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Ken White:

Hi, it's Ken White

Josh Barro:

And it's Josh Barro and this is Serious Trouble. Ken, why don't we start this week with a story that we spent a fair amount of time on last week, which is the dispute between Gavin Newsom, the governor of California and the Trump administration over this deployment of the National Guard in Los Angeles. And this question of does the president have the legal authority to deploy the National Guard over the objections of the governor of a state who would ordinarily command the National Guard in the situation where they're supporting immigration raid that the federal government is doing? And so there's been action in this case both at the trial court level and at the appellate level.

Ken White:

Right. And it is often the case we recorded last week's episode discussing what might happen and then all sorts of stuff happened immediately, like within minutes. So the first thing that happened is that Northern District of California Federal Judge Charles Breyer, who's the brother of former Justice Breyer, ruled in favor of California and issued a temporary restraining order requiring the administration to return control the National Guard units to California within 24 hours. The order on this is lengthy and it goes through all the issues we expected it to go through. So really the main event is that question of what role do courts have in evaluating a president's assertion that they need to federalize the National Guard to put down a rebellion or feared rebellion? And Judge Breyer went through a lot of the same past authority that we talked about and made reference to what Judge Rodriguez said in that Alien Enemies Act case where he parsed that very difficult for us to understand distinction between judges interpreting the law and the president having the power to determine facts, but somehow not all facts or not all the time.

And basically came to a place where he said, okay, this is what rebellion means and it doesn't mean anything you want it to. And there are no facts here showing that this is a rebellion or feared rebellion and no facts showing that the president or the locals can't enforce the law without the National Guard, which are some of the triggering possibilities under the statute. He also said basically that the statute does require the order to be issued through Newsom, through the governor of the state, and whatever that means, it doesn't mean the president just doesn't unilaterally without talking to or consulting the governor or going through the governor. So this is a decision. It's unsatisfying to me simply because I think the president's power to do this should

be outside of judicial review, but I think it's a little hand wavy with respect to what exactly the president's discretion is and what's the difference between deference to that and judicial review of the underlying facts. So I still don't understand after Judge Rodriguez's opinion in the Alien Enemies Act case and this opinion, what exactly it means to say that the president gets to determine facts and there are limits on the court's second-guessing of them.

Josh Barro :

Right, because I mean, my recollection when we talked about that Alien Enemies Act case was that basically it suggested that the set of facts that the administration alleged, which were tendentious but not completely insane as an interpretation of what was happening with Tren de Aragua, that Venezuelan gang, that it didn't amount to an invasion or a hostile incursion. I forget what the term is, but that it seemed that from the logic of that decision, that if the president instead asserted a completely preposterous set of facts that would meet the legal definitions, that he could then do what he wanted, that if he said, well, the regular Venezuelan army has invaded and taken control of Alabama, that that would describe an invasion and it wouldn't be up to the court to inquire into what was actually happening in Alabama. Is there a similar situation here where the administration could go back and just give a different description of what's happening in Los Angeles that would meet the definition of a rebellion under these terms and that the court wouldn't be able to inquire into whether it was actually happening?

Ken White:

Maybe? It's not clear to me, Josh, because I mean that is like a coherent theory, a theory that's kind of like the theory of trying to dismiss a lawsuit that a judge has to take seriously and accept specific factual allegations as true at the motion that dismiss stage but isn't required to accept conclusions. So maybe the point of these is that if the president simply says this is a rebellion, the judge doesn't have to accept that, but if the president makes specific findings of fact, the judge has to accept those, but then maybe can ask whether those do amount to rebellion. And it's really cloudy to me. I like the idea frankly, that there is some limit on the president's ability to unilaterally nationalize the National Guard, federalize it and take it under his power based on his say-so as a rebellion now that we're in a place where that's not just some sort of wild scenario, but it's really happening.

