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Ken White:

Hi, it's Ken White.

Josh Barro:

And it's Josh Barro and this is Serious Trouble.

So we are taping on Wednesday this week. There was a big appellate hearing about the DC federal criminal case against Donald Trump on Tuesday, and we're recording ahead of what's happening on Thursday, which are the closing arguments in the New York civil case. So we'll have updates for you on those closing arguments on our next episode, including a discussion of the personally delivered closing statement from Donald Trump, which was proposed, but alas was not to be. But this week, Ken, why don't we start with what happened on Tuesday in those arguments before the panel of appellate judges in Washington, DC?

Donald Trump says that he is immune from prosecution over acts committed within the outer perimeter of his service as President of the United States, that he can't be put on criminal trial for any of the allegations related to the aftermath of the election that lead up to January 6th, or at least that he can't be because he was never impeached and convicted on that. Their argument is that the Congress would have to act first, they didn't, and therefore he's immune from prosecution. And so this argument was heard on a very expedited basis before three judges who were members of the DC Circuit Court of Appeals. How did that argument go?

Ken White:

Well, Josh, as a rule of thumb, if the judge questioning you brings up a hypothetical involving SEAL Team Six in an incredulous tone of voice, that's a good sign it's not going well for you. No one expected this to go well because hardly anyone takes Trump's immunities theory seriously, and the DC Circuit is generally not favorable to Trump. And the panel is, as one of my conservative colleagues said in a tone of complete disgust, two Biden appointees and a George Herbert Walker Bush appointee. Horrors. Anyway, it went badly for Trump. There was very little interest or sympathy for

Trump's frankly silly theories of immunity. And one of the highlights was one of the judges saying, "So are you saying that the president of the United States could call out SEAL Team Six and order them to assassinate the person running against him and he would be immune for prosecution for that unless he was impeached first?" And more or less Trump's lawyer had to say, "Yes, that is what he was saying."

So Trump's lawyers were sort of envisioning the impeachment process as a prerequisite to any post presidency prosecutions. The judges did not seem impressed by that. The closest they got to getting any sympathy was the most conservative judge saying, "Well, I can see how there would be this problem with president's frequently getting prosecuted and how that would be an issue, but I can't see how you can say that a president's taken an oath to uphold the law could be completely above it." And that was very much the spirit of the panel. But that wasn't the only problem for Trump during this argument.

Josh Barro:

Right. There's some fun procedural stuff here, which I'm especially excited for.

Ken White:

Yeah, I thought you would be. So there's the question of whether or not this court even has jurisdiction to hear this argument right now. So remember that in general, you can't appeal something directly until you have a final judgment. That's the regular rule. There is an exception in cases where you allegedly have a right, not just a win, but a right not to be tried in the first place, not to have to go to trial. This is most usually invoked on behalf of cops with qualified immunity arguments who get multiple bites of the apple, multiple intermediate appeals. There's an argument here that this is improperly applied to this situation to a claim of presidential immunity. That's a live argument. So one way the court could go is just saying, "We find that actually you don't get to immediately appeal an argument to presidential immunity. You have to wait until the end of the case." So that would be kind of the way to dodge having to make any momentous pronouncements about presidential immunity.

Josh Barro:

Well, I mean in our notes, you call that the chicken way out here. But I mean conceivably, is that the correct way out? I mean they talk about this case *Midland Asphalt*, which is a unanimous decision from the '80s that basically said there has to be

an explicit statutory or constitutional guarantee that you won't be tried in order for you to have this ability to appeal immediately to get your right not to have a trial and they're saying, "Well, there's no explicit guarantee."

