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Ken White:

Hi, it's Ken White.

Josh Barro:

And it's Josh Barro and this is Serious Trouble. So Ken, we're recording this episode on the morning of Wednesday, August 6th, and there's news reporting including from ABC News that there's going to be a big meeting this evening on Wednesday that Vice President Vance is going to sit down with Pam Bondi and Todd Blanche and Kash Patel, and they're going to hash out what they can do about this whole Jeffrey Epstein situation. And I guess one of the things they're talking about doing is they might release a transcript of the interview that Todd Blanche just did with Ghislaine Maxwell, but this has been the pickle for the administration. They hopped up all of this demand for the big Epstein secrets they were going to put out, and then Pam Bondi put out this statement about, actually there's nothing to see here and the file's just a bunch of child pornography and how dare you ask us to release that. And so that was unsatisfactory and they're going out and figuring out what they can hand out here, but they have various problems including that there are legal restrictions on some of this information, what they actually can share with the public.

Ken White:

Yeah, this is a problem of just sort of relentlessly lying and trash talking, is that sooner or later it all catches up with you and you have to come up with something consistent. So we've heard them talk about releasing a few different things. So let's talk about the first one, which is the grand jury transcripts. We're talking here about grand jury transcripts of the indictment of Jeffrey Epstein in 2019, I believe, and Maxwell in 2020. And one interesting thing we found out is that both of those indictments were single witness indictments. In other words, it was just the lead federal case agent in both cases testifying to the grand jury. Now that's not unprecedented and probably 75% of federal indictments are done just by the lead federal case agent coming in and summarizing the evidence because you can use hearsay to get an indictment in federal

court and that way you don't make the witnesses have to come in, you don't make them have multiple statements they can be impeached with.

It's much logistically easier. So that for the vast majority as simple run of the mill cases, that's what happens. But in complex historical, controversial investigations, investigations with witnesses who may be a little unreliable or twitchy, anything where you're really having to compel people to participate there, it's much more usual to use a so-called investigatory grand jury and bring multiple witnesses before them. And evidence the purpose of that is to lock people into testimony. If they might go sideways later, it's to compel them to give a statement when they're not willing to talk to you because you can compel them before the grand jury. So to have these particular cases of this level of complexity and historical difficulty and this number of different witnesses who may not be cooperative, it's a little surprising to see that they did both of them just by having an agent come in and summarize.

Josh Barro:

So who were the uncooperative witnesses here? I mean, you had a number of accusers of Jeffrey Epstein who seemed to want him prosecuted.

Ken White:

It might be friends, allies, employees. Maxwell herself might've been an uncooperative person connection with the Epstein indictment. Obviously she was with respect to her own indictment, they could have compelled her to take the fifth in effect by calling her to the grand jury. It could be any number of people who might have been present for any of the wrongdoing. The possibilities are endless. And also when you've got investigations like this close to people with wealth and power, it's common for people not to want to get involved.

Josh Barro:

So what do you make of the fact that they proceeded with these single witness indictments? And I'd note the Maxwell investigation concluded with a conviction,

Ken White:

Right?

Josh Barro:

So clearly whatever they did there worked. Epstein of course is dead.

Ken White:

It reflects an interest in getting it done quickly and conclusively rather than doing a slower, more methodical investigation that locks in testimony. And that's probably a calculated risk. There are pros and cons to the approach. One of the cons is that you can't compel people to testify in advance. So you don't know for sure what they'll say if they're not willing to talk to you. And one of the pros is then you don't have their prior testimony locked in with a grand jury transcript that can be cross examined with. But I would normally expect to see the grand jury used more extensively in cases of this nature.

Josh Barro:

So Ghislaine Maxwell was indicted in July of 2020. Is it possible at all? I mean, were the grand jury procedures irregular at the peak of the COVID pandemic and more difficult to bring people in for testimony?

Ken White:

Possibly, but that's not something that would have deterred them. They found ways around that and they did some by video, they got special permission to do that, all sorts of stuff like that. It's more likely it was a strategic choice about, I think in part they felt a lot of pressure to get indictments here with the sense that the government had dropped the ball or even collaborated in what Epstein was doing.

