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Ken White:

Hi. It's Ken White.

Josh Barro:

And it's Josh Barro and this is Serious Trouble. Hi Ken. So we have this running list of fora in which you should not discuss matters regarding which you may be under criminal investigation for or for which you may have even already been indicted and I think we have a few additional contexts that we are going to add to that list this week.

Ken White:

We do. And I'm expecting the question, is it a good idea to go on Bret Baier's show and more or less confess to the thing that you've been indicted for in federal court?

Josh Barro:

Is that a good idea?

Ken White:

Well Josh, I was expecting you to ask. In the interest of consistency and efficient use of time on our show, I've asked Sarah to prepare a stock response to insert and post every time you ask this. Sarah. Yes, that is a goat screaming. Anyway, thank you Sarah. We'll be using that every time. Josh, it is a terrible idea for someone under federal indictment to go on anybody's show and answer questions about the indictment. It's a particularly bad idea, even if it's a friendly network like Fox, to go on with someone like Bret Baier who actually has an interest in at least appearing to look like a journalist and will ask some follow up questions. I know he's gotten some criticism for the interview for not following up more, but I would say it was a more dogged interview than Trump typically gets, certainly on that network. And it was terrible. It was bad on every level. He locked himself in to particular stories about how

things happened. Arguably people have been saying, I don't think it's a huge exaggeration, confessed saying that he decided not to turn over boxes containing documents because they still had his golf clothes in them. His pants and shirts and shoes. Now Josh, I've seen Donald Trump's golf clothes and I can understand why he wouldn't want them to become further a matter of public record, but that's not actually a defense to willful retaining of secret information.

Josh Barro:

Well, there was a follow-up I'm going to ask here. Yes, you should not go on Fox News or any other cable news network to do an interview about the matter regarding which you've just been indicted. But if you are going to do that interview and you are asked about the allegations that are raised against you in the indictment, should you confirm the allegations or deny them?

Ken White:

I think you should deny them or say that your lawyer won't let you answer. I don't think that you should basically agree with them, but offer a justification that is not actually an excuse at law, which is more or less what he did. He could have said any number of things that would be a defense. He could have said, "I always intended to turn over all the documents I thought I had, but there was confusion over which boxes were which." That's perfectly plausible. All these things. But what he said was, "I'm really busy. I didn't want to turn them over because it still had some of my stuff in it so I didn't." And that's not a defense.

Josh Barro:

How does this interface with the way that he might make a defense at trial? Because he's not going to take the stand at trial. So it's not like we're imagining a situation where Donald Trump otherwise might take the stand at his trial and say, "Well gee, I thought I turned over all the boxes. I got confused. I have so much stuff. Mar-a-Lago is a really big house. I got confused. I meant to comply." Blah blah blah. And then they show him the transcript and say, "But here you said this different thing then." That's not going to happen because he's not going to testify at all. So how does this impact the ability of his defense to raise certain of these defenses? How do they raise the idea that maybe he intended to comply with the subpoena and just got confused if he's not actually going to testify himself?

Ken White:

Josh, first of all, I don't think it's completely clear that he won't testify. I think it's clear no rational person in his place would testify and no competent criminal defense attorney would want him to and any good attorney would do their utmost to stop him. But I don't think it's perfectly clear that he won't because he's Trump.

Josh Barro:

Well, we did have this civil case where not only did he not testify, he didn't even bother showing up to court. And I realize that they're different matters and this one's a criminal matter, but I think that Trump's pattern of viewing the very existence of legal proceedings against him with contempt and believing that he can have essentially a political strategy here ... My boxes, how dare they is a complete nonsense legal argument. But as a political argument, I think that carries a fair amount of water with the audience that he's speaking to. I think that if he viewed this as the fight of his life and the way to win it was to put on the best performance in court, I think he might testify. But I think he thinks this stuff is almost beneath him even though it could literally result in him going to prison. We never know exactly what he will do, but I don't believe he will testify. I think he will accidentally do the smart thing and not testify, but for different reasons than the reasons his lawyers would have him not testify.

Ken White:

It's certainly possible. But to circle back and actually answer your question, I think it's still harmful even if it's not used to impeach his testimony because it basically lets the prosecutors put on this evidence that shows him more or less admitting elements of the crime, more or less refuting some of the defense theories that his team has floated over time. It makes it harder for Judge Cannon to tank the case with a straight face. It removes the plausible arguments and it just generally increases the strength of the case. Now, I want to say that with Trump a lot of really terrible things wind up being cumulative. So he says so much crazy stuff and so much incriminating stuff that sooner or later you're just adding more onto a giant pile and marginally it doesn't make a big difference. I would say that this interview is probably the worst thing he's done in terms of his public admissions about the case.

