

Released Friday, November 17, 2023. This transcript has been lightly edited for clarity.
Questions or feedback? Email ricohotline@serioustrouble.show
© Very Serious Media

Ken White:

Hi, it's Ken White.

Josh Barro:

And it's Josh Barro, and this is Serious Trouble. Ken, this civil trial in New York is just the gift that keeps on giving in terms of drama. And it's interesting to me, it's a bench trial and so normally I would expect a bench trial to be more orderly, but is there a phenomenon here where basically because there's no jury that you have to behave in front of, it's made it possible for this trial to be weirder and more of a mess?

Ken White:

In a way, I think it's a combination of it being no jury and the judge already having pretty clearly made up his mind about a lot of the key issues and come out in pretrial rulings and during trial very strongly against Trump. And so Trump's team kind of figures they've got nothing to lose by acting out in a way that they can use politically, and maybe they'll get lucky and drive the judge into some sort of excess that will basically take away the credibility of the trial. So that's what they're kind of doing. They're going over the top trying to provoke the judge into the reaction and basically capering for their audience.

Josh Barro:

Well, and then also the judge, because there's no jury to worry about prejudicing, it seems like there are certain things the judge is allowing that he otherwise might not. I mean, we saw that this week with certain evidence that the defense wanted to bring in, the attorney general kept objecting saying this stuff is irrelevant, et cetera. And the judge almost basically says, do you really want to risk a reversal by keeping this stuff out? And partly it's that if the stuff is irrelevant and the judge is the person who's making the decisions, he knows whether or not it's relevant. And so he doesn't have to worry about confusing a jury with the material.

Ken White:

Right. Josh, this is a great example of how the judge ruling in your favor is not always a good thing. When it comes to evidentiary rulings, if the judge all of a sudden just starts waving his or her hand and letting in everything you possibly want to put into evidence, that's not necessarily a good sign. That may just be the judge saying, "Knock yourself out. You just put in whatever you want to put in and we'll see how it turns out for you," taking away arguments on appeal.

Josh Barro:

And so this was marketing materials for Trump properties.

Ken White:

Right. So Trump is trying to make the point, "Actually these properties are worth millions, millions. Look at our internal marketing materials that say they are." And the AG saying, "That's bullshit, judge, you can't let that in." And the judge is, "Just simmer down. Okay, let's just let it in." So when you're the other side, when you're on the AG side in that situation, you have to have a certain level of confidence in yourself, in your case and in the judge not to completely flip out over this sort of thing happening. And I think it took a little while for the AGs to get there, but I think they figured it out.

Josh Barro:

A couple of other notable things that have happened in the last few days in this case. One is that there's a motion for a mistrial from the Trump side. They're basically saying the judge is hopelessly biased and therefore we deserve a mistrial. And the motion lays out more or less three arguments. One is this stuff that has so angered the judge and has been so bizarre for outside observers where they're claiming that the fact that his law clerk sits up there on the bench with him and that he confers a lot with his law clerk, that that's some sort of improper and impermissible co-judging that he's doing with the law clerk and they want a mistrial for that reason.

They also say that Judge Engoron has improperly put news article links about the trial in the alumni newsletter for the private high school that he attended some decades ago. And they're saying that that's an indicator of some sort of bias or just improper public commentary by the judge on the case, even though it's basically more or less just providing these links. There's like one little snippet of commentary that they fixate

on, but it's mostly just the sharing of links. And then the third thing has to do with political activity by the law clerk who they're so fixated on. They're saying that she gave contributions to democratic candidates that were in excess of what's permitted under certain ethics rules for court employees in New York, and that's a reason that they want a mistrial.

So what do you make of these three arguments that they deserve a mistrial?

Ken White:

Almost uniformly, observers think it's an extremely long shot. It's clear the judge will deny it and that it's incredibly unlikely that a court of appeals will do anything with it. The arguments about the clerk co-judging are just nonsense, it's just a freak show designed to draw attention. Because this clerk is a young woman perceived as very liberal, and therefore exactly the sort of person that the Trump people love to bully and call out for abuse and that type of thing.

Josh Barro:

I would note that the situation where the clerk sits on the bench next to the judge, that is abnormal, right? It's not necessarily abnormal in a way that matters for any of this, but this is not how it usually looks in the courtroom, right?

Ken White:

Yeah, it's not typical. But I mean you're just talking about the difference between the clerk being on a table several feet away and occasionally bringing notes or even communicating by text or something with the judge versus the clerk being up there. It's purely appearance. Nobody serious thinks that this is a serious issue. The judge, if he did put these comments into a high school alumni newsletter, that's probably not appropriate. Notably, all of the instances seem to be not only before the trial, but even before he made the key summary judgment rulings. And there's kind of an extent to which you can't save up this type of argument and then make it after the trial is basically over. You have to make it timely. So I think that's one argument against it.

The other is that although it might be inappropriate for the judge to be anywhere posting comments that have anything to do with the case before him, it's probably not something that mandates the judge's recusal. So I think it's a weak argument. The stuff about the law clerk, the consensus seems to be that the law clerk has some potential

problems in terms of making excessive donations in excess of what law clerks are supposed to in New York and engaging in political activities. But again, the problem is how does that connect it to this particular trial or to Trump? So generally the consensus seems to be that no, this is not something that mandates recusal.