Ken White:

That's true. In fact, the whole concept of presidential immunity is invented by judges and there's no explicit provision for it at all, let alone an explicit provision that you have a right not to be tried. If you have presidential immunity. *Midland Asphalt*, yes, the court and the Supreme Court could go along with that way. They seem to have moved away from that in other areas, noting for instance, in the case of qualified immunity, this doctrine that says that government officials can't be held liable for violating your constitutional rights unless they were clearly established at the time. There's no constitutional provision for that, and yet they give them an immediate appeal. So it's not clear whether or not *Midland Asphalt* is good law to that extent.

Josh Barro:

So that's interesting, because if the court went for this, and it was Judge Childs, one of the judges on the panel, requested briefing on this, but both of the parties, they actually agree on this issue. They say, "No, this is ripe. You should rule on it now. It does not need to wait until after trial." If they went for that argument, could that conceivably make the Supreme Court more interested in looking at this case than they otherwise would be? Because as you described there, could that endanger the doctrine of qualified immunity or at least the way that the doctrine of qualified immunity is operated? If the Appeals Court had said that there's no right to an interlocutory appeal here because there's no explicit statutory or constitutional guarantee, would the Supreme Court want to take that up in order to protect the existing way that the doctrine of qualified immunity works?

Ken White:

Josh, the answer is I think in general the Supreme Court would be more likely just to let the decision pass the less new law or the fewer big pronouncements it makes. So if it just said that and relied on existing law, I think it's less likely the court would take it. The issues here are momentous enough that it might still, but I think if it doesn't get to the substance of presidential immunity, I think it's less likely. Although they may actually

have feelings about interlocutory appeals and want to clarify that because as you pointed out, and as I said, it has connections to other areas of law.

Josh Barro:

And then let's talk about the other argument about why they could say no to Trump here, which is judicial estoppel. Can you explain what that is?

Ken White:

Sure. Judicial estoppel is the term for bringing up old shit. Basically, judicial estoppel is saying, "You can't make this argument now because you made the opposite argument in an earlier case." So judicial estoppel is the concept that a court has the discretion but not the absolute obligation to refuse to let a party make an argument that contradicts an argument already made in that case or a prior case.

So here, the argument is that during Trump's impeachment proceedings, his lawyers, and I think it was Alan Dershowitz who said this, who said that, "One of the reasons you don't have to impeach him for this, you don't have to convict, is that we have an investigative process in this country to which no former office holder is immune." The idea being that if he did something wrong, well, they can investigate him and prosecute him for it. And now they're turning around and saying, "Oh no, they actually can't do that." So it's an equity argument. You got off the hook by making this argument before that you could be prosecuted later and now it's later and you're saying you can't be prosecuted.

I think the reasons the court might not go in that direction are that that was kind of a off the cuff comment during a extremely lengthy oral presentation to the Senate. So it's like taking one sentence out of a three-hour closing argument and applying judicial estoppel on that. I think that makes it somewhat less likely to be applied, though it's certainly a possibility. They could say, "We're not going to let you make this argument because you said the opposite before."

Josh Barro:

Does it matter that that wasn't a judicial proceeding?

Ken White:

I'm not sure that it does. It's a quasi-judicial proceeding. But I think again, that would be a point of equity for the court to decide in its discretion.

Josh Barro:

Because it is true that this was a key political argument that was relied upon by Republicans who voted to acquit the former president in that second impeachment trial, is that they pointed to this recourse that there could be... More than 30 Republican senators made comments about, "Well, you could try him if you were going to try to hold him accountable for this." So clearly, that argument did hold force.

The other thing is the interesting way that interacts with another argument, which was about whether it was even possible to impeach a former president. You had a lot of people saying that impeachment has to be against someone who is sitting in their office. You can't impeach someone who formally held an office. And if it was true, both that you couldn't impeach a formal office holder and that you could only criminally prosecute the office holder if they had been impeached and convicted while in office, that would create another loophole here, which is at 11:45 AM on January 20th of the final day of someone's presidential term. They could commit any crime that they wanted. The Congress would not have time to impeach and convict even if it wished to, and that would, in yet another way, put the president above the law.