Josh Barro:

We've talked a fair amount about attorney client privilege issues and how that's going to be a key way for Trump's legal team to try to attack the government's case here in the pretrial phase. Try to get certain evidence thrown out. And you've also suggested that the problem that could arise there for the government if it gets unfavorable rulings from Judge Cannon is not just the loss of certain documents and interview testimony from Evan Corcoran and other attorneys who were interviewed about matters that would otherwise have been privileged, but a different federal judge ruled that they could pierce the privilege under the crime fraud exception to the attorney-client privilege. That there could be other fruit of the investigation that arose from that that the government would therefore be unable to use.

But I assume that public statements Trump makes cannot possibly be fruit of the poison tree there. One thing that I can imagine happening here is if you have Donald Trump go on television and confirm certain things that the government was otherwise going to rely on testimony from people like Evan Corcoran for, then that could in theory make that otherwise privileged evidence of less importance to the government's case than it ought to be if Trump would just shut up.

Ken White:

Sure. I think that's right. The theory of fruit of the poisonous tree, that some piece of evidence is derivative of a improperly gathered piece of evidence has its limits. And it can't be too attenuated between the wrongdoing and the piece of evidence and there can't be a break in a series of independent decisions that relate to it. So Trump going on TV is an independent decision that cuts off the chain between the allegedly improper actions and the evidence. So if it had been a confession, they get a bogus search warrant, they search his house, they interrogate him and he confesses, that might be fruit of the poisonous tree. Doing something far later after the indictment talking in public, that's not at all fruit of the poisonous tree. But you're right that he's just backstopping what could be weak parts of the case for the government.

Josh Barro:

Another key part of this Bret Baier interview that's gotten a lot of attention is his explanation of what he was doing in that meeting at Bedminster where there's the audio recording. He was meeting with the ghostwriters for Mark Meadows' memoir of his time as Donald Trump's White House Chief of Staff and he's waving around what appears to be a war plan document from General Mark Milley about how you would invade Iran if you were going to do that. And talking about how this document is secret

and I could have declassified it when I was president, but now I'm not president anymore so I can't so it's still secret. And he claims in the Bret Baier interview that there was no document and maybe he made the document up and he was just holding up press clippings and various other unclassified documents.

In contrast to being a confession, this is the sort of thing that you might expect to be raised as a defense. That maybe Donald Trump was lying about having classified documents because Donald Trump lies about all sorts of things that he might brag about. And even though he's saying on the tape that he has this war plan that he never really had it. But again, that's not something that they can bring up through his testimony unless they actually put him on the stand at trial. So how would they advance that defense if they were going to try to do that?

Ken White:

They might have some other witness who was in the room saying, I looked and I saw that Mr. Trump was actually holding, whatever, a flyer for KFC. They could argue the government hasn't actually proven what was in his hand. That no one saw it. The whole he lies all the time is a very unappealing defense and we actually haven't had them say that. We've had them say in defamation cases that he speaks rhetorically and hyperbolically and that sort of thing, but we've never had them say he lies all the time.

The other thing, Josh, is that you don't really need that document as a document to prove the case. The significance of that speech I think is less as proof that he had that particular document, whatever it is. It's more as proof of willfulness of his knowledge that he's not allowed to keep secret documents and that he can't declassify them after leaving the presidency and that there are documents that he didn't declassify. So I think that's why the testimony is important and that it doesn't matter what he's holding. It just matters that he admits these facts about how he's supposed to treat things.

Josh Barro:

And so we will see these are some things that we're talking about how the case might shape up once it gets into Aileen Cannon's courtroom. We got the first order from her, but it looks like mostly a boilerplate order. It sets out an initial trial date for August, but I assume we're not in fact going to have a trial in August in that courtroom.

Ken White:

It's very unlikely because there's going to be a ton of pretrial motions. As you've suggested it's probably in his best interest to delay. This case has more than usual complicated issues. Among them, how to treat classified documents and the challenge to the attorney-client communications and things like that. Most of that order is boilerplate. Now, federal judges in criminal and civil cases have standard orders about things that they want the parties to do in every case. The clerk inputs the particular dates and they issue it. No real thought goes into it. Probably it was set for trial in August because that's what the Speedy Trial Act would require absent any finding to any of the factors applied for an extension and the parties haven't yet submitted their thoughts on whether those factors apply.

