litigation in federal court, then, yes, they could try to intervene and assert the privilege, although bear in mind that the status of the attorney-client privilege in proceedings before Congress is not 100% clear.

Josh Barro:

Let's talk about the documents investigation into Donald Trump. So you have the prosecution in New York, then you have two matters that are being overseen by special counsel Jack Smith. One is an investigation related to the election outcome and the aftermath of the election and Trump's efforts to overturn that outcome. And the other has to do with these documents with classified markings that ended up being found at Mar-a-Lago. And so there's been an increase in news about this document's investigation including there's apparently a letter from the National Archives that undermines Donald Trump's claim that whatever he had taken out of the White House had been automatically declassified.

Ken White:

So there's a report in the media that they have a leaked copy of a letter from the archivist to Trump's lawyers saying basically, "We're going to be disclosing these 16 documents to Jack Smith for his investigation and they reflect us telling your closest advisors things about the status of documents." So the idea is that these may be documents that help establish Trump's knowledge and intent because remember that for the wrongful disclosure of documents and the wrongful retention of classified document stuff, intent and knowledge can make a difference. And so maybe these show that he knew at the time that this whole thing about how he can declassify with his mind and stuff like that wasn't true and that would certainly be a piece in the puzzle of a prosecution of him.

Josh Barro:

If you have documents addressed to Trump or to his close advisors describing classification procedures, wouldn't it be easy enough for Trump to say that he didn't read them? That's entirely plausible that Trump did not read documents that were addressed to him.

Ken White:

I think it's more plausible than the notion that he did read them. So yes, that's the difficulty in ... Unless they're with bullet points and pictures, I think that's the difficulty with this evidence and the difficulty in prosecuting Trump for any type of thing that

requires knowledge of intent, is that his long history of people saying that he doesn't read stuff and he doesn't read the briefing books. He certainly wouldn't be reading dry legal analysis that's really addressed to his advisors and so on, but it's a link in the chain. It's a piece of evidence even if it's not a smoking gun. I hesitate though to treat it the way the media has treated it, the way the media has treated every leak since sometime in 2015 as, "We really got him this time. This is the kill shot," etcetera, etcetera. People have been saying that this shows that the investigation is about to conclude with charges. It could, but that's not necessarily so.

Josh Barro:

Why would this imply that?

Ken White:

I don't know. I think that's wishful thinking. I think that's wish casting, just that this would be the last piece to approve his intent and knowledge or something. I don't see it that way. I see signs that Jack Smith's investigations have components that are fairly far along like what we discussed about having former Vice President Mike Pence, in the grand jury. That's a mature investigation. On the other hand, you also see other things that suggest very preliminary moves. There was a story this last week about subpoenas to the Trump organization about its business dealings going back during the Trump administration, which would suggest a new avenue of investigation and certainly not a mature ready-to-end investigation. So there could be a lot of components to this. He could be further along on some than others, but no, I don't read this as saying it's going to happen any day now.

Josh Barro:

Would you expect him to develop all of those avenues and bring any charges all at once or if they're ... People definitely talk about this as being at least two separate investigations. The documents matter as a separate matter from the stuff related to the election. Are we waiting on all of those to be ready before there are any charges or is it that there could be, "This avenue is matured enough. We're going to bring charges on these matters while we continue to develop an investigation on various other matters"?

Ken White:

I think it depends on how strong the cases are and how long waiting for one of them would require them to delay. So I think Jack Smith knows that institutionally the credibility of charges is going to be boosted if he can make them in multiple areas and show multiple types of wrongdoing. Prosecutors always like to come at you with a ton of stuff saying, "Look, this person was doing crooked stuff all over the place." Look at the Sam Bankman-Fried laundry list of him speed running Title 18 in violating every criminal provision possible. Similarly, here, I think Jack Smith knows that if he shows a bunch of different types of crimes, that gives him more institutional credibility and makes it seem less like a political put-up job.