Ken White:

Right. And in general, I think we kind of edge away from interpretations that put someone completely above the law. One of the judges pointed out the point that we talked about before, which is that President Ford pardoned President Nixon who had resigned, and under Trump's theory there wasn't any particular need to do that. The response to that from supporters of President Trump was, "Well, President Ford wisely wanted the whole matter to be over. He didn't even want judicial proceedings in which Nixon would have to raise the issue of presidential immunity. He wanted the nation to move on, blah, blah, blah." But it is a strong argument and the judges raised it.

Josh, I think the bottom line is there's no sign whatsoever that the three judge panel is going to approve any level of immunity of the sort that Trump is looking for. It's not clear what theory they'll reject it on. Trump, when he loses, as I think it's a certainty he will, can ask the entire DC Circuit to hear it on bonk. I don't think there's any sign that the DC Circuit as a whole will decide any differently.

Josh Barro:

Mm-hmm. And then they will appeal to the Supreme Court as we've discussed. But then there's-

Ken White:

Exactly.

Josh Barro:

And we don't need to rehash it in full again, but there are reasons to suspect that the Supreme Court might not be interested in taking it up either.

Ken White:

Well, I mean you've got at least two votes on the Supreme Court to permit drone strikes of political opponents. So I think it's certainly possible. I think it depends in part on how the DC Circuit gets there.

Josh Barro:

There's another thing that's happened in this case, which again, as this appellate proceeding is ongoing, the case is more or less paused. The things that were supposed to be happening pretrial and all of those deadlines are stayed. And so during that process, Jack Smith provided some discovery, submitted discovery that is relevant for the case, and Trump's team is real angry about this. They're saying that, "Basically, they're breaking the rule that we're in a timeout" and they actually asked the judge to hold Jack Smith in contempt of court for not following the judge's order that the case was stayed. What's the deal with that?

Ken White:

Yeah, this is just sad and petty. Several defense lawyers I saw said, "This is the first time I've ever seen a defendant complain about getting more discovery." Smith responded, and he's right, that this didn't obligate Trump to do anything. This is just Jack Smith continuing to do stuff he's obligated to do. He gave over discovery. It didn't

trigger any obligation on Trump's part. Similarly, Jack Smith filed that in [inaudible 00:12:34] motion asking that Trump not be allowed at trial to make his wild, I'm being selectively, prosecuted argument. But it wasn't set for a hearing, so there was no obligation to respond to it yet. All that stuff will come back live when the case is unstayed. And I think the notion that he's violating the stay is kind of petulant, not really... I mean, it's an unserious argument even for Team Trump.

Josh Barro:

Let's talk about E. Jean Carroll. So remember that E. Jean Carroll won her defamation lawsuit against the former president and is still suing for defamation. There were an additional set of claims that had been tied up because of some issues about it being more difficult to sue him over things that he said while he was actually president. And so that case is supposed to go to trial. And now he's saying I should be able to argue that, "I'm immune from being tried in this case also because the stuff happened when I was president."

Ken White:

Right. The way this played out, Josh, is that E. Jean Carroll had her initial defamation suit against Trump, and that got delayed for reasons of his presidential immunity arguments that she filed a second case about some new statements he made about how "No, I didn't rape her." And under New York's new law that let you sue people for old cases of sexual assault, she won that. But now the first case that had been delayed is live, and that's over earlier statements Trump made where he denies having raped her. And yes, Trump has been trying to stop it. He's asked the court and the court of appeals to stay at pending resolution of all these presidential immunity arguments he's been making in his criminal case. The courts have all said, "Yeah, no," in part because he could have made the presidential immunity cases here and the E. Jean Carroll case years ago.

Josh Barro:

Right. And so I guess that's because there are two somewhat different arguments that were available to him. One was about can you sue a federal employee for acts that they do while they're in office? Or does the government need to stand in as the defendant? Which is a separate question from, does the president have superpowers that make him immune from any kind of liability for anything?