But I struggle to find a kind of coherent theory here. I think that the judges need to pull the trigger a little more one direction or the other in terms of saying yes, actually the judge's role is to look to see if facts support the allegations or back off some. So I'm not sure where we're going with this, but at any rate, it's been taken away from Judge Breer to some extent because the Ninth Circuit in a panel of two Trump judges and one Biden judge very promptly issued an administrative stay. And remember that's a stay where they just say, we're going to stay this while we decide whether to stay it throughout the whole appeal. And they held argument on that earlier this week, and the consensus of the argument is that they express skepticism about how broad Judge Breyer's reading of his authority was.

Josh Barro:

And so then apparently Judge Breyer is also, there's a temporary restraining order. He's going to proceed with an argument on whether to issue a preliminary injunction, which is a more durable stay of sorts than the TRO would be?

Ken White:

Right. A TRO is something issued on an emergency basis where there's a showing that there's not time for full briefing and there's going to be an irreparable harm. A preliminary injunction is generally after more complete briefing, even though it's very accelerated in this case and more of an opportunity for fact finding and hearing in that type of thing. I think the preliminary injunction is likely to rise and fall on the same issues though as the TRO.

Josh Barro :

And so should we then assume that the appeals court will do the same thing with a preliminary injunction that it would do with a TRO?

Ken White:

Very likely. And moreover, I think that even if the Ninth Circuit does not, and I could see something happening where this panel issues a stay and the full ninth circuit reverses it or something like that, I think it is highly likely that the current United States Supreme Court will get involved in this on the so-called shadow docket that will step in and if the Ninth Circuit doesn't give some sort of emergency relief or stay that the Supreme Court will, unless it becomes moot, which may be their exit hatch, but the way they've been intervening in cases about presidential power and given their current predilections, I think it's highly likely they'll step in and take the administration side at least saying the administration is raising serious issues and therefore they should be stayed.

Josh Barro:

And so then if the Supreme Court gets involved in that way, that would set us up for at some point, I don't know, are we talking months more than a year from now where there would actually be a consideration on the merits at the Supreme Court?

Ken White:

Maybe although it's the kindest situation that lends itself to getting out of that through mootness. So to the extent that the federalization of the California National Guard ends, then the court may decide it's no longer a live issue and decline to exercise jurisdiction on the theory that it's something likely to happen again. Meanwhile, practically speaking, in Los Angeles, we have not burned the ground the way the administration's rhetoric would suggest. Although you can see why some of the local law enforcement political authorities' reaction supports President Trump's claims. So there have been repeated curfews at night here in downtown LA and a lot of the bus services have stopped running to Downtown LA. And so people are acting as if it's much more of an issue than I think it really is because the actual instances of violence have been extremely limited and extremely narrow in location and scope.

Josh Barro:

Downtown LA is really big. It looks like it's like a few blocks in probably a part of Downtown LA that I wouldn't be spending a lot of time in anyway.

Ken White:

No, you wouldn't like it, Josh. So I mean, you've been here before to my office, but yes, LA is much more sort of archipelago of kind of areas, and Downtown LA is sort of a distinct one. The civic center where City Hall and the DA's office and the courts are, it's kind of a distinct one, and the areas where there has been any sort of violence have been very limited, and the curfew and the blocked off areas are very small compared to the size of the City of LA, let alone the county as a whole.

Josh Barro:

Meanwhile, in Boston, there was a ruling of sorts from Judge William Young, who's a Reagan appointee. So he's been there for a long time that overturned certain executive orders that blocked grants from the National Institutes of Health. And so one interesting, there's been a lot of news reporting about this decision by Judge Young and about comments that he made, but these seem to be comments from the bench. We haven't seen a written ruling yet from Judge Young fully explaining his legal reasoning about why the NIH isn't allowed to cancel these grants.

Ken White:

Right. So this is one of the cases where a bunch of states got together and sued the administration over that flurry of executive orders. This particular executive order directed the NIH to shut down all grants for to generalize anything that could be called woke. Basically to get rid of all DEI-related grants. The state sued saying it was first of all a violation of separation of

powers because Congress has the power of the person and not the administration. And second of all that it violated the Administrative Procedure Act.