Josh Barro:

Well, I mean the allegation about how it connects, and the law clerk was engaged in political activity in the pursuit of... she herself was trying to get elected to a seat on civil court in New York. And she gave money to various democratic clubs and committees, and they talk about how those clubs and committees engaged in political activity in support of the attorney general who's a party in this case. And so that's the claim about how it would relate to the case.

Ken White:

Right. The thing is, this is one of many ways that your courts are deeply weird there, Josh. In addition to the trial court calling itself the Supreme Court, you've got this system where a lot of time-

Josh Barro:

We love to keep people on their toes. Start in the Supreme Court and then move up.

Ken White:

Exactly a lot of the time, from what I understand, people who are law clerks who elsewhere would be a rather junior job, wind up directly from that job running for judge, which is deeply weird anywhere else in the country. But apparently this sort of thing happening is very common. And in fact, the donation limits were put in place, not so much because of the worry of bias, but because of the worry of patronage. That the only way you get supported in your running for the judge position as a law clerk or whatever is if you're paying money to the right people. So that's kind of the context for those rules.

I can certainly see why it creates an appearance that probably shows bad judgment by the law clerk. But again, the standard for forcing a judge to recuse himself is very, very favorable to the judge, even though nominally the standard is what would a reasonable

person think in looking at all this, that reasonable person is an artificial construct. It's a reasonable person as seen by judges steeped in, immersed in this particular judicial culture. So it's not any reasonable person you and I would recognize, it's a reasonable person who goes to lunch with judges every day. So I think just about everyone thinks the motion is a loser.

Josh Barro:

And so if the motion is an argument into the court of public opinion, then whatever. I mean, that's the argument that they've been making all along, is that this is a rigged and improper proceeding with Democrats on all sides out to get them. To the extent that the motion is actually an effort to set up for an appeal, this would be entirely in state courts in New York, right? You'd go ultimately up to the Court of Appeals in Albany, which is a substantial liberal majority on that court. Is there any possibility that they can get into a federal court with any of these issues?

Ken White:

Well, they could try. They could say it's a due process violation on such a level that the federal court has to intervene. The problem is federal courts are set up to be extremely adverse to interfering with state court proceedings, and that would be truly unusual and against all sorts of doctrines called abstention doctrines that forbid federal courts from interfering with state court proceedings. So he could make the argument, but again, I think it would be mostly performative if he did. I think it's very unlikely that a federal judge, with the exception perhaps if he got lucky and drew some of his most partisan Trump appointed judges, would intervene.

Josh Barro:

And then the other notable thing that's happened in this case over the last few days happened on Truth Social, where the former president re-truthed a post that said, "I would like to see Letitia James and Judge Engoron placed under citizen's arrest for blatant election interference and harassment." And so the former president resharing that statement. Now, the gag order that Judge Engoron imposed doesn't apply to statements about Judge Engoron himself. So I don't think this is a gag order issue, but the question a lot of people have is this a crime? Is this incitement where they're trying to get somebody to commit some sort of crime against Letitia James or the judge?

Ken White:

I mean, look Josh, you know that for the years we've been doing these shows, I've generally said that the allegations that Trump is engaging in illegal incitement outside the First Amendment, I've generally said probably not. It's a really tough test to meet. Here, we're starting to get into the realm where this is a plausible law school fact pattern where the answer could be, yeah, this is outside the First Amendment. I mean citizens arrest stuff comes in... It has a context, a history. And there have been several periods in the nation's history where citizens arrests has been used by extremists to harass and attack public officials who are doing something that extremists don't like. Indeed, the attempted kidnapping of the governor in Michigan was framed as an attempt to make a citizen's arrest.

So when you've got Donald Trump promoting the statement, re-truthing, which is the same as retweeting, which just means reposting on your account. Given Donald Trump's audience, its past propensity for violence and extreme action, basically calling for a citizen's arrest of the judge and the attorney general, which amounts to calling for them to be forcibly detained by some citizen.

Josh Barro:

Kidnapped.

Ken White:

Kidnapped. Yeah, I think the standard under Brandenburg for incitement, is it intended and likely to cause imminent lawless action? I think you've got likely, at least for these purposes, I think you've got intended. The only question is whether it's imminent enough. Because I can absolutely plausibly see him doing this, getting some nut on his side to try to arrest the judge and summarily try them or something.

Josh Barro:

So what is imminent? Because I feel like the normal case with imminent is like you're giving a speech to a crowd and you're basically sicking them to riot on some business or some crowd of people, and it's imminent in that it's literally just about to happen. Whereas this is like, "Who will rid me of this troublesome priest?"

Ken White:

So imminent is not set in stone. You're right that the clear case for imminence is, "Go get those guys over there." The middle ground for imminence is like the Trump speech on January 6th where they've got to walk a few miles, or in the case of many Trump supporters, ride their rascal scooters several miles to get to Congress to commit violence. And the longer one is like this, but there's sort of like this is one of the areas of the law where there is movement. Where people are saying, "Okay, what is imminent in the internet age?" Because if imminent requires everyone to be physically present, that would mean it's impossible to commit incitement online, which doesn't seem to be right. So could I defend this case? Absolutely. I could say this is not imminent. Is it absolutely clear that it can't be incitement? No, I don't think it is.

Josh Barro:

If there were to be criminal charges brought over this, who could bring them?