Josh Barro:

The other thing that was interesting in this order is that it says the trial will take place on that date in Fort Pierce, Florida. So Aileen Cannon, her duty station is Fort Pierce, which is up in St. Lucie County quite a bit north of Miami as you go up the coast there. She also hears some cases in West Palm Beach. I think we'd been assuming that this was going to be a West Palm Beach case because the Mar-a-Lago Club is in Palm Beach. The order suggested that that could be modified later, although I didn't know whether there was significance to that. Should we expect that this trial is going to happen way up in the middle of nowhere there?

Ken White:

It's too early to say and federal courts have some discretion in terms of deciding what courthouse a trial will take place at. Particularly when there are factors like security and capacity and things like that. So this is a truly historic case. It's going to have a unique drain on the resources of whatever courthouse it goes to. So I would expect the chief judge while maybe not willing to in effect switch judges, which is frowned upon, definitely to make decisions about which courthouse is best able to handle the media circus.

Josh Barro:

And so does that affect what the jury pool is? If the case is tried up in St. Lucie County, which is a significantly redder area of Florida than Palm Beach County or Miami-Dade County, does that mean we're getting a jury pool that's from St. Lucie County and it's therefore presumably more Republican?

Ken White:

So federal jury pools are a little different. They're not drawn from one county the way your jury pools for a typical criminal or civil trial in state court are. They're drawn from the entire district. So often it involves more travel for the hapless juror who gets picked for a trial. But it'll be more than just that county. It may be on average more weighted towards that direction of the district, but it's going to be drawn from the entire district.

Josh Barro:

So if you live in Miami, you can be forced as a juror to commute 100 miles up to Fort Pierce to sit on a jury in a multi-week trial?

Ken White:

In theory. Although realistically you would probably say that you're not able to do that for some reason or other and you'd wind up quite likely getting kicked off the jury.

Josh Barro:

Okay. So in practice it would tend to be a jury of people who live relatively close to the courthouse rather than people who live very far away from the courthouse?

Ken White:

On average, it's more likely to be closer. However, there are cases where you have people commuting substantial distances on juries. And an hour here in Los Angeles where everything is an hour away and it's not unusual to have jurors who are going a very substantial distance. Even an hour and a half or more.

Josh Barro:

Yeah. You mentioned classified information as one of the pitfalls in the pretrial phase of this and the New York Times had an interesting story on this on the Classified Information Procedures Act or CIPA. And so this basically sets out rules about how you handle classified documents if they're important evidence in a criminal case. And that's

going to be a significant issue here. You have these 31 documents, which almost all of them are marked either secret or top secret. And so there's a fair amount of discretion for Judge Cannon to make decisions about exactly how they'll handle those documents. And then it's also reasonably likely that the government might want to immediately appeal some of those decisions that she makes and that could add significant time to this process.

Ken White:

It could. Although, again, remember one of the things we talked about before about how the government would love to get rid of Judge Cannon is that immediate appeal gives them an opportunity to be before the 11th circuit. And if she's acting in some nutty way, that may be the opportunity for the circuit to say, maybe we'll send this back to a different judge. That aside, yes, there's a bunch of decisions to be made under CIPA and a lot of it is governed by what the government is asking for. So the government will be asking for permission for what it's required to turn over, how redacted those documents can be, what can be put into evidence publicly and how redacted those documents can be, under what circumstances the things they turn over can be held and stored. Decisions like that.

I told you before and you were a little skeptical of it, but I still think that Jack Smith likely chose the documents here with an eye towards it not being catastrophic if a significant amount of them gets revealed publicly. I don't think he chose documents, at least not all documents, where it's going to be terrible for national security if it gets out. I anticipate though that they will be taking advantage of CIPA and they will be at least with some documents asking to redact portions of them.

Josh Barro:

There's a couple of separate questions here. One is about what the government is going to be willing to share with Trump and his legal team and the other is about what the government is going to be willing to have published for the broad public to view. And one of the things the Times discusses is that the reason the defense team wants to look through as many of these documents as possible and possibly even related classified documents, which have not been charged, may not have been in Trump's possession, is they want to be able to figure out what the actual sensitivity of the information the documents is. And in particular if there's something that's in one of these classified documents and then they can show that there was information in the

public domain that was substantially similar, that can be a defense at trial because the espionage act is not actually specifically about classification levels.

Classification levels provide an indication of how sensitive a document is, but it's a defense here if the information's release would not actually be damaging to national security. And one way you could argue it wouldn't be damaging is if the information was already publicly known. And so I guess, I'm still confused about the thing that we talked about with this early on, which is that if Jack Smith picked documents where the government is relatively freely able to share what's in those documents, won't that tend to help them with that defense where they'll be able to say, see, this information was not in fact that especially damaging to national security if it was released?