On the other hand, he doesn't want to delay valid charges for a long time, for years, and he also may not want to delay it if one of them is notably weaker than the other.

Josh Barro:

Right. But if the charges were all brought together, would there still be separate trials? I'm thinking about Michael Avenatti who engaged in so many different categories of federal criminal misconduct that he needed initially three trials and then they further separated it, so that he had four trials over four different kinds of related misconduct rather than just doing it all at once.

Ken White:

You would probably expect it to be separate, so completely different schemes. Typically, the defense would demand to separate out because it prejudices the defendant to have them both done at the same time. It's also just logistically very complicated and difficult. So I would expect, for instance, if they indicted on January 6th stuff on obstruction of justice in connection with the election and on document stuff for those to be in separate indictments.

Josh Barro:

A related matter we're seeing is outward signs of infighting among Donald Trump's legal team, and in particular Timothy Parlatore, who is one of the trial lawyers who has been working on Donald Trump's legal problems, not only withdrew from representing Donald Trump, he appeared on CNN to talk about why he had withdrawn. And he basically described that he was having conflict with Boris Epshteyn, who is an attorney, although not an experienced trial attorney. He's more a close political ally of the former president and it sounds like he's taken on almost like an inhouse counsel role where

he's helping former President Trump choose and retain attorneys. And basically, Parlatore says that Epshteyn is getting in between him and the other attorneys and the client and that he's giving Trump bad advice and causing Trump to make bad decisions in these representations, basically making it impossible for him to give good representation to Donald Trump. So I guess, first of all, it's improper to go on national television and talk about why you withdrew from a case, right?

Ken White:

Well, certainly, you're not allowed to disclose any client confidences.

Josh Barro:

Would this count?

Ken White:

It depends on his exact language. So what is confidential and what you shouldn't disclose as broader than attorney-client privilege, it's really anything that is confidential that you learn in the course of your representation. So it's hard to imagine that this isn't, at the very least, very bad form because you're disclosing the inner workings of the defense camp and that's not cool. So it may not be a full-blown thing that the Bar Association would go after you for, but it is definitely something that lawyers look at you, will give you side-eye about and think, "I'm not sure that person could be trusted." But, Josh, what's remarkable to me about this story is it could have been from any date between 2018 and now. In fact, it has been repeatedly. How about we cover this exact same story tumult in the Trump legal camp with the political lawyers and the more experienced trial lawyers having disagreements and some of them may be leaving?

Josh Barro:

Yes.

Ken White:

We've had this story so many times ...

Josh Barro:

So many times.

Ken White:

... in the context of impeachments, of all the different things going on.

Josh Barro:

They don't usually go on CNN to levy the complaints, but we have done variations on this story over and over again and the broad strokes of it sound completely plausible, that it makes perfect sense to me that you have this yes man close to Donald Trump who doesn't want to deliver him bad news about what the actual legal situation is and what the actual law is. And so gives Donald Trump bad advice. And Donald Trump also enjoys infighting among his subordinates and I guess that that would include his attorneys here, that he thinks that you thrive organizationally on having people fight it out with different theories about what you should do. But it does sound like this, in fact, would lead to a less effective defense than if you hired someone experienced and let them actually implement a good strategy.

Ken White:

Well, but here's the thing, let's look back at the last five years, how much does it really lead to an ineffective defense? For the most part, he went through impeachment twice and ultimately skated both times. He's been charged in New York on the DA thing, but that's relatively minor compared to all the other things. I think he thinks that, "This has generally worked out for me," this approach, listening to the lawyers who are more political and who are emphasizing what's good for fundraising and what's good for politics as opposed to what's good for court.

Josh Barro:

Right, but that's because it was a political matter for that whole time. Even impeachment is fundamentally a political process. And so having a viewpoint that is primarily about politics and that is primarily about PR might serve you well through those circumstances, although he was defeated for reelection. I don't think that he was

some great political genius who achieved a lot of success politically while he was in office. And because the power of the presidency helps you a lot when you're trying to delay legal proceedings, there's a memo saying that at least federally they can't indict. You get of deference from judges and civil proceedings about the fact that you're very busy and maybe things shouldn't have to proceed in a normal manner.