Ken White:

Well, there's a federal statute against basically inciting or encouraging violence over interstate communications, which would include the internet. They're New York statutes. I don't think at this point anyone's going to do it unless something happens. So if this winds up with some deranged Trump supporter attacking the AG or their staff or the judge, then I could see them making a decision to charge Trump with inciting that.

Josh Barro:

Yeah, so that was what I was going to ask is how common it is to have incitement charges brought in cases where no act was in fact incited?

Ken White:

It's less common when nothing happens and when there's not circumstances suggesting that it nearly happened. So it's more likely to happen in the two crowds facing each other type scenario, that's more likely to lead to charges. This where it's kind of, you could imagine something happening but it didn't, less likely, much less likely to lead to charges. In part because of the First Amendment ambiguities.

Josh Barro:

Let's stay in New York and talk about our mayor, Eric Adams. Speaking of gifts that keep on giving or gifts that end up getting you in prison maybe.

Ken White:

Eric Adams, Josh, Eric Adams as part of your history of Eric Adams. Rudy Giuliani, which is the Cuomo who thinks that groping women is Italian.

Josh Barro:

That might be a multiple choice question.

Ken White:

Yeah. But there's nothing to be ashamed of. Self-governance is not for everybody.

Josh Barro:

Look, I voted for Catherine Garcia. This is not my fault. But so anyway, Eric Adams, our fun mayor who's in favor of whatever you do so long it's after 2:00 AM. Eric is being investigated by the US Attorney's Office and the FBI related to his ties to Turkey. This is not what I had on my bingo card for what Eric Adams might go down for in the end. But so there's this fundraising scandal. A few weeks ago, the home of his chief fundraiser got raided by the FBI. Eric Adams was on his way down to Washington DC on official business. He turned around and headed back to New York, which... This is more PR advice than legal advice, but if you're trying to send the image that whatever is happening related to your political organization is not aimed directly at you, I would not get off the [inaudible 00:15:57] and start heading back to New York because one of your employee's homes gets raided by the FBI.

But so this was the home of Brianna Suggs, his chief fundraiser who's also 25 years old. She was described in the New York Times as his longtime advisor. I don't know how long you could be an advisor to a political official if you're 25. But so in any case, she had her home raided. He was also approached by federal agents and had his electronic devices seized, two cell phones and an iPad. And then there's been this

news reporting that there are questions about fundraising that was done illegally by these foreign Turkish entities, maybe bundling donations illegally to his campaign funneling. It's this straw donation thing where I want to give a bunch of money that exceeds the limit of how much I'm allowed to give. So I give money to my friends and they turn around and give it to a political candidate, that's illegal. Don't do it. Maybe that happened with some of this Turkish money.

And so then there are some questions about the extent to which he used official influence to help them, particularly with this new building they built that had a Turkish diplomatic facility in it that had some fire code problems and they were having trouble getting a certificate of occupancy. And he intervened to help them get their building open back when he was Brooklyn borough president. So anyway, this is what's swirling around Eric Adams. Is he in serious trouble?

Ken White:

I would say so. I mean your advice to him not to turn around and come rushing back and increase the narrative is right. I would also add, I don't know if Eric Adams has committed crimes, but if you're going to commit crimes, don't put a 25-year-old Brooklynite named Brianna in charge of the crimes. This would be my recommendation. As you've pointed out to me before, Josh, you get a lot of stories where lower down people who work for politicians are investigated for campaign finance stuff and it never reaches the top person. It never reaches the candidate themselves. What's different here that was quite striking to me, is that the feds actually went out, rolled out with a team, confronted the mayor of New York City in public and seized two of his phones and his iPad in front of his security with a warrant. That is a fairly dramatic escalation, and I don't think there's any chance they would do that unless Eric Adams was at least personally a subject of the investigation. That is someone that they were open to concluding, had committed a crime. More probably, a target of the investigation, someone they think has committed a crime and they're developing information to indict. Because you just don't show up and take the mayor of New York City's phones as the feds unless you were really into this investigation.

So I would say we don't know what the trouble is yet. It could be some sort of bribery theory where he allegedly improperly asked someone to take an official action in exchange for money. It could be campaign finance, it could be any of a number of things. But that act, seizing his phones with a warrant is absolutely the sign of a serious investigation of him personally.

Josh Barro:

So there's sort of a couple obvious sets of theories you could have where you'd have a criminal investigation here. One, as you note, is a bribery theory. The other is simply about donations that are illegal, that come from people who are not allowed to give or in excessive amounts or are given through straw vehicles, that sort of thing. So I mean, there could be that set of questions. As you note, one of the problems that is often arisen in those sorts of investigations is that you can pin that maybe on people who work for the candidate. It's often difficult to pin that directly on the candidate and show that they had knowledge and were involved in those sorts of schemes.

The second is a bribery theory where the mayor is taking certain official acts in exchange for political donations. And the problem there is showing a quid pro quo, and there's been this line of Supreme Court cases, the McDonald case and other related ones, which make it very hard to show a criminal violation there without certain very explicit agreements.

And the defense that you've seen from the mayor about this action, which was an action taken when he was the Brooklyn borough president, was that he gets requests all the time from various sorts of constituencies and entities to help with issues, with city agencies, and that they were just trying to work things out with, I forget whether it was the fire department or department of buildings, basically saying, "Well, isn't this workaround that they have on the fire detection suppression system, isn't this good enough to get a temporary certificate, blah, blah, blah." That's ordinary type stuff.