Josh Barro:

Thank you, Ken.

Ken White :

You're welcome.

Josh Barro:

— for that singular.

Ken White:

— in that it was arbitrary and capricious, not based on any proper process and so forth, judge Young addressed the merits and the substance by saying that it was arbitrary and capricious pointed out that the government could not even really offer a definition of DEI, but what was really remarkable here was Judge Young going off on his view of the law as being explicitly bigoted

Josh Barro:

Of the order as being explicitly bigoted.

Ken White:

Yeah, the executive order as being explicitly bigoted. Well, the government's whole policy against DEI and such things. And he explicitly said, I've sat on this bench now for 40 years, I've never seen government racial discrimination like this. He said it was clear it was also discrimination against gay people, and he even dropped the, have we No shame, of course, the reference to a famous rebuke to Joe McCarthy. The interesting thing about all of that, as he talked about how this was so clearly an instance of just dressed up bigotry, was that that wasn't really the argument the states were making. They make some reference to it being basically a hatchet job on disfavor subjects, but they don't really go this far. He went a lot further. So you can consume this in a number of ways. It's being largely consumed as sort of a breadth of truth and fresh air from someone calling out the administration, but also, I mean, it's a federal judge

who's been on the bench 40 years going off on a subject that's not precisely the one before him. So I think it kind of tends to address your priors to that extent. I think he's right, but I've been in front of a number of federal judges who have gone off and a subject that's not directly before them at the time, but I think there's a value to calling it out in a way that other judges have not.

Josh Barro:

Do you think he's right as a legal matter rather than as a policy matter? I mean, I assume it's quite difficult to show that. I mean, because first of all, the administration has a fair amount of executive discretion about how to hand out these sorts of grants. It's a program created by Congress, but it's created by Congress that gives the executive agency various authorities to approve and deny grants. And so if you had a policy, for example, that no black researchers will be given grants that looks sort of like open and shut race discrimination there if they disfavor certain topics, it seems like that would be a fairly fact intensive question about whether that constitutes race discrimination, which I assume the courts tend to look at relatively narrowly. I mean, it strikes me as a little bit like the judge doing policy commentary in an area where the legal analysis, I assume would be a lot more exacting than that.

Ken White:

Well, sure, and one should point out that this was not the basis of his ruling. The basis of his ruling was the finding under the APA that this was arbitrary and capricious. And I think it is true, but I don't think the states that are the plaintiffs here have done the work yet. So I think it's very plausible that you could make a case from the comments by the people who put together the policy from the comments from the administration, all the Steven Miller comments so forth, that it really is based on explicit animus based on race. The government responds, oh, well, but we left some NIH grants that are for black people or whatever.

Josh Barro:

Well, I think the government's claim is that certain research that is focused on racial distinctions and divisions actually furthers more divisions or something like that. But it's not that. It's a policy that is not aimed specifically at research that is designed to benefit people of one race or another. It's research about race. And so then you have obviously the very sloppy way in which the administration has defined that. But I mean, it strikes me that that would be a lot of stuff to tease out there.

Ken White:

It would, yeah. So that's why I say I don't think the states have done the work to get there yet. The administration did say that basically, actually, this is because we find these DEI things to be

poor uses of federal money and bad research. And the judges said, well, there's no evidence of that. Which, to be fair, the response to that is because it's not the lead issue so far. So I agree with what he said, but I don't think the record is there yet. I think though what this shows is that judges may be willing to reach that conclusion eventually, but someone's got to do the work to make the argument and document it and prove it before you get that as the basis for one of these rulings in a way that will stand up on appeal.

Josh Barro:

Mike Lindell has lost his defamation suit in Colorado, brought by Eric Coomer, formerly an employee of Dominion Voting Systems, whom Lindell accused of being personally involved in the theft of the 2020 election using Dominion's technology. But Mike Lindell has been spinning this as a victory. First of all, one of his companies got excluded from the judgment even though Lindell and another one of his companies were found liable. And then also Coomer was awarded only \$2.3 million, which I say only in the context of Coomer asked for more than \$26 million. Is this a good verdict for Mike Lindell?