Now that he's out of office, he's had a multimillion dollar judgment against him in E. Jean Carroll's civil rape case. A number of these other investigations are proceeding and it looks like he may be indicted in several other places. So I guess I understand what you're saying there that he may look at this and see, "This has generally produced good results for me over that period." But I think that's an analytical error because I think that now some of his problems, fundamentally the legal problem is the problem. It's not just that the legal problem looks bad politically or might look bad politically. You might get sent to prison or you might have a large judgment issued against you.

Ken White:

Sure, but I'm not sure that at this late date, tumult in his legal team and listening to the politicians rather than the trial lawyers is going to make a big difference in whether or not he gets charged. It could certainly make a big difference in the defense of cases if he gets charged, but this is no longer the Mueller investigation where I think that his stance made it worse for him, even though he ultimately skated on that. I think the facts are what they are. It's out there. I don't know. He can do much to make it better or worse at this point.

Josh Barro:

Speaking of E. Jean Carroll, there's another lawsuit. We had this lawsuit that was regarding the allegation of rape itself and certain statements that the former president made denying that. There's another lawsuit, an older lawsuit about other statements that he made while he was president denying that he had raped E. Jean Carroll and that had all of these legal issues about, if the president is speaking and he's trying to defend his own reputation, is he speaking in his capacity as president and therefore can you even sue him or does the federal government have to stand in for him? And if the federal government stands in for him, you can't sue the federal government for defamation. These are the terms that we were discussing the E. Jean Carroll case on for years before you had the change in the New York law that allowed E. Jean Carroll

to sue directly about the rape and also some post presidential statements that she could make an issue of.

But so there's still this case kicking around about these other statements. It's gone, it's ping-ponged between various courts. The Second Circuit Court of Appeals had to ask the DC Circuit Court of Appeals to weigh in on certain matters about District of Columbia law and now it's being remanded again to the trial judge to make a determination about that they said, "Donald Trump was an employee of the federal government when he was president. You need to decide Judge Lewis Kaplan," the same judge who presided over the other case, "You need to decide whether he was speaking in his capacity as president."

And so I guess my first question here is, does this case even matter anymore? We've talked about E. Jean Carroll maybe could sue Trump again over new statements he's made again denying that he raped her, but the big issue would be, were there any incremental damages? Can she show that there was additional damage to representation that she deserves more compensation for? Don't you have that same issue in this case? She's already gotten a defamation judgment. Suppose that she gets another judgment in this case, what purpose does that serve?

Ken White:

Well, I think it serves the purpose of just continuing to pummel him and continuing to keep it in the news and put pressure on him and make him spend attorney fees. So you're right that we talked before about whether or not she could or would sue him for the new statements he made at the CNN Town Hall that provided a big platform for him to say the predictable things. What she's done is that she's made a motion to amend, to add those statements to her case against him, the one that you mentioned from 2019 that just got sent back to the trial court. So what she's doing is she still wants to move forward with those old statements he made when he was president, but she wants to add to it now the new statements he made just recently. So that's a way to continue to mix it up with him.

I think you're right that showing incremental damages is very difficult, showing more harm to her reputation or financial prospects. Anything like that based on the CNN Town Hall is going to be really difficult. I think a jury would be outraged. I'm not sure how much money they would give unless you can put on really good evidence. But the other thing that's going on in this case is, as you said, the judge still has to decide, "Was Trump acting in his capacity as president when he made these initial denials?" That's no longer an issue for the CNN statements that she's trying to add in, but the DC Court of Appeals gave some guidance. The Second Circuit gave some guidance.

Instead of incredibly muddy, now it's just murky. The DC Court of Appeals implied that it doesn't want to follow the rule that anything you say to the press when you're a public official is automatically in the course and scope of your duty. So it's not going to follow that as a hard and fast rule, but the test is still incredibly annoying, incredibly multifactorial and convoluted. And so it will be interesting to see where the judge goes on that.