Josh Barro:

One other thing that we've learned is that most of the grand jury testimony, which I guess again is this sort of summary from the lead investigator, most of it's already been revealed previously in various legal filings. And I note the reason that we're talking about the grand jury testimony here is that the president clearly is reluctant to release the broader body of material from the investigation. And I would note ordinarily the government doesn't just go and dump all of the investigative material that was not

introduced at trial. There's reasons you don't do that. And there can be derogatory information about people who were never charged, who didn't necessarily commit any crimes, and he has concerns that he might be one of those people. And this book that the Wall Street Journal has reported on, there's probably this letter from the president that's kind of creepy about Jeffrey Epstein, but that's not directly evidence of a crime. The president hasn't been accused of a specific crime. So one thing for him is that if you go release these grand jury transcripts that are just this testimony from this investigator, it probably doesn't say anything about Donald Trump. And now I guess we're learning that it may not say very much at all that we don't already know,

Ken White:

But I think the point is that it's very unusual to be seeking to release it. Normally grand jury proceedings stay secret even if all of the same evidence winds up getting presented at trial. And so the grand jury transcripts, nobody sees them other than the prosecutor unless you go to trial. And then the prosecutor has to reveal to the defense the transcripts of witnesses who testify so that they can cross examine them. So this is very unusual and that's one reason the judges here have so far declined these requests because the government really hasn't presented a sound legal basis to depart from the norm. But that's not the only type of information they're currently talking about possibly releasing Josh.

Josh Barro:

So this idea that they could release this transcript of this just conducted interview with Ghislaine Maxwell, I mean isn't the punitive point of this interview to open up new investigative channels, try to figure out are there Epstein co-conspirators who were never charged, never properly investigated? It seems like if you want to conduct that investigation, the last thing you should do is release the interview transcript because that's important information that you want to withhold from the people that you might be investigating.

Ken White:

Absolutely. So there are a few very outside the norm things happening here. The first, frankly is for the interview to be recorded at all. So if they recorded this interview with Maxwell, that is different than the way the FBI and other associated federal agencies regularly do things. And that's something defense lawyers often complain about

because what you get is a report with the summary of what the person said that you believe may not be 100% accurate and also may lose a lot of nuance. So you lose the ability to cross examine people.

Josh Barro:

Wait, so not only did they not record it, they don't even transcribe it. Correct. That's crazy. Yeah. I mean we have an auto-generated transcript of this podcast. Is it a cost thing that they don't transcribe it or it's that they are intentionally being cagey and withholding information?

Ken White:

Well, defense lawyers would say it's the latter, Josh, but I do think a lot of it is like tradition and this is the way we've always done it. Now to be fair, a lot of federal agencies have moved towards audio recording or otherwise transcribing, but it is still in my experience, not the norm to do that. And so it's unusual particularly with a cooperator because if you are the government, you don't want your cooperating witness to have a lot of prior statements and detail out there because inevitably the witness changes a little bit every time they tell the story and that's ripe for cross-examination. But here they're talking about releasing all the transcripts or the recording of these two days of interviews, which like you said, that just blows it open. All these people who are mentioned now know they might be a target. The means and methods the feds are using, you gather things from what question they're asking to determine what they already know. It's not as explicitly black letter law illegal as releasing grand jury transcripts, but it is strongly against Department of Justice. General policy of the result of an investigation should not be gratuitously released. There's no procedure or precedent for doing this type of thing. Hey, we think everyone's super excited about this case. So let's give you the recordings of this witness being interviewed.

That is very weird and it seems only consistent with the goal of let's satisfy the president's base that's upset about Epstein and let's divert attention from the president since Maxwell's lawyers have said that she didn't have anything to say about Trump's involvement in Epstein's activity.

Josh Barro:

And then meanwhile they've moved her to some sort of minimum security prison camp. Is this like a club fed kind of thing?

Ken White:

It's not the absolute lowest type of camp, which basically you can literally walk out of if you feel like it, but it is very lightly restricted. And this looks like the camp you send your wayward kid to if they're fuckups, it does not seem much like a federal prison, although it very much is. And this is a huge, huge, huge benefit to her. It's hard to exaggerate how horrible prisons are versus camps. It's also a big violation of DOJ regulations. So they had to give a waiver to do this because sex offenders and she is a convicted sex offender are not eligible to be in that camp. And so they had to do a waiver of that rule to put her there. And that's been a big scandal. Although now Bureau of Prisons is suggesting without right saying that it is because she's gotten death threats and threats as a result of perhaps a publicity about all this or perhaps the crime of which he was convicted.