Ken White:

No. I mean, it's still finding that he committed defamation, and it's still a multimillion dollar figure, but in a very real way, in his mind, it's a win. And he immediately texted to, I think Rolling Stone, awesome win MyPillow 100% innocent, which is not actually what juries find in defamation cases, but whatever. You were never going to get vindication out of Mike Lindell where he said, oh, yes, you're right. This was all made up. I was wrong. All you were going to get is sort of indication from a jury saying, yes, you were defamed. The thing about the \$2.3 million versus a \$26.7 million, I mean in the real world, getting a \$2.3 million defamation verdict in the absence of a strong showing that you lost a huge amount of money, lost your job, that sort of thing without a lot of really specific economic damages is a big win for the plaintiff.

And the problem with these, looking for these gigantic multimillion dollar verdicts, which we've seen for people like E. Jean Carroll, is that it really depends on how much the jury is in the mood to make a statement, to really do it in a sort of punitive damages type of way. But jurors are often somewhat financially conservative. And when you're looking for a big verdict, you're also, you're fighting against the juror's instinct to say, well, are we going to make this guy filthy rich off of this? And a lot of the time, these are people who don't have \$2.3 million and think that it's a vast unimaginable sum of money and don't see why it should be the even more ludicrous sum of \$26.7 million. And they think that's a big, big win. They don't really consume it the way we do because we've gotten used to these big kind of emoji based numbers in these verdicts. So I think it's the jury saying, you were absolutely defamed. It's absolutely unacceptable. Here's a big amount of money, but not saying sort of, we're just going to use whatever number the plaintiff asked for.

Josh Barro:

It's funny, I keep going back and thinking about that nearly \$800 million settlement that Dominion got from Fox Corporation on the eve of that trial. And the amazing thing about that number is Dominion had very real economic damages, but not \$800 million of them. \$800 million in fact far exceeded the value of Dominion prior to that trial. The private equity owners of Dominion, it's probably one of the best private equity deals that's ever been done to buy this company, have it be defamed by Donald Trump's political operation, and then end up with this huge windfall that exceeded what the company was worth before. And so obviously one possibility with that settlement is that Rupert Murdoch just screwed up and paid too much. Another possibility is that what was going to happen in the trial was going to be so damaging to the business of Fox Corporation that it was worth paying more than they might've actually gotten in a judgment at the end of it. But it's I guess kind of lightning in a bottle for those attorneys that they managed to get that enormous number that does not seem to have replicated for Mr. Coomer here.

Ken White:

Yes, I take your point about how buying dominion through private equity with this happening is a windfall. And Josh, I have an idea for a business I want to talk to you about later anyway. I think it's rarely one thing, and the decision to settle something like the Dominion case for \$800 million is going to have a lot of people participating in it. I suspect it's a combination of what they thought their real exposure was, the fact that Fox as an entity with so much more money than Mike Lindell. So it really had those deep pockets that punitive damages might significantly touch that it was going to be hugely expensive to continue to litigate no matter what, that it was going to be hugely damaging and embarrassing and that it was possible that it could reveal things that would trigger liability in other cases. But often just people like Rupert Murdoch just have these unimaginable sums of money and they think, eh, I don't want to do this with my time. I want to do something else. So that may have been it, but \$2.3 million to million Eric Coomer as I think a good result for him.

Josh Barro:

Speaking of good results, Michael Avenatti maybe did a little bit of good lawyering. He appealed his sentence, he got his sentence overturned in the ninth Circuit because they screwed some things up and calculating exactly how severe his sentence should have been. He's now been re-sentenced and he got, what is it, a few months shaved off his sentence, he's going to get out of prison earlier than we thought.