Ken White:

Right. It's the difference between, can you sue the president and can the president be held liable? So anyway, the judge has now ruled on a bunch of pretrial motions, not surprisingly because trial is supposed to start on January 15th, which is right around the corner. One of the key things the judge ruled is that Trump cannot deny what was found by the first jury. So the court says, "Accordingly, Mr. Trump is precluded from offering any testimony, evidence, or argument, suggesting or implying that he did not sexually assault Ms. Carroll, that she fabricated her account to the assault or that she had any motive to do so.

So the judge not only found that Trump was bound by the earlier jury's verdict that he sexually assaulted her, but throughout Trump's efforts to say, "Well, I'm not going to deny that exactly. I just want to put in evidence of her financial motives to make it up or indications that they're inconsistencies." And the judge says, "No, you can't attack that finding at all." So this is purely going to be about damages. The judge rejected Trump. Trump wanted to bring in who's funding her lawsuit, who's behind it, what shadowy figures are leading her to do this, typical Trump stuff, and the judge is just not having any of that.

Josh Barro:

Is Trump's best available argument in this case going to be that she's already received damages or she's already been awarded damages for very similar claims and that whatever is an issue that he said here did not cause her incremental damages?

Ken White:

Exactly. He's going to say that. And that's not a bad argument because what she's been compensated for happened afterwards. So he's going to say, "She's been compensated for my latest statements saying the same thing. She can't show any additional harm from this earlier period based off these statements where I simply defended myself."

Josh Barro:

And so what's the point of continuing to sue him?

Ken White:

Well, I think the point is a sentiment to hold him to account to keep his feet to the fire. And I think there's no doubt political motives. In other words, Donald Trump is the big bad of the last several seasons of this show. And so she's going to continue to go after him. I mean, if jury found that he sexually assaulted her and then he's reviled her and called her a liar and said terrible things about her, I can hardly blame her.

Josh Barro:

Yep. Let's talk about Roger Stone. There's apparently a tape of Roger Stone shortly before the 2020 election talking with a guy named Sal Greco who was at the time a New York Police department cop. He's complaining, as one does, about Eric Swalwell and also about Jerry Nadler, who are both democratic members of Congress from California and New York respectively. They had both been aggressively involved in various efforts to hold Donald Trump to account for things. And he says to Greco, Stone says, "It's time to do it. Let's go find Swalwell. It's time to do it. Then we'll see how brave the rest of them are. It's time to do it. It's either Nadler or Swalwell has to die before the election. They need to get the message. Let's go find Swalwell and get this over with. I'm just not putting up with this shit anymore." Spoken like a man who's watched too much MSNBC. So is this a crime? Is this a true threat against Eric Swalwell?

Ken White:

Well, look, first of all for context, Stone is mad because at the time in 2020, Swalwell and Nadler, this other congressmen, were both saying that there should be a congressional investigation into why Trump pardoned Roger Stone. That's what got Stone all head up. The thing is, Stone always talks like this. Stone always talks like a David Mamet script if David Mamet had been hit in the head with a shovel. And also I would just say, if you're talking to an NYPD cop named Sal Greco, I think it would seem almost impolite not to ask him to kill someone for you. It seems like almost an obligation of manners.

But no, my ruling, Josh, is no crime here. It's not a threat because it's not directed to them. It's not incitement because it's not intended and likely to cause imminent lawless action. Greco isn't going to spring out of the diner booth and go shoot someone. It's not

conspiracy because Greco didn't agree to anything. It's not attempt because there's no substantial step towards doing it.