Josh Barro:

I mean, aren't a lot of people in danger for various reasons in prison also? I mean, and I can come up with reasons why Ghislaine Maxwell might be a particularly great danger and there's all sorts of theories out there about a lot of people think Epstein didn't kill himself, even though I think he killed himself. I realized there's been more news around her in the last couple of weeks, but it strikes me as particularly implausible that there's a security need for her to be moved to this sort of facility that did not exist a month ago.

Ken White:

That's exactly right. I think that it's very implausible that there's this new pressing security threat. It's very implausible that this is routine, that they were this responsive to a security threat because they simply are not responsive to security threats. You can have clients who are with a cellmate who's threatening to kill them and it might take years to get them moved. The other implausible thing is that it kind of counterintuitive, but you might be more at risk going to a lower security prison. You're with people who are less likely to be violent based on their background, but you're also more gettable. There aren't security measures. You can't be put into sort of administrative segregation. Other people can't be. So there's a lot more freedom of movement which can translate into more danger potentially to you. So the Bureau of Prisons and the administration's whole, oh no, that wasn't a special favor, frankly is not credible.

Josh Barro:

One thing that's interesting to me here is the administration is clearly doing this nice thing for Maxwell here, and Maxwell has sat for this interview and maybe we'll soon find out what it is that she said in the interview, but she's not being fully cooperative with the administration's efforts right now. She's trying to block the release of those grand jury transcripts that might even not have that much additional information. And I guess that's for the ordinary reasons that any defendant might have an interest in keeping the grand jury materials secret. They were never introduced to trial. It might be more derogatory information about her. And then she's also still trying to get her conviction overturned.

Ken White:

So there's three things. First of all, she has a set of demands that she wants before she'll testify before Congress and the administration would love her to go before Congress and spew stuff about Democrats. She's not willing to do that unless she gets immunity and various other considerations. And so

Josh Barro:

Far Congress looks reluctant to give immunity to her

Ken White:

Right so far because of the appearance that you're basically helping a pedophile, which outside of elections we don't do in America. So we also see her resisting the release of the grand jury stuff in part because it's another few news cycles of the terrible things about her also possibly because she might think there's some sort of scenario where she gets a retrial, which seems to be unlikely. And then there's the Supreme Court, she's petitioned for her conviction was affirmed on appeal, but she's petitioned the Supreme Court for review and said that there is a split among the circuits, the federal courts of appeal about the subject of her appeal. And Josh, this actually goes to an issue we did an episode on in 2019, which is the completely bizarre plea agreement that Jeffrey Epstein got in 2007 or so where the government agreed that you're going to plead to these rinky-dink reduced Florida charges and we're not going to prosecute you federally.

And there was a truly bizarre clause in there about how we're not going to go after your co-conspirators. So the issue before the Supreme Court potentially would be did that

only bind the office that extended the offer the Southern District of Florida or did it also bind every US attorney's office in the United States? So that's kind of the issue. And it would be normally this type of thing would be a very frivolous thing. But the problem for the government here is this is a non-standard, bizarrely written, deeply suspicious plea agreement that the administration handed to Jeffrey

Josh Barro:

Epstein. And so it's that the agreement normally says this office won't prosecute you, but it says the United States won't prosecute you.

Ken White:

Right? So there's conflicting language, the agreement in one place. It says this agreement binds the US attorney's office of the Southern District of Florida, but in another place it says the United States will not prosecute you. So there are kind of conflicts in language and that's something on which the circuits have conflicted somewhat about the meaning of guarantees not to prosecute. And so it is not out of the possibility the Supreme Court will take the case. I do think that the Supreme Court would not approach this in a purely partisan, how can we help Trump type of way?

Josh Barro:

Well, I'm not sure which ruling helps Trump. No, I don't think it is either. I mean, if you let Maxwell out of prison, then she has no reason to cooperate with him anymore.

Ken White:

And if you overturn her conviction where the evidence was very strong that she aided and abetted and participated in child molestation, that's a very bad appearance and causes a lot of controversy.

Josh Barro:

As you note, there's a circuit split on this issue. Normally when you have a question like this, wouldn't the Supreme Court rather take it up in a less politically charged case

where they can resolve the legal issue about what office can bind the government in what way? Without people associating everything they do with Jeffrey Epstein?