Ken White:

This is not Michael Avenatti being a good lawyer. This is the lawyers of the office of the federal public defender being very good lawyers as they typically are. And I would comment only that prior to his exposure to this segment of the justice system, Michael Avenatti was very openly contemptuous of criminal defense lawyers. One wonders whether he still is, but yeah, what had happened, remember is that Judge Selna—

Josh Barro:

The longest suffering federal judge, wasn't he the first one that we called a long suffering federal judge?

Ken White:

No, I think that was Otero.

Josh Barro:

Oh, sorry. You're right. It was James Otero, not James Selna.

Ken White:

Right. Judge Selna had sentenced him to 14 years on this particular segment of his kind of international crime spray. And what happens when the Ninth Circuit reversed the sentence because Selna had not given him credit for money. He paid to the victims. So in other words, in calculating the amount of loss, which is the driver of the numbers in the sentence, Selna had not given him any credit for money he paid, and Selna had not given him credit for the value of his services.

Josh Barro:

Which are incalculable

Ken White:

Right. Well, this is something that goes both ways. So basically like in a Ponzi scheme, when you give money to people in a Ponzi scheme to keep the Ponzi scheme going, generally you don't get credit for that because it's understood as the lubricant that keeps people sending money. But sometimes you do get credit and it can be a little cloudy which-is-which. So Selna gave him that credit and so reduced the sentence to about 135 months. He was going to reduce

it even further. But one of the victims gave a very impassioned plea in court, and Selna kept it at 135 months. So it's a little more than 11 years. He's got about another eight years to go by most calculations, he's serving at a terminal island near the port of Long Beach. Terminal Island is a federal facility that holds a lot of immigration detainees, and it is every bit the garden spot that it sounds like. So he's prepping for his redemption tour. He was emphasizing how he goes to AA meetings, how he's found religion and goes to church in jail. So I mean, Josh, I just think we should ask right now, what is the name of Michael Avenatti's podcast going to be when he gets out, assuming that we still have podcasts?

Josh Barro:

In 2032? It's not that far off, Ken.

Ken White:

It really is not.

Josh Barro:

Meanwhile, the Proud Boys — we talked about, they filed this lawsuit, several of the Proud Boys filed this lawsuit saying that their civil rights have been violated when they were prosecuted related to January 6th. And it's another one of these lawsuits that looks like substantively it has no apparent merit, but because the counterparty is Donald Trump, he could choose to settle the lawsuit using federal funds. And so that seems to be what the Proud Boys are probably hoping for here, but they've hit a little bit of a snag with their representation. They don't have a great lawyer like Michael Avenatti.

Ken White:

Right.

Josh Barro:

Well, he is like Michael Avenatti in one way.

Ken White:

Yes. So the case was interrupted by the magistrate judge in the case issuing an order directing their lawyer to explain whether or not he had reported to the bar of the middle district of Florida

his recent felony conviction, their lawyers, a gentleman previously known in his human form as Austin Gillespie, now known as Augustus Saul Invictus

Josh Barro:

From the firm of Invictus and Invictus.

Ken White:

Right. Austin Gillespie is the nice young man in your daughter's graduating class who you now believe is at Brown whereas Augustus Saul Invictus is someone arrested for getting into a fist fight over age of consent laws, and he's someone who was infamous for being one of the main speakers at the Unite the Right rally in Charlottesville. He got into politics in Florida. He was too crazy for the Libertarian Party of Florida, which is very crazy indeed. There were disputes about not whether he drank a goat's blood, but what the purpose was, was it sadistically unquote or for sort of communal Thanksgiving purposes. Anyway...

Josh Barro:

It's like a supplement, right?

Ken White:

Yeah. Anyway, recently he was convicted of burning an object with an intent to intimidate, I believe based on at the right rally sentenced to nine and a half years in Virginia, but out on bond pending appeal and apparently did not report the conviction as the bar the middle district of Florida requires. So what you have to know is you're barred in a particular state, you're licensed to practice in a state, but then you also have to have permission to practice in a particular federal district, and that's much less formal. You don't have to take a bar or anything, but you have to get permission from that district. And a lot of the districts have their own rules, and those rules include things like, if you get convicted of a felony, please let us know so we can decide what to do. So the judge of his own accord figured out that this from the news that he had been convicted and apparently not reported it. Anyway, this is the guy, the proud boys chose to represent them. They were lucky to get him before the administration snatches him up for some position in the Department of Justice.

