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Ken White:

Hi, it's Ken White.

Josh Barro:

And it's Josh Barro, and this is Serious Trouble. Ken, it looks like Elon Musk and Donald Trump are already making up again. I guess whatever drug cocktail Elon Musk is on changes from day to day, and sometimes he's in a better mood than others, and it seems like he's conciliatory enough that what we thought might be producing some content for us might get cut short because it seems that Elon Musk has a friend again in the White House.

Ken White:

Yes, I guess the course of narcissistic bro, mutual admiration never did run smooth for a while there. I thought maybe God loves me so much that Trump is going to sue Musk for defamation over saying he was in the Epstein files, but God doesn't love me that much, Josh, so it's not going to happen. It's a shame.

Josh Barro:

I really try to avoid discussing lawsuits that might be filed rather than lawsuits that are filed. But I agreed to indulge Ken a little bit here because this one is so much fun. And so I guess there's two claims there, right? One is Trump is in the Epstein files, and the other claim was that the reason the Epstein files, if they even exist have not been released is that Donald Trump is in the Epstein files. That's why he's withholding them. I mean, famously, Pam Bondy gave all those binders to the dumbest right wing influencers in America, and they all took pictures with them on Twitter and then found that the binders were full of documents that everybody already had. And so if Elon Musk goes out there and says, the reason the president isn't telling you the whole truth here is because he's in the files, is that potentially defamatory?

Ken White:

I mean, is a super weak case. Musk in the midst of this slap fight with Trump, said that the bombshell was that Donald Trump is in the Epstein files, but what does that even mean? I mean, we know the Epstein files include records of who flew on Epstein's jet, so it's not really a surprise, and by itself it's not defamatory. So the statement that he was in the files is too vague and ambiguous to be defamatory. It's not enough to be a provable statement of fact that therefore there's records that Donald Trump engaged in child molestation or something like that, particularly because it's in the context of Twitter and it's in the context of a Twitter slap fight. So any reasonable audience is just going to consume it as rhetoric and hyperbole and not as a really specific allegation that there is proof that Donald Trump committed sexual assault on somebody or something like that.

Josh Barro:

I mean, a lot of people knew Jeffrey Epstein. We know that Donald Trump knew Jeffrey Epstein, so that's

Ken White:

Right. They're pictures of the two chumming him up. So it's nothing. But Donald Trump is just egotistical enough and just fond enough to perform of litigation that you could imagine him suing over it. But it seems as if they are making up and

Josh Barro:

Reconciling. Yeah, I mean, Ben Dreyfus was pointing this out on Twitter the other day, but Jeffrey Epstein was a billionaire with a jet and an island who had lots of interesting friends, and it is at least conceivable that a lot of people got on that plane for reasons other than to molest a child,

Ken White:

Right?

Josh Barro:

So yes,

Ken White:

There's a very long list of people who are suspects, if you can make that inference.

Josh Barro:

Right. Let's talk about some actual cases and controversies here, and I guess we can start where you are in Los Angeles. First of all, are you okay

Ken White:

The other night? There were some cops in the way of my normal route home from work, but yes, absolutely. In fact, almost everybody is Absolutely okay.

Josh Barro:

Yeah. Yeah. I see these pictures on television and I know your office is in downtown la, so I'm a little worried about you, Ken.

Ken White:

Yeah. Well, I understand that you've probably seen that footage of the same automatic car burning like 180 times, but the truth is right. The truth is that the places where there were anything, any protests that were even a little unruly, it's limited to a very narrow geographic area in the vastness of LA City, let alone LA County. The protests have been so overwhelmingly peaceful that even the LAPD and the sheriffs describe them as mostly peaceful and appropriate, and those guys don't like protests and the level of violence and property damage and stuff like that is very minor. I know pastor we know is down here for a pastoral protest, a bunch of people who have been at other things, they have all been perfectly normal, safe law abiding demonstrations, but the media has very much accepted the administration's framing of how LA is plunging into abyss that requires the saving of the US Marines. But it is really not true,

Josh Barro:

And I mean there's some business owners who've suffered looting and that sort of thing, but as you note, there's a police department and a sheriff's department in Los Angeles that has some experience dealing with these sorts of things and is ordinarily the federal government doesn't get involved on rare occasion when these things really get out of hand. The governor will voluntarily call up the National Guard as it's happened a handful of times in Los Angeles in its history, but this time the unusual situation is that the administration has sent in troops against the will of Governor Newsom, and that's setting up a significant legal clash here about this question of can the federal government send in the National Guard and send in the Marines when the governor doesn't ask for them?

Ken White:

Right? And the administration's actions have been rhetorically very well planned in addition to physically planned. So they have really been using all the keywords and magic phrases to set up all the things that you can tell they want to do. They've been talking a lot about this being an insurrection by people here. They're claiming that the protests and what they call the riots are being led by aliens and enemies, and they're claiming that significant force by the military is necessary to protect federal agents and federal property. So you can hear the various statutes they're hoping to invoke. But ultimately, governor Newsom here, who until recently had been sort of cozying up to the administration and to figures on the right in general, has taken a very hard stand against this and sued the federal government claiming that had violated federal law by nationalizing the California National Guard and turning it out here in Los Angeles.