Ken White:

They would, but more than that, I think they would rather take it in a case it's more of a horse rather than a zebra because you've got one where the plea agreement is not like any other plea agreement's ever going to come before them because it is bizarre, bizarrely drafted. And the Supreme Court stance is sort of like we resolve questions of law, but we're not like the automatic last appeal for people. And so if a case really is not going to be applicable in other cases, then that's not necessarily the one we take.

Josh Barro:

Speaking of blasts from the past, I want to talk about Jack Berkman and Jacob Wool. Jacob Wool, still no big boy federal felony, but he's pleading no contest to state felonies this time in Michigan. He and Jack Berkman placed these robocalls that were some effort to convince people that you vote by speaking your desire into a trash can or something. They're pleading guilty and so are they going to go to jail in Michigan?

Ken White:

I don't know. So actually I asked that question to a bunch of Michigan practitioners and I'm waiting for reliable answers. I can tell you what a bunch of engineers think. Josh, here's the thing. First of all, Jacob Wall, I'm stunned by how long we've been talking about this idiot. Is

Josh Barro:

He like 35 years old now?

Ken White:

We've been talking about his hi jinks for many years.

Josh Barro:

He's 27 actually.

Ken White:

Okay, well he's no longer a kid. This particular conviction here arises from Michigan. So Ohio and Michigan both charged him and Jack Bergman in connection with robo robocall in Michigan. The robocall was directed at voters and discouraging them from voting by mail saying things like they'll use that to track down if you have warrants pending, and you'll get on a list for mandatory vaccinations because this is right in the middle of COVID and it'll be handed to credit card companies to track down collections cases and stuff like that. So they have pled no contest to Michigan felonies of intimidating voters conspiracy to violate election law using a computer to violate election law and using a computer for conspiracy. And I articulate those four just to point out how easily prosecutors can turn one thing into four different crimes. And so all these have a substantial maximum penalty, but it's not yet clear to me what the probable penalty is. So I'm hoping that one of our listeners who is a criminal attorney in Michigan may be able to give us some guidance on that because I would like an actual local practitioner's view of what they're likely actually facing.

Josh Barro:

Ken, if people have updates on that for us, what email address can they contact us at?

Ken White:

RICO hotline at Sirius Trouble Show.

Josh Barro:

Yes, that's right. RICO hotline at Sirius Trouble show. Let us know what's going to befall. Jack Berkman and Jacob wo in Michigan,

Ken White:

Right? In Ohio, notably they got community service. And in New York where there was I think an attorney general action or private attorney general action, they got a big fine that they'll never pay.

Josh Barro:

We have a number of news stories out of California this week. I actually want to start with one that we sort of held over from last week. It's been an ongoing development where there's been all this turmoil in Los Angeles, maybe less turmoil than it sometimes looks like in the national press and the way the administration frames it. But there's been these ice enforcement efforts in Los Angeles and protests against and arrests related to those protests, and there've been news reports that a number of the people who have been arrested related to this anti-ice activity in Southern California, they go before a grand jury and the grand jury has been returning no bill, which is to say the grand jury has been refusing to indict the people that the Trump administration wants indicted. And that is extremely unusual. The saying is that a grand jury will indict a ham sandwich, but it seems they're passing up on some of these ham sandwiches.

Ken White:

It's true. So the information that's been getting out from leaks from the US Attorney's office is that a number of cases have been no billed by the grand juries there. And to give you an idea of how unusual that is in the approximately six years I was at that office, I only saw one no bill case, but that was also ironically in a alleged assault on an INS agent, the predecessor to ice. So that was a case where basically INS swooped into somebody's house to pick them up. The mom was very upset and opened a gate that let a dog out. They shot the dog and then charged the mom with assault on an officer. They didn't bill her for the bullet, but they did the full Soviet of charging her for trying to attack the agents. And the grand jury was, no, that's bullshit.