Josh Barro:

Yeah, he's going to be like acting US Attorney for the District of Columbia or something.

Ken White:

Exactly.

Josh Barro:

E. Jean Carroll continues to try to collect on the judgements that she received against Donald Trump in two trials in New York, and one of those cases that has gone up to the Second Circuit where there was an en banc consideration of an opinion that upheld the judgment and the court as a whole decided that they also would uphold it. But there was some dissent from Judge Steven Menashi who was very upset about this and so upset about it that he got some of the other judges upset about how upset he was.

Ken White:

So this was a very boring procedural thing, a routine rejection of a request for rehearing on bonk meaning by all the judges of the Second Circuit after Trump had lost. What Judge Menashi did is issue this 37-page dissent, basically arguing and re-litigating the case from his own perspective. And it is quite remarkable in that it shows none of the sort of deference or approach to a lower court's decisions that an appellate court normally does. And it's not even limited by what arguments Trump made. So it's kind of making the arguments Trump should have made. So it's more like a blog post than strictly speaking a traditional judicial dissent. He basically thinks that Trump's denial, his saying this is a hoax, the accusation of rape was non-actionable opinion denials should be treated that way and that the judge should have let in evidence of why Trump thought this was a hoax and a put up job by his political enemies because that was relevant to his mental state and whether or not he acted with malice, all of which are arguable, but were not argued in the way this judge argues them by Trump or his lawyers.

And so Judge Myrna Perez writes a short concurrence that's kind of dripping, not with condescension, but with sort of alarm and surprise saying, this is not how we do things. You're making arguments not raised by Trump, and you are re-litigating the case below instead of giving it the trial court the appropriate deference. So it just kind of goes to show how Trump litigation can drive weird behavior in the judiciary.

Josh Barro:

Speaking of weird behavior, let's talk about the P. Diddy case, which continues in Manhattan. The jury continues to hear evidence and there was some drama, there was a juror on the case who's been removed and in echoes of the Eric Adams campaign for mayor, he was removed because of a dispute about whether he lives in New York City or in New Jersey,

Ken White:

Right. This guy had said during jury selection that he lives in the Bronx, which would make him eligible to serve on a federal jury in this district. But during some offhand conversations with the court staff, they heard that he actually is currently maybe living in New Jersey, and when they inquired further, well, he moved to New Jersey with his girlfriend, but he spent some of his time during the week in New York, and the judge was basically concerned not so much about the question of whether he was eligible to be a juror in a federal district in New York, but really about the inconsistency in his answers and the seeming possible deception. But what really drove this, what really made this a big issue in the case that was highly controversial and got very heated, was that this juror is black and the defense spun this as a racial thing that they're trying to drive one of relatively, it's a fairly diverse jury, but there are not many black men on the jury.

Josh Barro

He was one of two black men on the jury.

Ken White:

Which for an American jury actually is maybe more diverse than average. So the defense was saying that this is a put up and it's for racial reasons, and if you do this, judge, you're making the jury less diverse because you alternate as a white guy. And what the judge said is, well, the logic behind the prohibition on striking people because of race, the so-called Batson rule equally should mean that we don't refrain from striking jurors because of race, that we don't say, well, normally I would excuse you or I would expel you, but because you're black, I'm going to keep you on that. That's illegitimate too. The prosecution was very angry at being accused of having raised this for racial reasons. And they pointed out that this information that the juror had said this to court staff had only just come up, but the defense was very much leaning into the idea that this whole thing is a racial prosecution showing animus against Sean Combs because of his race. And this is just merely that recent instant. And the judge was just, no, I would release a person for doing this and I'm not going to not release him because he's black. So a lot of this is based on reporting by Meghann Cuniff, who's one of the best independent journalists out there covering trials like this.