The only thing I think it could maybe possibly plausibly be, it's solicitation. So Title 18 Section 373 prohibits solicitation of somebody to create a crime of violence, and to show that you have to show that there's strongly corroborative evidence that he's sincere in asking the other person to commit a crime and that he actually literally asks them to commit a crime. I think it's a weak case. I think that this is just the way Stone talks all the time. And in fact, a lot of the law is set up so that we don't constantly have to prosecute dudes like Stone for shit talking at a diner in ways that never go anywhere. That's why conspiracy has an overt act requirement, right? So if the three friends are shit talking late at night in the diner but no one ever does anything and no one ever was going to do anything, you don't have a conspiracy. You just have guy shit talking in a diner. Same here.

Josh Barro:

And so basically, it's the question of... I mean people say like, "I'm going to kill him." People say all kinds of stuff. And so it's a question of Stone's mental state. You'd have to figure out... In fact, it's a defense for him. The fact that he talks like this all the time makes it easier for him to contend that this was merely talk and that he did not actually wish for Sal Greco to commit this crime for him?

Ken White:

In a way, in the sense that the way Stone talks all the time is the context for evaluating whether or not he meant it literally.

Josh Barro:

Right.

Ken White:

So the bottom line is nobody's big talk crosses the line into crime unless it satisfies various requirements. And those requirements don't seem to me to be met here. I mean, we've seen plenty of Stones in old school Nixonian and he likes to brag about it and talk big about violent revolution and bodies hitting floors and that type of thing. It's

just the way he is. If he had said that to a crowd or to a room full of people who might immediately go out after these congressmen, if he had said it in the media to them or in a way that was calculated to get to them, that might be different. But this I think is just hot talk.

Josh Barro:

If this were Jacob Wohl that we were talking about, we would talk about how he had not yet committed a big boy federal felony, but we had confidence that he would do so soon. But Roger Stone has already met that bar. I mean, he committed a felony for which he ended up being pardoned in the Trump administration. So Roger Stone, we're not watching for your big boy federal felony. We've already seen it, but maybe we will see another one in the future.

Ken White:

Maybe. I always felt that Roger Stone was more talked than substance. More-

Josh Barro:

Are you saying he's too old for felonies?

Ken White:

Well, I would say that I would worry that he might fall down and break a hip if he tries to kill these two congressmen. But yeah, I think he's getting past the point of committing felonies as opposed to big talking about them.

Josh Barro:

Let's talk about this enormous mess in Atlanta with the Fani Willis RICO case. Co-defendant Mike Roman, one of the many defendants in this case, filed a motion for Fani Willis to be disqualified. The reason why she should be disqualified that they argue is a lot more interesting than I would've expected. They're alleging that Fani Willis has been having or had an affair with Nathan Wade, who's the special prosecutor that Willis hired onto this case to prosecute this RICO case. Wade has been paid hundreds of thousands of dollars for his role as a special prosecutor here. They allege

that Wade took a number of fancy vacations on places such as the Royal Caribbean cruise line and took Fani Willis along with him, and that she stood to benefit financially from his hiring and the prosecution of this case and that therefore that's illegal under Georgia law and that she should be disqualified from prosecuting this case.

And so I mean, we've got some emails from listeners, some of which were sort of along the like, "How dare they?" lines. Like, "Can you really file a motion like this? Do you get in trouble for filing a motion like this?" So first of all, is this a serious matter with relation to this case?

Ken White:

It's a serious matter. A lot of the critics have said that the motion is big on rhetoric and short on any sort of evidence. There's no affidavits, there's no documents. But the lawyer filing the motion is known to be a serious lawyer, known for sort of digging up things and not the sort of person with a reputation for making Trumpian purely invented type of accusations. The motion sort of sets out a series of events that would explain why it doesn't yet have all the evidence. For instance, it says that, "I learned a lot of this by looking at a divorce file that was supposed to be under seal, was nominally under seal, but was actually available at the clerk's office and you should unseal it so I can submit the documents." That type of stuff leads me to suspect that it's not completely just invented out of thin air. There's been talk for a long time that this guy, Nathan Wade, who was appointed as a special prosecutor, did not seem to be particularly well qualified for an investigation of this importance. There's suggestions he's never tried a felony case.