Josh Barro:

So is it conceivable that we're going to get a meaningful precedent out of this case on that question of what the scope of presidential duty is?

Ken White:

Yes, or at least an analytical model for how you go about determining how when you've got a public official and they make statements to the press, whether or not that's in the course and scope of their duty. You might remember that we have a past case about this that dealt with a congressman got caught having an affair, who claimed that the reason his wife was leaving and was actually not because of the affair, but because that she was scared of the Council of American Islamic Relations, which was a bunch of terrorists or word to that effect. It's an argument. Anyway, they sued him, and there, the Second Circuit said more or less, "Well here the evidence shows that he explicitly thought that he had to calm down his constituents to do his job effectively. To do that, he had to talk to the press."

And the DC Court of Appeals says back to the Second Circuit, "Hey, no offense, but we're not going to really follow that exactly too closely," implying that was complete. So it will be interesting to see where it goes from here.

Josh Barro:

Finally, John Durham, who had been the US attorney for Connecticut and was the long-serving special counsel investigating the investigations into the Trump campaign and links to Russia in 2016, he brought a couple of prosecutions that actually ended in acquittals related to that. And now that his probe is winded down with no further charges, but there's a report that he has issued and what do you make of this report and what John Durham says about his time investigating the investigators?

Ken White:

Well, the report is either the biggest nothing burger in history or the greatest American political scandal in history, depending on who you're listening to right now. The report does not say that the FBI violated the law and it more or less concedes that there were grounds to conduct the investigation that they did. What the report does say is that they should have done a preliminary investigation rather than a full-blown one, that they should have considered contrary evidence and that they were less skeptical of claims about Trump and Trump's campaign than they were about similar claims about Hillary Clinton's campaign and that this was, in effect, a big investigation that was at least partially politically motivated and had an impact on political campaigns that should have been done differently.

Nonetheless, it didn't ask for any more charges and bear in mind that Durham has prosecuted only two people and he's 0 for two on those, which is really unusual for federal prosecutions. And it doesn't really recommend any substantive policy or procedure changes. So it seems to me to be more smoke than fire.

Josh Barro:

So it's like that thing at the end of Burn After Reading where they're like, "At least, we learned," and then they're like, "What did we learn?" And they're like, "Well, I guess we learned not to do it again."

Ken White:

I thought it was more like the congressional report about prohibition, Josh, and no, I was not alive for this, but Congress basically commissioned a report that said, "Prohibition isn't working. There's alcohol everywhere. It's creating organized crime. It's absolutely terrible for society, but we don't have any recommendations." So it's like that. So I'm more on the nothing burger side, although I think the report is fairly convincing that law enforcement basically ignored the contrary evidence and saw what they wanted to see. The difference is I don't think that's unusual. I think that's the way law enforcement works all the time.

Josh Barro:

I think that's a good place for us to leave it this week. And, listeners, you know where to find us. You can go to serioustrouble.show, if you're a paying customer and we thank

all of you who are paying customers, you can join the comments section there, pose questions, react to this episode. You can also send us questions by email. Ken, what is the email address that people can contact us at?

Ken White:

It is ricohotline@serioustrouble.show.

Josh Barro:

Yes, exactly. By the way, we are going to be off next week. Sara and I are both on vacation next week. Ken, I don't know what you'll be doing while we're gone, but it's not taping a podcast.

Ken White:

Work, Josh.

Josh Barro:

Yes, Ken will be working. So we will be back in two weeks, but we encourage you to send in those questions in the comments or by email and so we'll have a nice pile of mail waiting for us when we get back to do the next show in early June. Serious Trouble is created and produced by Very Serious Media. That's me and Sara Fay. Jennifer Swiatek mixed this episode. Our theme music is by Joshua Moshier. Thanks for listening. We'll be back with more soon.

Ken White:

See you next time.