Josh Barro:

You note that there's a hazard here for the prosecution because you can get a reversal of a conviction over a wrongful dismissal of a juror. Am I wrong to looking at this from the outside? It sounds to me like the judge is on solid ground here. If you live in New Jersey, you can't sit on the jury. If you have given dishonest statements to the court about your place of resident to sort

of squirrely statements, that seems like it ought to be at least an area within the judge's discretion as to whether to decide to excuse this juror or not. Is there a real risk on appeal here?

Ken White (33:41):

There's always risk, and this is one of those areas where if the Court of appeals decides it doesn't like you striking the juror, they're going to decide that. But here, the judge did everything a judge should do in terms of an inquiry with a juror, careful analysis, that type of thing. He's laid a record that I think very likely is well within his discretion, but it is a risk. And there are famous cases of Fife Symington, the governor of Arizona, and got his conviction reversed and then eventually pardoned based on a juror being kicked out who the Ninth Circuit said should not have been, things like that. So it's a real hazard for the prosecution, but it's also sort of like a no-win scenario for them because if they think they have a juror who's lying and mid deceptive, then that's a hazard to the case. But also getting rid of them is a hazard to the case. But I think the judge here did everything they should do to make a record, and that record is probably well within their discretion.

Josh Barro:

Usually people try to get out of jury duty. If you live in New Jersey and are trying to get on a New York jury, you really want to be on the case. I assume that the prosecution would find that particularly suspicious.

Ken White:

So if you're kind of passing up an excuse to get out the prosecution may think, I'm not sure we want you.

Josh Barro:

Right. Finally this week, Ken, I'm so excited for this thing that you are clearly not excited for, and I want to thank commenter LawZag for flagging this for us. This is a decision that came down in late March that we somehow missed that is right within our wheelhouse, and it has to do with Real Housewife of Atlanta, Porsha Williams, who has been locked in a bitter divorce and lots of ancillary litigation with her former husband, Simon Guobadia, who is a businessman originally from Nigeria — actually in just the last week, he's in the news, apparently been deported to Nigeria after decades living in the United States, and some time apparently spent in Dubai. But so anyway, Porsha and Simon really do not like each other, and Simon has sued Porsha for defamation because of some Instagram posts she made about erectile dysfunction, and he survived a motion to dismiss in this case, Ken. So first of all, it's been a tough time for Simon

Guobadia with the divorce and the deportation, but he does continue toward trial in his defamation case against Porsha Williams.

Ken White:

First of all, thank you to the supporters out there who, recognizing this isn't a visual medium, couldn't demean and humiliate me by having me dress in some awful outfit and dance or something, but they can do this instead. So yeah, the particular thing is these two are very online already and very in the media, and once they start having these marital problems, Porsha Williams spelled P-O-R-S-H-A.

Josh Barro:

Of course, that's how you spell Porsha.

Ken White:

Everyone knows Porsha published a series of statements on her Instagram about erectile dysfunction. Now, didn't mention her soon to be ex-husband, but she just used the men's health tag. She said it causes relationship problems, causes men to feel anger and sadness, and of course, all the sort of outlets that follow the Real Housewives closely, immediately interpreted this as her saying that Simon has erectile dysfunction and reported on it. And Simon was unhappy with this. He sued for defamation and false light. He says that I'm quoting here, "his credibility and image within his community and professional networks has suffered." And also he complains that now when he posts on social media, everyone in the comments talks about erectile dysfunction, which he finds less than rewarding as a way to use social media. So he sued Porsha, she moved to dismiss, and I mean, the reasons are interesting. First of all, she says, okay, but I didn't name him. So these aren't of or concerning or about him. So he can't sue for defamation.

Josh Barro:

Right. She was just raising awareness about erectile dysfunction, which is a significant public health problem for certain men, certain unspecified men.