Josh Barro:

So I saw Andrew Fleischman saying he'd never tried a RICO case. Where was it that he's never tried a felony case?

Ken White:

That's in the motion they can't find any record of it, and that's from some commentators who couldn't either.

Josh Barro:

Okay.

Ken White:

He has been paid more than \$650,000, which is a lot of money. And so you've got kind of an array of things going in here. To the extent Mike Roman, that the defendant here is saying that the case should be dismissed, that is probably just bluster and theater, because in general, something like this wouldn't get the case dismissed. Judges can, in their exercise of supervision over courts, dismiss cases where prosecutors engage in truly egregious misconduct, but this probably doesn't rise to that level. However, if this is true, and that's an if, it is a very serious conflict of interest because it means Fani Willis basically had a financial interest in the process of the case in that someone when she had a close romantic relationship with was making money depending on whether the case was going forward or not, and she was a beneficiary of that to the extent of going on cruises and getting Legionnaire's disease and stuff.

Josh Barro:

It's Norovirus that you get on cruise ships.

Ken White:

Right. That's the sort of thing that would frankly get you prosecuted in a lot of jurisdictions for having a... In most places, it's prohibited for a public official to have a financial interest in a contract they administer or create on behalf of the government.

Josh Barro:

Isn't this particularly a large part of your legal practice, Ken?

Ken White:

Yeah, I do a lot of practice on a California statute called Government Code 1090 that prohibits California officials from having a financial interest in the contracts they do on behalf of the government. And absolutely, they would go to jail over this if this is true in California. It's serious stuff. And if it's true, it is such a bizarre, arrogant, stupid owned goal. I mean thinking that you would get away with something like this is just the

epitome of prosecutorial arrogance and thinking that, "I'm not held to consequences in that type of thing."

I think that the other arguments that are being made here are mostly without merit. So they also make an argument that he never filed his oath of office. The judge already rejected that saying he's not required to because it's only one case and it didn't cause any harm. They argue that the county didn't approve the contract where he was hired. The consensus seems to be that, again, that wasn't required. The DA has the power to hire him as a special prosecutor without county approval. But the core of it, this conflict of interest, if Fani Willis has this financial interest in how the case progresses, that is a disqualifying financial interest. She should not be in her office, should not be leading the case. And then you get to the big question is, "Well, who does?"

Josh Barro:

Yeah. So apparently, there's some entity called the prosecuting attorney's counsel of Georgia, which makes replacement appointments in places where the prosecutor's office has been conflicted out.

Ken White:

Right. And here's where it gets interesting, because the other prosecutors in Georgia are, on average, significantly more conservative, significantly more pro-Trump than Fani Willis is. Fani Willis, Atlanta area prosecutor, very different than other areas of Georgia. So if it's this prosecutor's counsel appointing a replacement, it is likely that the replacement is going to be significantly more conservative, significantly more pro-Trump, and possibly significantly more hostile to this case. And that's one way this case could unravel just because you get a new prosecutor who says, "Hey, I actually think this is bullshit." It won't be that clear, but it'll be on careful consideration, I think that this was undertaken without proper blah, blah, blah.

Josh Barro:

There's another interesting angle there which the Washington Post had about what happens if it gets into the hands of the prosecuting attorney's counsel because they note that this has already happened. There's a case against Burt Jones who was a Trump elector in 2020 who currently serves as lieutenant governor of Georgia, and Fani Willis was investigating him. And in 2022, a Fulton County judge disqualified her from investigating that case. The prosecuting attorney's counsel is supposed to appoint

a replacement prosecutor for that, and they haven't yet. It's been more than a year and they've been sitting on it. So I guess the first step before you see did they appoint someone who's a lot more favorable to Trump is, could they just bottle this up and appoint nobody?