Ken White:

Yes. Although again, There's a difference between being harmful to national security when it was taken and retained and being harmful now. In addition, there can be documents that are selected because they are easy to redact or suitable for redaction. So sometimes the super sensitive stuff is interwoven in all the parts of it. Sometimes you can have a document that says in the event we elect to use force against Iran, the plan will have the following components. Bang. And then you can redact stuff after that. It being clear enough from the first what it's about. And again, the standard you're right to point out, and this gets confused a lot in stories about this, that the Espionage Act does not have to be classified or top secret or anything like that. That the standard is about whether or not it is defense information that is potentially harmful and that's a different standard. I think it's a standard that historically the government has interpreted very broadly, historically the public and juries have been inclined to interpret pretty broadly. The question is how a jury would feel about that when it's a former president.

Josh Barro:

Right. The other thing the Times notes is that there hasn't been Supreme Court litigation over CIPA ever and that there conceivably could be. Because there are rights that a defendant has about being able to confront accusers and that sort of thing. When you effectively have a certain amount of secret evidence being brought against a defendant, it seems like that's the sort of thing that you might have appellate relief about.

Ken White:

It is. Defense lawyers have often argued that it's fundamentally unfair for the government to be prosecuting you over a document that you can't see in its entirety and use in evidence in its entirety. That would normally be a defense pro civil liberties position. And this is an example of how the script gets flipped in all these Trump cases. Because I think if you took this to the Supreme Court, to a Supreme Court that's sympathetic to Trump, they've got the prospect of basically undermining many decades of a traditional stance of being very deferential to national security concerns just to help him in his ongoing cascade of stupid actions.

Josh Barro:

And I don't think we have a Supreme Court that's sympathetic to Trump. I think that when the Supreme Court has faced a choice between conservative legal principles and doing something to protect Donald Trump from his legal difficulties, they've chosen conservative legal principles basically every time.

Ken White:

I think that's fair at least as to specific cases against Trump.

Josh Barro:

Right. That's what this is.

Ken White:

Yeah. I don't see a sign right now that the Supreme Court is going to go radical on national security issues just to help Trump.

Josh Barro:

But I think one of the things this drives home is that before you even consider Aileen Cannon misbehaving, a normal judge in a normal position, there would still be quite a bit of pretrial motion argument in this case. You could conceivably end up with some sort of dispute with the government, although only the government can appeal before trial. The defense will have to wait until after trial if it wants to appeal. You are more likely to end up at the appellate court level early with Aileen Cannon. But it's basically

that there's all sorts of reasons that this is likely to take quite a long time even compared to a normal federal criminal trial both before it goes to trial and then the possibility for appeals after trial.

Ken White:

That's right. And it's one of the reasons why there are so many opportunities for a federal judge in a criminal case to tank the case that aren't flamboyant and obvious. There are so many little rulings that help shape the way the case goes that are discretionary calls that depending on how you call them, can spell the difference between success or failure.

Josh Barro:

And then that interacts with Donald Trump's general practice of trying to slow down litigation. The thing I find interesting about that strategically though for him is that I think his idea is basically if we slow this down, then I can be elected president again and I will dismiss the case. He seems more likely to go that way than to try to rush to trial to get a quick favorable verdict out of Aileen Cannon basically staking his hopes on the idea that she's going to tank the case for him. I think it's likelier that he will delay, delay, delay. But the other possibility there is that Biden wins reelection. That gives Democrats four more years on the clock for this prosecution and the other investigations. And it also ... Who knows? Maybe he would run for president again in 2028. But it's at least fairly likely that he will be of less political significance to Republicans after once again losing the presidential election. He might actually lose some of the political levers that he would have available to him if he was going to trial right now.

Ken White:

I think that's right. But again, the interview that we talked about earlier is just emblematic of how he thinks about all these things very differently than we do and than a regular person would. He may decide that ramping up things in the criminal case is the way to ramp up his base and drive votes. We really don't know where it's going to go. I suspect that he will look for some easy early victories in the criminal case. You might see something like a motion to dismiss for outrageous government misconduct, which is a thing. There's a doctrine under which if the government has behaved in a way that is truly outrageous and beyond the pale for violation of rights, the court can in

exercise of its supervisory power, just dismiss the case. I think he'll take a shot at that even though I don't think he has anything approaching a plausible argument for it. I think he'll try relatively early to knock out the attorney-client stuff, which would be something that would derail the case for a long time.