Ken White:

So the judge says basically, no, that's not the law. The law is whether in all the circumstances, people will reasonably understand that you're talking about a particular person. And given that they were in a highly publicized, contentious divorce when she started doing this, as she was

talking about, at least for the pleading purposes, he's pled enough that a jury could find that a reasonable audience would understand she was talking about him, but the judge says it's not defamation per se. So defamation per se is a category usually defined by statute where it's so obviously and uniquely harmful to your reputation that you don't have to prove or plead special damages. And the judge says erectile dysfunction is not in the Florida statute of things that are defamation per se, which surprised me a little bit given Florida, and it's not harmful to his profession. There's no indication that his profession requires a functioning erection, which I'm sure we're all grateful for. And so it's not injurious on its face and therefore no defamation per se.

Josh Barro:

Yeah, the judge notes that erectile dysfunction is neither a contagious disorder nor a debasing act. And so if you accused him of having syphilis, that could be defamation per se. But because ED is not communicable, or at least not by means of a bacterium...

Ken White:

I don't know, I've read this story and not sure I ever want to have sex again, but anyway, it's also not intentional infliction of emotional distress because it's just kind of insulting and it's not outrageous enough. It's like a mere insult or negative accusation.

Josh Barro:

This judge is very focused on defending the honor of people with erectile dysfunction and saying it's not that embarrassing. That's very interesting.

Ken White:

Yeah, maybe someone should write an article about that, see if the judge continues to think that. So the end result is that his defamation claim continues. Some of his other claims get kicked out. But meanwhile, as you said, after this was litigated and adjudicated, because this order was from a few months ago, he was deported to Nigeria, which is a somewhat bad outcome for anybody and probably makes kind of his Housewife ex-wife the least of his problems.

Josh Barro:

And so I assume if you have been deported to Nigeria, or maybe he's gone back to UAE where he seems to have been residing more recently than Nigeria, can you continue to pursue your defamation claim in the US Court?

Ken White:

Yes. There's no reason you can't pursue a claim here and submit to jurisdiction, but it become very difficult in terms of how does he get here to testify. I'm sure what he would do is when they try to take his deposition, which is something I hope to God I never have to read, they'll probably ask the judge to let it be done by video or something. But the trouble comes when he has to come and testify at his trial because they're not going to let him into the country. So maybe again, him asking to testify remotely or who knows what will happen,

Josh Barro:

Right? Because eventually the court has to get to a fact finding stage, like in the motion to dismiss. We talk about, is this sufficiently pled? But at some point, I assume that one of Porsha's defenses will be 'he can't get it up,' and the court will have to inquire into whether he actually has erectile dysfunction. I assume his testimony will be an important part of that.

Ken White:

Well, more specifically, first, there'll be discovery back and forth and maybe a request for an independent medical exam, depositions, written questions, request for admission, and yes. And then sooner or later it might go to trial, and that's when that fact finding would happen.

Josh Barro:

I can't believe we're going to be deprived of that because he's halfway around the world. It makes me so sad.

Ken White:

Well, who knows? I mean, this is exactly the sort of story that I think will stay in the news as many Housewives-adjacent stories do. There was controversy when Tom Girardi was sentenced, which we talked about recently, because the news coverage emphasized that his ex-wife is a former Real Housewife of Beverly Hills. But the truth is these details are the things that gets a wider array of media interested in these criminal justice stories.

Josh Barro:

I just think it's great that people are learning about defamation law. I mean, people talk about housewives as trash tv, but now a lot of people know what defamation per se is who didn't know that before, and I personally think that's great.

Ken White:

Josh, I'm not entirely convinced that people are focused on that element of it, but isn't it pretty to think so?

Josh Barro:

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

Ken White:

Thank you, Josh.

Josh Barro:

Serious Trouble is created and produced by very serious media. That's me and Sara Fay, Jennifer Swiatek mixed this episode. Our theme music is by Joshua Moshier. Thanks for listening. We'll be back with more soon.

Ken White:

See you next time.