Ken White:

They could. They could derail it for a long time, which is very much benefits Trump. And then there's the propaganda value to Trump, which I think is incalculable. I think even if it does not justify dismissal, I think it gives him a huge propaganda victory and I think that almost arguably spills over into some of the other cases. It helps his narrative that the whole thing is a setup by corrupt people. It is really just a nightmare. And it really kind of goes to something, Josh, that we've been saying on this show for a while, which is you need to be really careful making prosecutors your heroes in these circumstances because ultimately, they are not your day of [inaudible 00:30:35] writing in to save America from a shitty political system. They're their own people embedded in their own political context with their own political culture, with their own flaws and problems.

And when people say, "How could someone possibly think they could get away with this?", my answer is, "Well, if you're part of a system that routinely tells you you can do whatever you want and there's not going to be any consequences, absolutely you can come to the mindset 'I can get away with this'." So remember, this is an office where when a court of appeals describes an argument they made, something they did against defendants as bizarre, which is not a compliment, the office came up with T-shirts that said Bizarre for Justice, and that's sort of like, "We're in the right no matter what, and anyone trying to put a check on us is in the wrong," that's the attitude that leads you to think you can get away with this shit.

Josh Barro:

Yeah, I mean we've been relatively skeptical of this case the whole way through in a number of ways. One of them having to do with it being so overcomplicated. I mean Andrew Fleischman, the Georgia Defense attorney we had on the show some months ago to talk about this, one of the things that he was lamenting recently was basically they could have brought a much simpler false statements case against Donald Trump much earlier and have secured a conviction well before now. And instead, they decided to do this extremely flashy, extremely complicated thing that was going to take absolutely forever and going to have all sorts of legal weaknesses. And then also,

perhaps if this motion makes true allegations, in a way that also involved a really substantial conflict of interest that was going to blow up the case and embarrass people who had backed it.

Ken White:

Right. I mean, when we say that this is derailing the case and the process of possibly disqualifying Fani Willis could derail the case, what we mean is derailing something that it's highly dubious when she was going to be able to get it to trial, and when she did, the trial could easily take a year. So what are you derailing exactly other than the longest goddamn circus you've ever been to?

Josh Barro:

It's funny, Ken, I had jury duty just last week. The one case they pulled me in for was going to be a two and a half week medical malpractice trial. The two attorneys are there and they have a group of 30 people out of the jury pool, and they're describing, "This case, it's not even going to start for next week, and it's going to take probably two and a half weeks and you're going to hear about all these subjects you might have feelings about." And so he gives this long spiel and then he is like, "Okay, who here has a reason to discuss with us about why they can't serve on this jury?" And literally every single person in the room put their hand up, including me, to say, "I have a ski trip coming up. I can't be on this case."

And it turns out that's a valid excuse, but I'm just trying to imagine. I mean, we talked about the incredibly long process of seating that young thug jury for what was supposed to be an eight-month case or something. But the idea that you will draw some people to spend a year of their lives sitting in judgment on one of these cases, both, it's a big burden on them and it's got to be really hard to find a set of people who have that kind of time available and who don't have conflicts other than time conflicts, which you know, here everyone has a strong opinion about Donald Trump. I don't know how the hell you were going to get a jury in this case.

Ken White:

Well, that's why I've said that the RICO prosecution in Georgia is not reasonably calculated to impose on Donald Trump consequences for his actions anytime soon. It appears more calculated to stay in the news constantly for a number of years.

Josh Barro:

Speaking of in the news for a number of years, let's talk about Bob Menendez who's on his second ride on the federal indictment case. And so, there's been yet another superseding indictment in his case this time having to do with Qatar. And he's real upset and he went and he gave a long speech on the Senate floor about how the government's doing him wrong. And one of the things he alleges, they've been dribbling these charges out in order to get more sensational stories in the press and to make him look bad.

Ken White:

I am not buying that. So as we've seen, federal prosecutors routinely supersede as they develop their theory, as they want to clean up a case, as they find more evidence. It's particularly true if they pull the trigger sort of hastily for some reason when they initially charged.