And furthermore, this was a building in Manhattan when he was the Brooklyn Borough president, so he didn't even have direct control over it. I mean, there obviously could be a lot more information that's not out here in public, but what we've seen in the paper around that seems a little bit like weak tea for a bribery theory. Right.

Ken White:

Well, I mean we talked about this in the case of the bribery case about Bob Menendez a few episodes ago. The state of law, as you said, is it's not bribery if you're simply making a call or introducing somebody or doing the handshake and socializing stuff, it has to be either doing an official act or using your influence to get someone else to do an official act. But if the fire commissioner is clearing a building that had been put on hold to be opened and occupied, that seems to me to be an official act. And if Eric Adams was a public official and who lobbied that fire chief to do that official act and he did it in exchange for money, then that is bribery.

Josh Barro:

But that's the part showing that it was an exchange, right? I mean, there are people who are political donors who interface with the city all the time.

Ken White:

Right, and if they give somebody money and that person as a result either does an official act or convinces someone else to do an official act, that is illegal bribery.

Josh Barro:

Right, but as a result. How do you show that it's as a result?

Ken White:

Well, maybe you do it with communications, maybe you do it with timing, maybe you do it with cooperators who are witnesses to the communications. You do it any number of ways. Eric Adams does not strike me as the guy who necessarily listens to Stringer Bell about not taking notes on a fucking criminal conspiracy. So he's not exactly subtle or restrained in his communications. It would not surprise me if he's out there throwing smoking guns around.

Josh Barro:

And then what is this stuff about potentially cooperating?

Ken White:

Well, he made big noise. Of course he has to because as his persona as Mr. Law Enforcement, Mr. Pro Police, Mr why don't you just cooperate with the police? He has to take the stance, "Oh, I'm cooperating with this investigation. We're just out for the truth." Who knows what that really means? Does that mean he's going to sit down with a no holds barred conversation and question session with the FBI? I would enjoy seeing that, Josh. I would like to watch that. But I suspect that when it gets to that point, that's not going to be what his cooperation looks like.

Josh Barro:

Would you advise him to do that if he were your client?

Ken White:

God, no. Absolutely not.

Josh Barro:

Okay. That sounds right. Let's talk about Hunter Biden. Hunter Biden has filed a motion. He wants to subpoena former President Trump and Jeffrey Rosen, who was the Deputy Attorney General or the acting Deputy Attorney General I believe, and Bill Barr, who was the Attorney General in the Trump administration. And these are subpoenas for documents, so he's not yet looking to force them to sit for interviews. But basically he wants documents and it's part of a theory that there was, that basically he's being selectively prosecuted for political reasons.

Ken White:

Yeah, this is a somewhat odd motion. So this motion is brought in the gun case. So you remember after that plea deal fell apart, the feds refiled the gun count against him as an indictment saying that he got a gun while he was an addict or a habitual user. And that is the case in which he's filed this motion asking to issue subpoenas.

Josh Barro:

It's the only active case, right?

Ken White:

Right. It's the only place where he could do this. And his theory in there is, like you said, I think these politicians improperly influenced the decision to charge me and set the chain of events in motion. Notwithstanding that he didn't get charged until after they had all left office. Here's the problem I see with it. Selective prosecution is a theory. Selective prosecution is when the government decides to prosecute you for something it normally wouldn't prosecute based on an impermissible motive like your

race or your religion or your speech, your protected speech. But there is a specific body of law dealing with when you're entitled to discovery into selective prosecution. So this was developed decades ago. When I was a prosecutor, and it was mostly about people trying to get evidence about why the government went so much harder against crack dealers than it did against cocaine dealers. The theory being that this was a policy deliberately aimed at African-Americans.

And the body of law that developed basically said, you can't just get it by asking for it. You have to make a showing of some evidence of the test for selective prosecution. Which is again, that other people who are like me are not being prosecuted and there is evidence that I am being prosecuted from impermissible reason. And Hunter Biden's motion doesn't really engage that test or that standard. So I think that's what the government's going to come back with. That said, given the types of things that Trump has said in the past and given how seldom this particular law is prosecuted, I don't think it's outside the realm possibility he could make that showing and get selective prosecution evidence. But I'm not sure he's going about it the way that the judge is going to want quite yet.

Josh Barro:

But here's what I don't understand about that. This indictment was brought by the Biden DOJ. These officials whose documents he wants don't run the Department of Justice anymore. How could it be... I mean, even if it's the case, and I find it plausible that it's the case that the Trump administration had a politically motivated reason why they investigated him, et cetera. How can that be used to show that this charge brought by the Biden DOJ under the leadership of Merrick Garland was selective prosecution?

Ken White:

I think that's one of the main problems, and I think the response would be that it was the Trump administration that set the wheels in motion, that started the investigation that led to the eventual prosecution decision, and that sort of the fix was in structurally as a result of starting the wheels. I don't think it's a terribly strong argument for the reasons that you suggest. Because I think, I have no doubt that the evidence will be that eventually higher ups who were Biden administration people okayed this particular decision. But I think it's more likely part of Hunter Biden's overall effort, and there's another instance we can talk about in a minute, of using litigation, using the system to develop more evidence that Trump people have it in for him that he can use in future prosecutions.