Josh Barro:

Okay,

Ken White:

So similarly, these are cases involving alleged assaults on ice agents during these protests and the grand jury is probably seeing that they are overcharged and are unconvinced by it. We also saw there was a story in the Guardian that reviewed a bunch of cases and said that basically the story that went into the criminal complaint, in other words, the affidavit from the case agent making claims about what happened that

resulted in a magistrate signing a complaint did not match the eventual video or other evidence of what actually happened at the scene and that they had to back away from that. So this is the type of thing that can happen if you've got a very strong ideological policy-based push to prosecute certain types of cases, high priority and the facts don't really match. So it is surprising because the grand juries don't do that often, but for the grand jury to be doing this, the cases have to be bullshit or offensive on the level of that shooting of the dog and then charging the mom. Because otherwise if you've got a grand jury that's kind of rogue, you just move to a different grand jury. They usually have four of them going at the same time. So this is very indicative that the current US attorney who is a sort of cartoonishly pro-Trump zealot is pushing for things and the facts just aren't delivering.

Josh Barro:

We talked earlier about the Maxwell and Epstein cases with the single witness indictments is the way that it would work in a case like this, you have some investigator or is it an ice agent directly who comes before, but then they also have to present video and other documentary evidence on top of their own summary of what happened?

Ken White:

They don't. So here's the way a grand jury appearance in one of these run of the mill assault on an officer cases would happen. The prosecutor walks into the grand jury, they say, we're presenting you with an indictment. They read the indictment, they read the statute, they read the elements of the statute. So that whole thing there takes three to five minutes depending on how long the indictment is. They say, agent Smith, what do you know about this agent Smith summarizes can be quite brief. And then does any member of the grand jury have questions? And if not, so we'll let you vote. They walk out and you step away from the door. So when the grand jury slams it open again, you don't get hit by it some 30 seconds to five minutes later. And whether or not you show video or stuff depends on your judgment as a prosecutor of whether it's necessary to persuade the grand jury about it.

So it could be that they didn't present it and the grand jury was unconvinced. It was too vague. It could be they did and they don't agree that it shows what they say. It shows one thing about federal prosecutors, and I want a trial over this, is that they look at the same video of the same event and they see something very differently than a citizen does. So they and federal agents will look at it, look how that maniac is attacking the officer's nightstick with his groin is kind of the attitude. And normal people will look at it

and say, that's bullshit. He's not assaulting the officer, the officer's assaulting him. So it could be something like that

Josh Barro:

Because we've talked a fair amount about the way that the presumption of regularity is declining in courtrooms for the federal government. A lot of judges are saying, well, our usual practice where if the government comes in and says something, we assume that they're telling the truth about it. I feel I've been lied to, other judges have been lied to. I can't give that presumption anymore. In theory, you could also see changes in the way grand juries think about that. But in general, grand juries, it's it's not a set of professionals and it's generally quite lyt. I'm wondering about how that goes and whether it's do grand juries, I assume sometimes they come back and say, I'd like to see more evidence before issuing that indictment. Is it possible that the grand jury here is asking for some of this evidence and then finding that it's wanting or that the government is unwilling to provide it?

Ken White:

Yes, that doesn't happen particularly in front of accusatory grand juries very often. So usually in most big districts that are processing a lot of cases, you've got a couple of grand juries that are accusatory, like maybe you've got one that sits on Tuesday and one on Thursday, and that's the one you throw all the bank robberies and drug deals and persons returning to the US after being deported and all those sort of quick reactive cases and you indict of them in a day. And then you've got investigatory grand juries sitting two other days of the week. And those are the ones you put on the slow burn, multiple witness cases that last for months or years. So an accusatory grand jury in Los Angeles, they would see in offices big push to charge a bunch of people with assaulting federal agents arising out of protest. So if this accusatory grand jury sitting on Fridays like this week, shit, we got five of these and the next week we got eight, and wait a second, let's slow down here and see what are these really assaults? I'm starting to have questions about this.

Josh Barro:

Well, and they're seeing it in the news too, presumably

Ken White:

Exactly, they're seeing it in the news. But most grand juries would not start to question the presumption that grand jury presumption of regularity because they wouldn't get the same types of cases regularly enough to start doing that. But if you got one like this where there's a big push by the office, then they would absolutely see what was happening and they might start to have opinions.