In terms of the idea they're doing that to keep it in the news, the truth is that the initial indictment gets big press. Superseding indictments tend to get very little attention, particularly if they don't add something big and flashy. These superseding indictments haven't added anything big and flashy. They've extended the time period over which the conspiracy allegedly lasted. They haven't done anything like super headline grabbing that's going to take it back up to the level it was when he was charged. So I think this is just kind of a gripe about the prosecution in general.

Josh Barro:

Actually, I disagree a little bit with that about the effects of the superseding indictments. Maybe it's not about the public paying a ton of attention to the superseding indictments, but the superseding indictments have sort of strengthened the idea that Bob Menendez is a national security risk, that these charges really involve serious misconduct involving foreign influence, which has created additional pressure within the Senate to remove Bob Menendez from situations where he can exercise the power of his office. His whole big thing had been foreign policy. And so he may be complaining about the court of opinion, but I think he might be really focused on his fellow members of the US Senate who probably are paying significantly more attention to what's actually in these indictments.

Ken White:

Yeah. But again, the idea of dribbling out the information over the course of several superseding indictments just isn't the way federal prosecutors tend to think. Remember how risk averse they are, and how when they charge someone, they want it to be bulletproof and easy and a no lose case. So those types of sentiments tend to make them go all in on their strongest hand in the first instance and not do cute things like, "Let's save some of the good stuff for later to influence the Senate." That's political thinking and not really prosecutorial thinking.

The other thing I'd say is Senator Menendez, in this case, I'm not sure bringing up that this is your golden jubilee of public service is quite the note you want to... Just say 50 years. Don't say gold in this case, maybe.

Josh Barro:

Yeah. He said this is not how he wanted to celebrate his golden Jubilee. I'm sure the way he did want to celebrate his golden Jubilee was with gold.

Ken White:

Yes, he wanted to celebrate wallowing on his pile of gold bars.

Josh Barro:

Yeah. We often talk about how the first piece of advice for criminal defendant is to shut up, and we've had to make an extended list of fora in which criminal defendants should shut up, adding the names of various social media sites and various kinds of family gatherings and other places where one might vent one's spleen. Is the Senate floor a relatively good place to talk about the pending charges against you? Because I mean, there is the speech or debate clause which says that senators and representatives may not be questioned in any forum for the statements they make in their speech or debate. Can you introduce Bob Menendez' senate floor statements as evidence against him in a trial? If he were to choose to testify, could you question him about them?

Ken White:

Josh, you would think this would be an easy call, right? The prosecutors could say this, "We're not prosecuting him for what he said on the floor. We're just using his

admissions on the floor as evidence." But as it turns out, some lower federal courts have said the speech and debate clause prevents even evidence of what a member of Congress said in the course of speech and debate from being used as evidence against them. So you couldn't, even if Menendez said some things that amount to some sort of admission, under these lower court precedents, you couldn't even introduce that as evidence against him.

Now, the Supreme Court hasn't adopted that view, but a number of lower courts have. So it may be in a way safe for him to say it, but even if they can't use it against him, they can certainly follow up on it and they can chase leads and they can figure out why he said things. And generally, the government can always find a way to chase down your admissions and find corroborating evidence that support those admissions. So it's still a very bad idea to go on the floor of the United States Senate or House and talk about your crime. And really, Josh, this omission from the list is unforgivable given our population of people in Congress. I mean, that's exactly one of the places I should have led with, not to talk about your crimes.

Josh Barro:

Yes, I think we can leave it there for this week. Ken, thank you so much for speaking with me and for providing again that useful advice for if you ever find yourself elected to the US Senate and then indicted. So that's going to be very useful for all of our listeners.

Ken White:

Thank you, Josh. And remember, to our listeners, when in doubt, shut up.

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, and we'll be back with more soon.

Ken White:

See you next time.