Josh Barro:

I want to talk about a different investigative matter. The January 6th investigation that significantly involves the former president and that could conceivably lead to another set of federal indictments against him. But there's a story in the Washington Post about the manner in which this investigation proceeded initially and some internal politics disputes within the Department of Justice about whether they should be initially focusing on Donald Trump, I suppose, as a target or subject of that investigation and instead they took an approach that really started with the rioters and moved up a pyramid rather than down it and there's been some second guessing about whether that was an appropriate strategy.

Ken White:

Yeah. This article in the Washington Post was I thought really well reported in terms of how the process played out. But it reflected some weird, fundamentally wrong expectations about the Justice Department. This was absolutely an article showing this is how they would do it. This is how the Justice Department acts. So the people in the article expressing shock that it played out a particular way are like I went on stage with this guy named Gallagher and he was hitting watermelons with a hammer. What the fuck? Well, that's what they do. So the basic idea was that they thought that they should have aggressively pursued specifically Trump from the very beginning of the investigation almost immediately after January 6th. And instead they built a base case gathering all the information about what happened on the ground at the Capitol for a good year before they broadened that to start investigating Trump's role in it.

And that is very much a Department of Justice way to approach things. First of all, they have been criticized and stung for the idea that they focused on Trump or his campaign too early and without adequate information on other occasions. And so this was a good way to avoid that. No one could say they rushed into focusing on Trump on January 6th. They laid the groundwork.

Second, just the way, like they say, this is the way they do it. They go up the ladder. They start with the small people, they get what they can out of them and they move up. And there's no real incentive to declare him an official subject or target early. For one

reason, so he would continue to say things and other people would continue to say things about him. I think the heart of the criticism may be a political one. That they should have realized that Trump could become president again, that the control of the House and Senate can change and all these things, and therefore you need to rush before those political things happen to get him indicted. To finish the investigation. But it's not really appropriate for the Department of Justice to think that way. They should be thinking about what methodology do we use to investigate a crime? Do we have enough evidence to prove a crime? Should we charge and not think about, well strategically I've got to file these charges before the voters choose someone else as president. That wouldn't be an appropriate thing under the principles of federal prosecution for them to consider.

Josh Barro:

I think the other important thing here is that the DOJ specifically exists to investigate crime and not other kinds of wrongdoing. And I think that immediately in the aftermath of the January 6th riot, it was clear that Trump had engaged in serious wrongdoing. And there was another process that sought accountability for that, which is to say that rather swiftly the House of Representatives impeached Trump for his actions. The House does not have to limit itself to matters that are literal crimes. That it doesn't have to be in the federal statute book. And they impeached him. The Senate chose not to ... He'd already left office at the time the Senate was voting, but they chose not to convict him. They chose not to bar him from holding further office. There's a certain category of wrongdoing by a president where the primary accountability mechanism lies with the Congress through the impeachment process and that process was used.

The question of whether Trump or people close to him had committed literal crimes associated with the riot itself, I think was less obvious than whether his behavior had been egregious and meriting impeachment and that sort of thing. And as you note, was going to rely on building some of that ground up evidence. There's two related but separate matters to do with post-election activities. One has to do with the efforts to steal the election, the other has to do with the riot. And the riot was really only tangentially a part of the effort to steal the election. It was not one of the more effective components of the strategy to steal the election. And so I think even if we get to an indictment for Donald Trump eventually on matters related to the election, it's not clear to me that it will necessarily be specifically related to the riot as opposed to being related to other activities related to the certification of electors, pressure brought on various other officials that might not even necessarily literally involve the riot.

Ken White:

Absolutely. And you have to remember, and we've said this many times, that the federal prosecutors, their competitive advantage is the ability to build a slow methodical case. To take time doing it and developing it, bringing in witnesses, discovering evidence, that type of thing. So when you're wanting them to do things fast, you're basically saying you want them to squander one of their strengths. The other thing I think about this, Josh, is that this is a recurring theme as you suggest there are political remedies for some bad things that go wrong. The federal criminal justice system is not your deus ex machina that comes in and saves and remedies fundamental flaws in our democracy. But people keep looking to it and they've been looking to it since we started all the president's lawyers in what? What was that, spring of 2018?

Josh Barro:

Yes.

Ken White:

The criminal justice system is not going to rescue you from political problems.