Josh Barro:

Meanwhile, there's that case where there was a temporary restraining order issued telling ice more or less, you can't go pick people up because they're brown or they're speaking Spanish or that sort of thing. You need a better reason to have a presumption that someone might be in the United States illegally that got appealed. And that TRO has been mostly upheld by a three judge panel of the Ninth Circuit Court of Appeals,

Ken White:

Right? So a three judge panel issued a procuring opinion, so not attributed to any one of them, and it's very detailed, which is somewhat unusual for these recently refusing the government's request for a stay. And remember, this is an injunction only applies here in the central district of California. It only really applies to these particular big anti-immigrant sweep operations. And it just says that you cannot detain and question people based solely on their ethnicity speaking Spanish, where they're congregated or what work they're doing or a combination of those. So basically you can't sweep in and detain and question everyone standing outside Home Depot who speaks Spanish, which is what the government is doing to this day, even after the TRO and the government says, we should be able to do this and they shouldn't have given this relief and they're not really suffering harm if we just briefly detain them and all this type of thing. And the ninth circuits having none of it, and they delete one small part from the TRO that ironically makes it stronger. The TRO had us that you can't do this except as permitted by law. And the ninth Circuit says, yeah, that's vague. Let's just strike that out. So now it says you can't do it at all. And they say that this is not some sort of broad and nationwide injunction. This is only an injunction that applies to these particular sweeps here in Los Angeles.

Josh Barro:

Well, sorry, in the central district. So that's Orange County and Santa Barbara and Palm Springs, et cetera.

Ken White:

It's mostly been in Los Angeles, but yes,

Josh Barro:

It's the most populous judicial district in the country. 19 million people live there.

Ken White:

Yeah, it's huge. And there've been long been talks about breaking it up and they double down on the concept that any of these factors could be factors that are part of a reasonable suspicion evaluation of a reason to stop somebody. But they are not by themselves enough. And because the court emphasizes this, the core of the right to stop and detain someone for questioning is that you have a particularized basis to suspect them in particular. And this is too close to saying we have a basis to suspect all Spanish speakers or all day laborers or everyone outside Home Depot, and that's not a particularized determination. So realistically, it's very easy for the feds to get around this. And what they're doing is probably right to this day. In fact this morning there was a report of them rolling up in a rented truck and jumping out the back and swarming home people at Home Depot is that they swarm out of the truck in full battle gear. And if anyone runs, then that's the additional factor that causes reasonable suspicion, something like that. Or they say they look shifty or they wouldn't meet my eyes, or the cops can always come up with some additional bullshit that will justify detention.

Josh Barro:

And then the third big piece of news out of Los Angeles is that Gilbert Arenas has been indicted.

Ken White:

Yes,

Josh Barro:

Along with a variety of other pretty shady sounding figures over an illegal poker game. Is this something that the feds usually spend a lot of time on illegal

Ken White:

Poker operations? So a couple of things happening here. The feds spend plenty of time on illegal gambling. Normally they would devote resources to gambling on a much bigger scale. And not to pretend a poker casino in a house in Encino, but a couple of things happen here. There's the prominence of one of the people, Hey, we get to go after a former NBA player. We invested resources, so now we've got to play it out even if it winds up being fairly small time, which is a thing. So a lot of cases are just, we're investigating this area of law breaking. We found one, it's kind of small, but now we've got a hundred hours into it. Let's do it. And then I strongly suspect there's the asshole factor, which is that if people act like assholes during the investigative process, they're more likely to take it all the way to a federal indictment. And by that, here's what I mean. So they had this house Encino, which is sort of the ER of the valley girl and valley movement. It's the ultimate valley city.

Josh Barro:

I ran your characterization of that by a friend of mine who's from Woodland Hills, and he agrees that Encino is more upscale than the average part of the valley, but the popular conception of the Valley is also more upscale than the average part of the valley. And Encino really does sort of fit that bill.

Ken White:

Exactly. Hence Brendan Frazier's Encino man as the ER text. But anyway, apparently Arenas had this house in Encino and he was using it to have these relatively high stakes poker events where there would be high rollers for a house party in Encino coming up. And they had security, they had professional dealers, they had chip runners, they had women described as women to provide massages and companionship. They had drinks.

Josh Barro:

They were also specifically playing pot limit Omaha, which is a relatively complicated game that has made my head hurt the only couple of times I've tried to play it. So that was interesting to me.