Josh Barro:

If there is a future Trump DOJ that brings prosecutions against him, this will help them argue that those prosecutions are selective?

Ken White:

Exactly. He's using every vehicle he can to try to gather information that will help him show that Trump partisans impermissibly participated in, did illegal things in the investigation of him.

Josh Barro:

And so the other thing in this vein is a defamation lawsuit that he's brought against Patrick Byrne. Patrick Byrne founded overstock.com. He's a nutty conspiracy theorist. He was showing up at the White House in the last days of the Trump administration, and he showed up in some of these libel lawsuits about various conspiracy theories. And now he's suing Patrick Byrne for saying that Patrick Byrne defamed him, defamed Hunter Biden by saying he was conspiring with Iran.

Ken White:

Right. And it's a full-blown aggressive defamation claim filed here in Los Angeles in federal court. Again, this does not appear to be calculated to wind up getting a lot of money from Patrick Byrne. It appears more calculated as a sort of strategic measure to get information and discovery into who was pushing him to say those things about Hunter Biden. What he wants is evidence that Trump or Trump people were telling him, "Go out and say these things about Hunter Biden," because that then helps in his long-term goal of having lots of evidence to establish that Trump people were biased against him that he can use if the worst happens and Trump gets reelected and starts prosecutions of him.

Josh Barro:

Let's talk about some things that have been happening down in Georgia, this big messy RICO prosecution. First of all, DA Fani Willis says that her trial of the former president could go into 2025. I don't think that timing is surprising to any of us, right?

Ken White:

It shouldn't be, but I am seeing people expressing surprise. And to me it's like, yeah, well, that's what we've been saying this whole time. That when you indict more than a dozen people and you want to bring tons of people to trial and you're doing it with this RICO theory, that demonstrably leads to 6, 9, 12 month trials, that you're going to be having a very long process that's not plausibly going to be done before the election.

Josh Barro:

It's funny, we talk about this other Rico case against Young Thug who's an Atlanta-based rapper and various other co-defendants, and that the jury selection has been going on forever and ever. And I periodically have to check and make sure the jury selection is still going on in that case. They finished it a couple of weeks ago. It took 10 months, but they have finally seated a jury in the Young Thug RICO case.

Ken White:

Yes.

Josh Barro:

So that one now they get to go to an interminable trial.

Ken White:

They now have a panel of jurors who are able to sit for another 10 months. People who have that free time are going to decide Young Thug's fate as a RICO defendant. So good luck, man.

Josh Barro:

But is that like that timetable going into 2025, is that planning on a 10-month jury selection process for this case too?

Ken White:

I don't know if they think the jury selection will take that long. I think it will certainly be pretty horrific, but I think just the way they've charged this with all these connected conspiracies under the RICO umbrella is going to take forever to try. Particularly in state court, which tends to be less crisp and fast, and particularly with the cast of characters they have here who are always doing time-wasting things.

Josh Barro:

Yeah, so speaking of not being so crisp, one other thing that's happened in this case in the last few days is some of these proffer videos, the statements from the defendants who have pleaded guilty and have talked about what they were up to in this election related conspiracy, those video statements got leaked and ended up in the press. And the most interesting thing was Jenna Ellis, who was one of the Trump attorneys talking about her conversations with Dan Scavino, who's a close right-hand aid of Donald Trump, his director of social media among other roles. He composes a lot of those tweets. She described talking to Dan Scavino in late 2020 and him saying, "Well, the president's just not going to leave office." And her trying to say, "Well, that's not really how this works." And he's like, "Well, we don't care." So that was, I don't know how legally important that is, but that was an interesting news note out of that. But people were wondering how the hell did these videos get out? And so long-suffering Judge Scott McAfee, can we call him long-suffering yet?

Ken White:

I think we can at this point. It's kind of a compressed process for him.

Josh Barro:

So Judge Scott McAfee, who's presiding over this, had to ask all the attorneys, "Did you leak the videos? Did you leak the videos?" One of the attorneys accidentally sent a statement saying they leaked the video, but it was a typo and they had to send it back and say like we meant to say we did not do that.

Ken White:

That's right. That was the lawyers for Harrison Floyd actually, who you'll hear more about in a moment. Who sent it saying, "It was lawyers for Harrison Floyd," later, desperately, "no, wait, wait, typo. It was not Lawyers for Harrison Floyd." I'm going to use the, actually that was a typo whenever I want to retract a confession from now on, I kind of like that move.

Josh Barro:

But so it turns out it was a false confession because in fact it was Missy Hampton's lawyer who got up and said that they released the videos and they said they did it for transparency because the case is important and they want people to know what really happened.

Ken White:

Right, and so now they're contemplating a protective order that would tell them not to do that and close the barn door after the proverbial horse is out.

Josh Barro:

Wait, so were they not breaking the rules by releasing the videos?

Ken White:

Yes, they apparently were under the existing rules. However, there wasn't a specific protective order in place so now they're remedying that.

Josh Barro:

Okay. But are they going to get in trouble for having done that?

Ken White:

I don't think McAfee yet ruled on what the consequence was going to be. And this may be the dog gets one free bite type of situation, so not sure what's going to happen.

Josh Barro:

Yeah.

Ken White:

But even though Harrison Floyd and his lawyers were not in trouble for accidentally confessing to leaking stuff, Harrison Ford is in some trouble.