Josh Barro:

And the other thing is that I think it is appropriate for the Department of Justice to have a lot of caution around a theory. And this is what the criminal theory would've been in the aftermath of January 6th, is that the former president's political actions, the speech that he made on the ellipse, the things that he asked his supporters to do and to object to and to stand up for that he committed a crime through his political speech by inducing people to riot or to do other things. Now, it is literally possible to do that, but I think it's appropriate for DOJ to have reluctance about moving in toward a criminal investigation that's going to lead toward the idea that somebody's political speech was in fact criminal.

Ken White:

Absolutely. Or the idea that normal political interplay and collaborating and scheming to try to get someone elected is criminal. It's right that they're very cautious approaching

that because it would be very corrosive to democracy and to freedom if that became something that was frequently the subject of criminal investigations.

Josh Barro:

Speaking, by the way, of situations where your primary wrongdoing may not actually be criminal wrongdoing, let's talk about Hunter Biden and whether he got off easy with this deal that's been announced with the US attorney in Delaware. So Hunter Biden was already under criminal investigation for various financial related matters before his father took office. There isn't a special counsel here, but the US attorney in Delaware is a Trump appointee who has been held over, who has been overseeing this investigation the whole way through. And they have reached a plea agreement where Hunter is going to plead to two misdemeanor tax offenses where he failed to pay more than \$100,000 of federal tax owed in both 2017 and 2018. And he won't plead to this gun charge, but there will be a diversion where basically this offense where he falsely claimed that he was not a drug addict when he bought a firearm, which he then owned for only a couple of weeks, they'll place him in a diversion program and if he meets the conditions of that program, then they will dismiss that charge.

So it's two misdemeanors. We have news reports saying that prosecutors will recommend probation here, although I think we want better sourcing on that. I believe it's the Washington Post had this as according to people familiar with the negotiations who spoke on the condition of anonymity. So we'll see whether there is in fact that recommendation for probation. But is this getting off quite easy here? This investigation has gotten so much attention for so many years involving fairly substantial amounts of money and this likelihood that he'll get off with misdemeanors and no jail time.

Ken White:

I think it depends on what more we find out when we see the plea agreement and things like that. So like you said, this is a Trump appointed US attorney making this decision and that US attorney has emphasized in responses to Congress, which has been nosing around all these investigations, that he's been given carte blanche here. He is out on his own making his own decisions on this. So part of this is fairly standard. When you have tax cases, it is not unusual for them to be resolved by a pre indictment plea deal to this particular charge. Title 26, United States Code 7203, which is a willful failure to file taxes. That's because it fits the bill when you just don't file a tax return. It's also because it's much harder to prove tax evasion, which is the felony charge, the more serious charge. With tax evasion, you have to prove basically some sort of deceit

or false statement or things like that. And if a guy is just, well, let's be blunt, a crack addict who's careening around doing all these wild things, it's a little harder to prove that he had this deceitful scheme as opposed to he just wasn't filing taxes. So that part of the resolution, the misdemeanors pre indictment is not remarkable.

If there is a recommendation of probation, then that is relatively lenient, I think, because as I run the very rough calculations based on what it says in those informations, the amount of tax that wasn't paid, it was more than 200,000. And so normally if you pled guilty pre indictment, that would get you in a range where you might expect to do a few months of jail time. But again, we need more information before you can say that clearly. But probation for a pre indictment plea to two misdemeanors would certainly not be a unheard of type of recommendation. Finally, as to the gun charge, it's the kind of charge that is almost never made and you really only tend to get it if you're being noticed for something else. So this statute says basically you can't possess a gun if you're an unlawful user of or addict of a controlled substance.

And I should point out that's going to include abuse of prescription drugs. So some vast number of Americans fall under this statute. Really, I saw a figure like 60 million people in any given year abuse an illegal drug or abuse prescription drugs and would not be allowed to have a gun. And I guarantee you a lot of them have guns and it's very rarely prosecuted either as an unlawful possession, which is what is charged here, or as a false statement to get the gun. And it tends to happen when something else is going on. So on the rare occasions when you see this charge, it's because there's a taskforce that's sweeping up all the gang members in a city and they're just looking for any charge they can find on them or they are investigating you for something else and this is all they can find. But it's not typically done. And if it were typically done, all you would have to do is go identify all the addicts or drug users and then compare it to gun ownership records, but they don't do that. So the diversion of something that's hardly ever charged is not particularly remarkable either.

Josh Barro:

Part of how this came to the government's attention is that Hunter published an autobiography in 2021 laying bare aspects of his soul that I think it might be in everybody's best interest if they had been kept private. But in any case, he described the purchase of this gun while he was amid all of these benders in the autobiography, and he was already under criminal investigation at the time that the autobiography was published. So again, Ken, I have to ask you, while you are under federal criminal investigation, should you publish a Bearing Your Soul Tell All Autobiography describing your drug use and gun purchases?