Ken White:

And he complained that people were showing up too drunk to play it right, which is very much a thing. I would not say that this operation was characterized by top opsec. So he had a poker table made that says Arena's Poker Club, which I would not recommend doing. There were a lot of discussions by text in detail about what they were doing. And then eventually, this is my favorite part when I scream at clients, once the place was rated, he filed an official petition saying he should get the money back that was seized there because he didn't have anything to do with the poker playing. Notwithstanding, there's a table that says

Josh Barro:

Arenas Poker club.

Ken White:

Arenas Poker club, which is because, so he gets charged, by the way, with lying to the federal government for that, which of course he did. What are you thinking? What possesses you when you're running an illegal gambling operation to file an objection with the government saying, give me my money back. I didn't know. Oh my God. Anyway, he was basically begging to be charged, and that's why something on this scale gets charged.

Josh Barro:

They also charged two of the other co-conspirators with marriage fraud saying that one of them who's not a US citizen entered into a sham marriage with another one of the co-conspirators in order to be able to live in the United States

Ken White:

And that there were lies in her application. And this is very much a sort of, eh, this is kind of small scale. How can we spice it up? Oh, we got some marriage fraud. Oh yeah, ICE will love that. We'll get their buy in. Let's do that. Do you have anything agriculture related here? Department bags been on my ass. So whatever they can throw in, they throw in.

Josh Barro:

So we have updates on a number of pet peeves that are bothering the president and that he's trying to get the DOJ to assist him with. Now the first is Judge James Boberg, a federal judge in DC who issued some particularly unfavorable rulings to the administration related to those removals to El Salvador. They say he made some inappropriate comments about the administration at a US Judicial Conference event, and they want an investigation. They want to reassign cases away from him. Is that a thing that works? If you're a judge and you say something to people that the government doesn't like, can they get you punished and get cases taken away from you for it?

Ken White:

No. So this is part of a proud line of whiny complaints about federal judges that probably won't go anywhere, and they come from both sides. Remember when we had Eileen Cannon doing ridiculous things for Trump? In those cases we had everyone, oh, well, I'm going to petition a complaint against her and she'll be removed from the bench. It's like, no, she won't. So this is an exceptionally whiny complaint and most evaluations of it are that it's very thin. So Steve Vick at One first tore apart saying basically it appears to be sourced by anonymous people who read The Federalist characterizing what happened. And they mischaracterized it because of what it seems happened is that Bosberg was just bringing to the attention of the judges' complaints he's getting from his colleagues, which is what you're supposed to do at these conferences. And that it's completely mischaracterized what he said. But it just goes to show this ongoing battle between the administration and the judiciary and administration desperate to characterize the judiciary as biased and against it and having to be restrained. And that's particularly true of Boberg because remember, he's the one he was digging into, whether the government was lying to him and deliberately violating his orders by shipping people out of the country.

Josh Barro:

And then meanwhile, there's litigation in Florida down in Miami. The president has sued the Wall Street Journal and Rupert Murdoch and reporters at the Wall Street Journal saying that that story about the book with the naked lady picture with the Trump's signature is her pubic hair. And the poem about Jeffrey Epstein, that that was all a lie. And the journal knew it was a lie and they defamed him. And one of the things they were trying to do, they filed this lawsuit and then they filed a motion basically saying, Rupert Murdoch's really old and we have no idea when he might die, so please make him sit for a deposition like tomorrow so we can get him on the record before he dies. Which that's usually not a thing the court will do.

Ken White:

First of all, it's very rare and it was clearly sort of intended as a huge power

Josh Barro:

Move,

Ken White:

Like I'm going to put all this pressure, but it wasn't very well done. It is not a thing that's done often. It's usually called a provisional deposition or if you're a pretentious taut the way this lawyer is a de deposition. And the thing is that immediately after they did it, they entered into agreement with the defendants. Okay, we won't do that. So I mean, you can't do a power move like that. You got to carry through with it. I think they saw they'd probably lose, and so they backed off of it. So now they're going to wait for the inevitable motion to dismiss. That's coming from the Wall Street Journal. That's likely, I think, to succeed. But again, this is sort of chest beating and SR rattling in that case. Anyway, so I think that's the way it should be consumed.