Josh Barro:

Floyd, Harrison Floyd. Leave Harrison Ford out of it.

Ken White:

Okay, fair enough. Harrison-

Josh Barro:

Sorry, we should explain for a moment who these people are. Missy Hampton was an elections worker in Coffee County, if I recall correctly.

Ken White:

Yes. And Harrison Floyd is the head of, I believe, Blacks for Trump who was alleged to have a role in this. Harrison Floyd is something of a, I think we use the term character. Before he was arrested in this case, he was arrested and charged in DC for allegedly body slamming the federal agent who delivered a grand jury subpoena to him. He seems to have something-

Josh Barro:

That's a no-no.

Ken White:

Yeah, he seems to have something of a temper. And now Fani Willis has filed a motion to revoke his bond saying that he is using social media to intimidate and attack potential witnesses, that he's going on TV and that he's using social media to do this. And she lists in the motion a bunch of stuff that to me is kind of more like typical Trump person trash talking less than, "You better shut up or you're going to get it." It's more, "you're dishonest and an idiot," type stuff. So I'm not sure what the judge is going to do with this. I think it's much more likely the judge will just give a warning and say, "Cut that out." But nevertheless Fani Willis thinks that he's going over the line into harassment, intimidation. He thinks, in typical restrained form, he put out a tweet, say with a picture of Clarence Thomas from the Thomas hearings saying, "I'm just another black man in a high-tech lynching here." So he's leaning into it.

Josh Barro:

When you say he's been going on TV, you're using the term TV loosely. He was on something called Conservative Daily. He was on something called The Absolute Truth. I don't think you can get these on your basic cable.

Ken White:

No, I'm sure they're kind of like YouTube guys in their basement or facility. But yeah, he was going on these right-wing shows and talking trash about people like Jenna Ellis. I didn't see anything that struck me as an overt threat. Mostly it was, "She's unethical and betraying Trump," trash talk like that.

Josh Barro:

I mean, is that First Amendment protected?

Ken White:

So maybe. I qualify it because when you are a person who has been charged with a crime and you're on bond, then the judge's discretion to restrict your behavior as a condition of bail is broader than the judge's ability to punish your speech in general. So a judge is very clearly established, can tell you not to talk to co-defendants, not to associate with co-defendants, not... Things like that. The exact contours of what that freedom of the judge is are not as well established as they probably should be because again, kind of like gag orders, it's something that's rarely challenged because generally

you don't want to piss off the judge. So I would say that probably there is more freedom to punish a wider variety of speech by someone who is on bond than there is to punish some sort of citizen just out there.

Josh Barro:

I want to just quickly talk about these cases, about whether Donald Trump can even appear on ballots in the 2024 election. We talked about a trial that was ongoing in Colorado looking at the question of whether he should be on the Colorado ballot. There are also proceedings in Michigan, and we've got a ruling from a Michigan judge basically saying that the Secretary of State does not have the legal obligation or authority to remove Donald Trump from the primary ballot on the grounds that he's ineligible for office. And that basically, this is a political question for Congress. It's not up to the Secretary of State. And furthermore, Michigan Law says specifically how the Secretary of State is supposed to put candidates on a primary ballot.

Doesn't deal yet with the question of the general election because that question isn't ripe. We don't even technically know whether Donald Trump is going to win the Republican presidential primaries and be a candidate in the general election for president in Michigan. But this certainly looks like a strong indication from this judge that this Michigan dispute, it's not looking like Donald Trump will be kept off the ballot there.

Ken White:

Right. And this is not very surprising. The relevant components are that Michigan law says who's on the ballot and who isn't based on specific qualifications and procedures. And the judge is saying, "Since the Secretary of State doesn't have discretion here, I can't tell her what to do. This is determined by law." The bigger point though is that political question thing. Remember we've talked about the political question doctrine over the years. It's a doctrine that says sometimes courts will not resolve a dispute when that dispute is, in the language of the Constitution, clearly left to another branch of government. And there's a typical Supreme Court six-part test to determine whether that's the case or not.

But the judge's theory basically is that the language of the 14th Amendment, Article three, that gives Congress the ability to relieve people from the disability of being made ineligible, demonstrates that it's Congress that's supposed to make these decisions. Which to me is kind of putting the cart before the horse because they only do that after the person has been deemed ineligible. But at any rate, the judge uses this to say this

is a decision for Congress, not for courts. It's a political question. The other term is nonjusticiable, and so we're not going to do it. I suspect that's the way a lot of the judges are going to come out.

Josh Barro:

But so here's what confuses me about that. I mean, suppose some Secretary of State somewhere decides that they are going to remove Trump from a ballot and there's no action by Congress on the matter. If it's a political question, then does the court disturb the action of the Secretary of State?

Ken White:

If they're being consistent, no. I think if this judge were presented with that set of facts, then to be consistent, this judge would say, "This is a question for Congress. Congress has the power to remove this disability that the Secretary of State has determined, and so it's up to Congress and not to me."

Josh Barro:

So the political question doctrine can cut both ways here. It could protect Trump, but it could also protect an official who decided to remove him from the ballot.

Ken White:

Exactly. The political question doctrine is one of those areas where really it's an elaborate way for a judge to say, "Look, leave me out of this shit. I don't want get involved." And it's often used to avoid getting involved in deeply politically contentious issues.