Ken White:

Josh, I think we're going to have to have a rule of only one goat scream per episode. So I'm just going to go with no, you should not. But the key point you made there is while you're under investigation for something else. There's all sorts of autobiographies out there and confessions on TV and this sort of thing of people completely out of control doing crazy things. People are in the news all the time who are both using illegal drugs and have guns. It doesn't result in prosecution. But this is someone who was already very closely under watch and as to whom there is this enormous political pressure that we've got to do this right or else there's going to be appearance we're letting the president's son skate. So I suspect that if this weren't Hunter Biden, that he wouldn't have to do anything with that charge.

They wouldn't make him even do diversion. And likely, to be frank, if it weren't Hunter Biden, they wouldn't have found the tax issues. Some incredibly minuscule percentage of Americans get investigated criminally for tax wrongdoing, and it's getting struck by lightning. And the people who are more famous are more likely to get struck by lightning. And in fact, there have been, I believe, internal guidelines at different points of time that say that in deciding who to investigate and prosecute that the person's notoriety is a factor because the deterrent factor will be bigger when you prosecute them.

Josh Barro:

But I think also the sense of unfairness that people have here ... And to take the better version of the criticisms that come from the right around Hunter Biden is to say that the business that Hunter Biden was in where he was receiving income that he was not paying tax on was a very sleazy influence pedaling business where he was going around the world finding foreign clients who wanted influence over the US government, claiming to have influence, very likely exaggerating the influence that he had over his father, but in any case, trading on his father's name to make income for himself. At least creating the impression that he could influence US public policy and that was what he was being paid for. And that is very sleazy and sometimes that sort of activity is a crime. It could be, you can have unregistered foreign agent activity, you can have bribery.

There are various ways to do that business that are illegal, but not all of them are illegal. Sometimes what you are doing is just very sleazy. And so I think a lot of the assumption of people looking at this investigation of Hunter Biden is that it wasn't

merely a tax investigation. That it was an investigation of these business practices that were themselves possibly illegal and that people were thinking there might be an indictment for matters related to that. So I mean, we don't even have a plea agreement yet, but I guess part of the question here about was this disposition an easy disposition for Hunter Biden or not, the underlying question is did he commit other crimes or is the only criminal activity here besides the gun that he didn't pay tax on the income that he made in this sleazy manner?

Ken White:

Well, it would definitely be against Department of Justice policy, if they determined that he committed some more serious crime, to resolve it by letting him plead to something else less serious. So you're supposed to plead, in theory, to the top count, the most serious crime that reasonably describes the conduct, even when it's a pre indictment plea. So yeah, it would be a gross violation of Department of Justice protocol and rules if they determined, oh yeah, he violated the law influence peddling, but let's just let him do the tax thing. But I don't see any indication that happens. The only indication is really political bluster, both in Congress and by pundits. Most of the time sleazy influence pedaling is not illegal. It's also ridiculously prevalent. You see all these spouses of politicians and judges and things like that getting pushy jobs and kids and serving on boards of directors of things and all that.

It's all about connection and influence and that type of thing. It's only illegal when it crosses into actually bribing someone in power or if it crosses to unregistered foreign agent activity or when it crosses to some sort of fraud. Like if Biden was promising stuff and not delivering and taking money, then I guess in theory, some of those foreign companies could step up and claim fraud. But that's not what has happened. And there is no party, no group of politicians that really wants a robust scheme of prosecuting influence peddling. No party's going to come well out of that.

Josh Barro:

Well, and it's hard to write laws that effectively prohibit that sort of activity without sweeping up other political activity that is part of our core political process. I mean, this has been the problem in a series of Supreme Court decisions involving politicians from both parties who will get convicted in bribery schemes often on theories of honest services fraud. And the Supreme Court basically keeps saying, no, these laws are too vague and it's too difficult to distinguish this activity from legitimate political activity. And so whatever recourse you have here, it can't be to the criminal justice system. So I

realize this is not exactly the same as the McDonald case, but it's an actually hard problem to write laws that would effectively sweep up just this sort of activity without criminalizing political activity.

Ken White:

That's right. And to your point, Josh, yes, there's this line of Supreme Court cases that you can't use the mail and wire fraud laws to prosecute corruption that doesn't involve bribery or taking money or things like that. That's not what the law is designed to do and the Supreme Court has declined to extend it. But there aren't even laws that are arguably fitting influence schemes where, hey, my dad is the president type stuff. There aren't even laws that arguably cover that and it would be difficult to draft one that does cover it.