Josh Barro:

And then finally this week, there's also this new DOJ investigation. They're saying, Hey, well, the Obama administration, when they investigated Trump and Russia and there was all of this stuff about Trump, and was he aligned with Russia, that they committed various crimes in the course of that investigation and they want, I don't know, to try James Comey or whoever. And so they're saying they're doing an investigation. I think the thing we're trying to figure out is, is this a real investigation in the sense of they're

actually working toward maybe trying to come up with something to indict someone for? Or is this just a way to say, here we are addressing the president's grievances?

Ken White:

Well, I think it's too early to say for sure. So I think there's a large part of performative grievance addressing going on here. The timing is suspect. It's clearly intended to distract from the whole Epstein affair. The sourcing is very dubious. It became very clear after Tulsi Gabbard demanded an investigation that she was misrepresenting the Intel documents that she's talking about, and possibly even relying explicitly on Russian manufacture documents to make her point,

Josh Barro:

Right? There are these purported emails with the Clinton campaign allegedly trying to manufacture this Russia scandal. And John Durham had looked into that and the Durham, his investigators had concluded that those documents were fake.

Ken White:

So it's something that's already been repeatedly investigated. It's something that is well outside the statute of limitations, although there's always tricks to deal with that if you want to.

Josh Barro:

Well, are there always tricks though? I mean, that's one thing I've been wondering, stuff that happened nine years ago, the past statute of limitations, you'd have some claim of an ongoing conspiracy. Is that something you can always put together?

Ken White:

Well, you can always, I think, put together a theory that will let you go indict, not that it's going to survive.

Josh Barro:

Okay.

Ken White:

So what I would expect them to try to do is say, actually it's an ongoing conspiracy, and here are overt acts that continued to happen into just recently even into the 2024 election, something like that.

Josh Barro:

How close would you have to get? Would it have to be within one year of now, five years of now?

Ken White:

Well, the statute of limitations for most federal crimes is five years. And what you would have to do is drag the last overt act in support of the conspiracy into that time window. So that's not super hard if you're willing to trade in complete bullshit and say there's this vast conspiracy to undermine Trump. And it continued until within the last five years. Well, that's the thing. It's not clear what the conspiracy is to do or what federal laws were violated because like the President says it's treason. Well, it's not treason, obviously, because treason is defined in the Constitution narrowly as going to war against the country or giving aid and comfort to an enemy at war of the country. But what they might do is just as Jack Smith charged Trump with this sort of conspiracy to submit fake things to the Senate in connection with the election, they may come up with some theory. They intended to get this false information to various government agencies and to pervert the course of justice and something like that. I mean, again, what we keep saying is that the federal criminal laws are incredibly flexible, incredibly diverse, and the thing that stops the feds from charging almost anyone they want to with something are largely political and norm based. And if those politics and norms disappear, then it's an incredibly strong weapon to go against your political

Josh Barro:

Enemy. Well, and it's also in most cases, the DOJ doesn't want to bring indictments that it won't be able to win a conviction on. But if your objective is to drag people through the process, then maybe you don't care about that.

Ken White:

And also maybe they don't care about actually getting indictments. They just want to say that former President Obama is under federal grand jury investigation for crimes. I think the bottom line, Josh, is this, we don't know what they're going to use it for. I don't know that they yet know what they're going to use it for. I suspect they're going to keep it in reserve to use it however they think it's mandatory to use it. And if they are willing enough, the federal criminal law is flexible enough to do a great deal of harm to a lot of political enemies, even if it doesn't result in an ultimate conviction or even an indictment.

Josh Barro:

We were talking before the show and your take on this was that this was likely, mostly performative.

Ken White:

Right?

Josh Barro:

And so I guess what do you mean by performative? Is it performance is just announcing that there's the investigation? Is the performance hauling these people before a grand jury? Is the performance trying to obtain an indictment that will then ultimately have to be dismissed? What does that look like?

Ken White:

That depends, I think, on what they need to do to be performative enough to get the results they want. So level one is just announcing it. Level two is grand jury activity that calls in not the ultimate targets, but witnesses and people like that. So say, look at this grand jury activity investigating Barack Obama or whoever else. And stage three is subpoenas to banks and that type of thing. And then you've got eventual indictments that are unlikely ultimately to prevail. So I think the whole thing is performative in the sense that I don't think they even think they're going to get convictions. I just don't know they know yet how far they're willing to push the performance.

Josh Barro:

I think we can leave it there. Ken, thank you for speaking with me as always.

Ken White:

Thank you, Josh.

Josh Barro:

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.