Josh Barro:

Let's talk about Congress, speaking of politically contentious. It's been a rough week in Congress. They've been in session for 10 weeks in a row in the House, and I don't think that's been good for moods over there. It's kind of like when you have your kids in the backseat of a car on a very long road trip, their behavior starts to deteriorate the

more and more hours you're on the road. Yes, that seems to be happening with our governing officials.

Ken White:

It does, to the point where I think right now the first rule of Congress is don't talk about Congress.

Josh Barro:

And so we want to talk about whether any of these things were crimes. And so first of all, Kevin McCarthy, the former house speaker, is in the halls of Congress. I forget whether it's the Capitol or one of the house office buildings. But so anyway, he's walking by representative Tim Burchett, who's one of the eight Republicans who voted to remove Kevin McCarthy from his speakership. Tim Burchett's talking to a reporter, he gets jostled and he decides that he's been elbowed in the back intentionally by Kevin McCarthy. And so he's talking with this reporter and then he starts pursuing Kevin McCarthy and yelling angrily at him, which is very out of character for Tim Burchett, who's generally a pretty happy-go-lucky figure. And so later, Kevin McCarthy's being interviewed, and he said, "I didn't notice that that happened. If I bumped into him, it wasn't intentional." He said, "if I kidney punched someone, they would be on the ground." And therefore it must have been unintentional because he didn't hurt Tim Burchett that badly, although he kind of laughed when he heard that Tim Burchett was complaining that he's still in pain from this alleged kidney punch.

There's also, apparently there's some material in former representative Adam Kinzinger's book in which Kinzinger alleges that after he sort of fell out of favor with house leadership, that Kevin McCarthy sort of shoulder checked him twice intentionally or what he eventually perceived to be intentionally going around the House of Representatives. And this was very immature behavior. And so is it illegal to punch your colleagues in the kidneys?

Ken White:

It is, and I would point out it's also corroborated Burchett's version is somewhat corroborated by the reporter who said that as McCarthy was passing behind him, Burchett suddenly lunges at her and not for any of the reasons that a Republican congressman would normally lunge at a reporter. So it seems as if something happened there. No, it's assault. It's not the sort of assault that's routinely prosecuted

when there's no injury. It's more the type of assault that is followed up by this sort of sad performative masculinity of saying, "If I'd punched him, he'd go down on the ground."

There's also an interesting question of whether or not it's protected by the speech and debate clause of the Constitution. So that would be an issue. But no, you're not allowed to punch your coworkers, Josh, in the kidney. I want you to remember that in particular. But he may be basically immune if it happened at Congress as he's on his way to congressional duties.

Josh Barro:

Why would it be protected by the speech and debate clause?

Ken White:

Because he could say, "I'm on my way to vote or do congressional business," or that type of thing. That's an argument he might make.

Josh Barro:

What the speech and debate clause says is that they can't be arrested during their attendance at the session at their respective houses, and they can't be questioned for any speech or debate in either house. So I realized that they can't arrest him right there in the House of Representatives, and they can't charge him for a crime related to his speech or debate. But I don't understand why that would protect him from charges for an assault that happened to be committed in the Hall of Congress, even if they couldn't arrest him in that moment for it.

Ken White:

I think it's unlikely that the defense would ultimately work. But the speech and debate clause has been argued and asserted very broadly to try to apply it to all sorts of things in Congress, at Congress related to congressional duties. So I would completely expect him to raise it. Whether it'd be ultimately successful is another question, but it's kind of an angels on the head of a pin thing because it's unlikely that this would ever get seriously investigated. I do have to say that coming up with a line, "If I kidney

punched that guy, he'd be on the ground," is the most Kevin McCarthy thing ever. Sort of like the douchiest possible response to being accused of this, is what he says.

Josh Barro:

In the Senate, which is supposed to be the more mature of these bodies, there was a hearing at which Senator Markwayne Mullin from Oklahoma, who is a former UFC fighter, he got into a dispute with Teamster's boss, Sean O'Brien. I guess Sean O'Brien has made some comments about Senator Mullin on social media that Senator Mullin does not appreciate saying that he needs to drop the tough guy act. And so of course, Senator Mullin responded to that by challenging Sean O'Brien to a fight right there in the hearing room. He goes, "You want to run your mouth? We can be two consenting adults. We can finish it here." And Teamster's boss, Sean O'Brien, in his own display of maturity says, "I'd love to do it right now." And again, Senator Mullin is a former UFC fighter, and he could definitely beat the shit out of Sean O'Brien. So I understand that he felt the need to perform the ability to stand up to that challenge, although I know who my money is on who would win that fight if it happens.

Ken White:

Yeah, but afterwards Markwayne Mullen gets buried under the 50 yard line in a stadium someplace, so.

Josh Barro:

Yeah, it's true. Sean O'Brien beat a Hoffa in an election. So I know he's not afraid of people who he maybe should be afraid of.

Ken White:

Right.

Josh Barro:

But so in any case, Senator Bernie Sanders who's chairing the hearing has to bang the gavel. There's been a lot of really good gavel banging in Congress over the last few weeks because of the great irritation so many of these people are feeling. And so you

have Bernie Sanders saying, "You are a United States Senator," to Markwayne Mullen, explaining why he's not supposed to challenge the witnesses to fights. Is it illegal to challenge someone to a fight?