Josh Barro:

Finally, on Hunter Biden, this diversion for the gun crime. For a couple of years, presumably he will have to stay sober during that period to meet the diversion program requirements.

Ken White:

I expect he will. It'll be interesting to see what terms they put him on. They may put him on something that is similar to probation or sometimes they have probation officers supervise diversion, and that could even mean he has something like drug tests or things like that, conceivably. We'll have to see exactly what the terms of the plea agreement are. But yeah, obviously he's not going to be able to get arrested. He's going to have to avoid issuing videos of him cavorting with crack and hookers and stuff like that. And so there are going to be some limits on him

Josh Barro:

And what will happen if he fails at that?

Ken White:

If he fails at that, then the charge stands and he can be prosecuted under it.

Josh Barro:

But that's sort of a weird outcome. What is the policy objective here? The policy objective is to get Hunter Biden to be sober, and then if you fail at that objective, then you're going to charge him with this gun crime that you almost never prosecute anybody for it. It feels like a weird use of the criminal justice system.

Ken White:

I agree. And one element we haven't talked about here, Josh, is that it is at least open to question whether this law is still constitutional under the law as now determined by the Supreme Court.

Josh Barro:

You mean the gun law.

Ken White:

Exactly. So the Supreme Court last year famously issued this decision with a new methodology for approaching whether or not laws violate the Second Amendment. And part of that was, is this restriction something that was historically understood in the United States to be part of ordered liberty and acceptable limit on gun use? And so I'm sure Ben Franklin, that guy was a snuff fiend and he had a flintlock, I'm pretty comfortable saying. So it's entirely possible that the currently constituted Supreme Court would say that this section that says you can't have a gun if you use illegal drugs or an addict is unconstitutional. So it is a little weird that they're making him even take diversion on it because they're already charging him with something. The policy idea, I think, is that you've committed a crime, there're extenuating circumstances and that you were an addict at the time, so we're going to give you an opportunity to demonstrate that we don't need to use the system's resources against you because you can behave now. But I agree with you that theory seems a little shaky when you're talking about addiction and that type of thing.

Josh Barro:

So then I assume also if there is in fact this recommendation for probation and if the judge accepts that recommendation, of course the judge could sentence him to jail, even if prosecutors have recommended probation. But supposing that he gets put on probation for the tax crimes, I assume that that will also have as a condition of probation that he will have to stay sober. And then if he were to relapse, would they then send him to jail?

Ken White:

Yes. It's likely. It's certain that the conditions will include not take any illegal drugs, not commit any crimes. It's likely that it will require him to maintain sobriety and even have occasional tests of some sort. And if he violates those terms of probation, then there would be a proceeding to revoke his probation and determine what the penalty could be. And that could be anywhere from sentencing him to some term of imprisonment to doing harsher terms of probation or anything in between. Josh, your right to call out that if it's true the government's going to recommend probation, that is only a recommendation. And actually tax misdemeanors are one place where judges do weird things. I think that they, like many citizens, have this sense of outrage when someone else isn't paying their taxes. And so it's been known for them to freak out and max people out on tax crimes. Wesley Snipes, the actor, famously went to trial on tax evasion charges. The jury acquitted him on tax evasion, basically believing he got duped by these tax protestor people and believed they're crazy theories, but convicted him of failure to file. And even though that's something that would often get a very light sentence, the judge maxed him out to three years on three misdemeanor counts. So judges will do weird things like that sometimes. So Hunter is definitely not out of the woods in terms of potential jail time.

Josh Barro:

Let's leave it there for this week. You know where to find us on the internet at siriustrouble.show. Paying subscribers can join the comments section under this episode and respond to our discussion about Hunter and Judge Aileen Cannon and everyone else. And if they'd like to write to us privately, Ken, what's an email address they could use to reach us?

Ken White:

Josh, if they would like to express sympathy for the constant state of oppression involved in the show, that would be ricohotline@siriustrouble.show.

Josh Barro:

Ken, I don't feel oppressed by you. Serious Trouble is created and produced by very Serious Media. That's me and Sarah Faye. Jennifer Swanick mixed this episode. Our theme music is by Joshua Moser. Thanks for listening and we'll be back with more soon.

Ken White:

See you next time.

Very Serious is created by me, Josh Barro, and by Sara Fay.

Jennifer Swiatek mixed this episode. Our music is by Joshua Moshier.