Ken White:

It can be. It can be illegal to issue a challenge or accept a challenge to a fight, that is literally fighting words. That narrow and seldom used and maybe partially dead exception to the First Amendment for issuing words that are likely to cause a person to respond violently. You can absolutely be prosecuted for disorderly conduct or things like that. There's some states that have laws specifically forbidding challenging someone to a fight, and it's generally understood that those are illegal.

But in Congress, that is probably definitely under the speech and debate clause because it's something he's literally saying on the floor of the Senate. And let's just point out that leaving aside the philosophical question of whether, if you name your kid Markwayne, that inevitably leads him to challenging Teamsters to fight. You have the fact that you're doing this surrounded by armed guards, protected by Bernie Sanders, and cloaked with the speech and debate. It's not that serious of a challenge to fight. So it's not really that bold, Josh, in my view, to challenge someone to fight under those circumstances. It's kind of more like standing behind your mom in the door and mouthing off to the neighbor kids, but that's just me.

Josh Barro:

Could Sean O'Brien be prosecuted for accepting the challenge? He's not protected by the speech or debate clause.

Ken White:

In theory, he could be. But he would probably have some sort of speech self-defense: "I'm just responding. I'm not issuing the challenge," that type of thing. And again, it's not anything that ever gets actually investigated or prosecuted.

Josh Barro:

George Santos is the less physically violent version of mischief in Congress this week, and he of course is already under federal indictment. So it's not an academic question

whether he can be charged. But there's a report that just came out from the House Ethics Committee that finds substantial evidence that he used campaign funds for personal purposes. And they referred the probe to the Justice Department, although the Justice Department has already charged him with crimes closely related to this.

And the details of this are fun. He received these campaign funds and then he used them to spend more than \$4,000 at Hermes, which by the way doesn't go that far at Hermes. You can spend more than 500 euros on a beach towel at Hermes, I discovered when I went into their flagship store in Paris earlier this year. So you may need to steal a lot of campaign money if you really want to outfit your house from Hermes. There was that photo of him carrying a big orange Hermes shopping bag. And I always wondered, does he tell people, this is my Hermes bag?

Ken White:

I'm sure he does.

Josh Barro:

And it was just a shopping bag.

Ken White:

What I like about this, Josh, is the contrast here.

Josh Barro:

Yeah.

Ken White:

What's after Hermes, Josh?

Josh Barro:

OnlyFans.

Ken White:

Right.

Josh Barro:

He spent money on OnlyFans. Supporting independent content creators like us, Ken. I think independent media is the backbone of American society, and I salute him for spending the campaign funds on OnlyFans.

Ken White:

And Sephora.

Josh Barro:

And Sephora. And I believe also for Botox. I got a text message from my husband during the taping about Santos Botox. So I assume that that relates to spending. Or maybe just to his very tight, youthful looking skin, I don't know. But so you were not allowed to do that. You can't spend your campaign funds at OnlyFans, even if maybe you should be allowed to do that.

Ken White:

No. Although I think it's entirely possible the people at OnlyFans are more competent running a campaign than the people George Santos has actually chosen. So I don't think we can rule out that's the idea here. So yeah, this is just more bad things happening to George Santos. And the only question is whether Congress is going to do anything about it other than just throw it to the DOJ and let them decide. I do have a concern about George Santos though, Josh.

Josh Barro:

Yes, what's your concern?

Ken White:

People need to stop giving him babies. It's like Lauren Boebert gave her grandkid, other people, they keep handing this man babies. This man is a sociopath. He's a serial fraudster. He's under indictment. Stop giving George Santos babies, okay? Jesus Christ. Why do I have to tell you people these things?

Josh Barro:

Whose was the first baby?

Ken White:

I'm not sure. But I'm just saying, if you hand this guy your baby, five minutes later, your baby is going to be the CEO of a 501 C3 corporation to raise money for Santos. And I just don't think it's a good idea.

Josh Barro:

My favorite thing was that the first time that he was seen with the baby, it was Tim Burchett's office that he was coming out of holding the baby. And a reporter asked him, "Is that your baby?" And he said, "Not yet." I don't know why that's so funny, but it's really funny.

Ken White:

It is. I'm just surprised he didn't say, "Yes, it is. I invented babies."

Josh Barro:

And so I'd also note, by the way, he says that even though he's innocent, he's not going to seek reelection next year, which is very sad news for us in the legal difficulties podcast business. By the way. I think we owe it in the interest of fairness and balance to quote his statement where he says, "If there was a single ounce of ethics in the Ethics Committee, they would not have released this biased report. The committee went to extraordinary lengths to smear myself and my legal team about me not being forthcoming. My legal bills suggest otherwise. It is a disgusting politicized smear that

shows the depths of how low our federal government has sunk. Everyone who participated in this grave miscarriage of justice should all be ashamed of themselves."

Ken White:

And so on in that vein.

Josh Barro:

"We the people desperately need an Article Five constitutional convention." I guess, can you call that on OnlyFans?

Ken White:

Well-

Josh Barro:

Maybe like a live stream or something? I don't know.

Ken White:

I think that would turn out as well as any other way, frankly.

Josh Barro:

So on that note, and all defendants are innocent until proven guilty, including George Santos. So important to note, maybe he didn't do anything wrong. But why don't we leave it there this week? Ken, thank you for speaking with me.

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, and we'll be back with more soon.

Ken White:

See you next time.