Josh Barro:

First there was news reporting that Newsom was going to sue, and you and I were discussing is he actually going to do that? Jack Goldsmith, the former Georgia View, Bush legal official, who's a professor at Harvard Law had a tweet about it basically like, gee, that seems like it's probably unwise because they'll probably lose and make some bad law in the process, and then the lawsuit actually emerged. What do you make of it? Does Newsom have a good legal case here? Are the courts actually going to stop the administration from doing this? There's

Ken White:

A possibility of trial court action putting some sort of breaks, but I think that the long-term prospects from the Supreme Court are very poor for Newsom's case. So the case so far only centers around the federalizing of the National Guard, and that's under a statute under Title 10 of the United States Code Section 12406 that allows the president to call into federal service units of the National Guard when the president finds that the United States has been invaded or is in danger of invasion by a foreign nation or if there's a rebellion or danger of rebellion. So Newsom sued under this saying, first of all, none of those conditions are met. Second of all, this is supposed to be ordered through the governor, and he did not order it. He did not consent to it. So he filed a complaint and a motion for an emergency temporary restraining order, which the federal court in San Francisco immediately denied.

Josh Barro:

He asked the court to act within two hours when he filed this.

Ken White:

Right. You generally don't want to tell federal judges that it's going to be decided Thursday, June 12th as we're recording this for the initial hearing, the government's response really lays out the problems. So the main problem is the same thing we've been seeing in a bunch of other cases by the administration. That is who decides whether or not there is a rebellion or danger of rebellion or invasion or so forth. So remember in the Alien Enemies Act cases, we were running into this issue where the question, if the President says, this is an incursion by a hostile foreign force, does a court get to second guess the President? Or is that uniquely in the president's discretion to say so? And here there is a fairly strong argument under existing law that the President just gets to decide whether or not there's a risk of rebellion. It's supported by a 200 year old Supreme Court case, *Martin v Mott* from 1827, basically involving a soldier who went to AWOL.

In his defense was, well, it was okay for me to go AWOL because the National Guard hadn't properly been federalized because there weren't the conditions to justify it. And the court said basically, well, that type of determination whether there's a risk of rebellion is uniquely in the President's discretion. So it's 200 years later, but there's still certainly the way the Supreme Court hasn't been interpreting things, I think a very substantial chance that the courts agree that it's the President who at the very least is entitled to very broad deference about whether or not something is a rebellion. And the way that the administration spins it, I think is pure bullshit, but they're saying, look, all

these people are trying to interfere with ice enforcement of immigration law, and that's a kind of rebellion, and therefore the presidents within his power, the government also argues that the statute only says that the order has to be issued through the governor, not by the governor. So they seem to think that if they sort of notify the governor, and technically it happens under the authority of the governor, even if the governor is saying, no, no, no, that satisfies the statute.

Josh Barro:

Wait, so I'm sorry. Let's start with that second part. That sounds wrong to me. The governor is not a part of the executive branch or of the federal government at all. How can the administration take action through the Governor without the consent of the governor?

Ken White:

It's a good question because the statute says orders for these purposes shall be issued through the governor's of the States. And the administration's gloss on that is that the decision is made by the president. The determination and the order just flows through the governor. But as you say, that reads the language out of the statute that renders it meaningless. And that is probably a stronger argument for Governor Newsom than is the rest of it because of that discretion the president has. I mean, I think it's an abuse of that discretion to say this is a rebellion or anything like that. It is nonsense. But the case law seems to support the administration's argument that they get to make that up if they want to.

Josh Barro:

So if we set aside through the governor thing and focus on this issue of the president's discretion, is there any limiting principle there does that the President could use the military for any domestic law enforcement purpose that he wished? Because if there isn't a limiting principle, is there even maybe a major questions issue here? If this is a statute that appeared to be about narrow rebellion related cases, but it in fact allows the President to use the military in this totally novel manner for any domestic law enforcement purpose that sounds like a mountain hidden a mousehole or whatever the language is that the conservative justice has used there,

Ken White:

Right? So you've got this contravening statute, a posse, Citis statute that limits using the military for law enforcement unless Congress has specifically authorized it.

Josh Barro:

And notably, that's a statute that was passed after this 200 year old court decision. So that presumably has some bearing on whether that decision is still good law.

Ken White:

And the administration here is saying this isn't a violation of the policy commentative statute because we're not using them for law enforcement using them to protect federal operations and federal personnel and property. We're not just go out there writing traffic tickets or something, which again, since they are clearly trying to use the National Guard and sue the Marines to enforce dispersal orders, to stop riots to arrest people engaging in violations of law during protests, I think it's kind of a tough argument that they're not using 'em for law enforcement at all. Josh, in terms of are there any limiting principles? I mean, that's the main question. That's the main event, and it's the same one we saw in the Alien Enemies Act cases. And remember we had some judges saying basically that we can look at the facts that the president articulates and decide whether or not those facts if true satisfy the statute, but other judges are saying no.

We can also look to see whether there's any evidence to support the facts that the president articulates. But this is actually, the administration has a decent argument here. I mean, the Supreme Court talked about that in *Martin versus Mott* 200 years ago and said, more or less the administration may not want to articulate the evidence it has, that there's a risk of rebellion and put it open for public scrutiny. So that's why we're going to defer to the administration. So you have this situation where it's not entirely clear whether the president can just make it up entirely and there's nothing we can do about it or whether courts have any role at all. And I think the way the Supreme Court is leaning recently, I would guess that they are probably going to come out on the side of unitary executive power, the president being the sole decider about these things, unless perhaps the president articulates specific facts in justification that contradict the statute. So it may just be you have to make up a good enough excuse.

Josh Barro:

And then this is just the authorities they're already citing you say the elephant in the room here is that they can try to claim more of those authorities by actually invoking the insurrection acts?

Ken White:

Absolutely. So the Insurrection Act is very broad, and it has a similar structure where the president makes determinations and allows the president to use the military. So some of the triggers are the president can use the militia or the armed forces if there is a insurrection, domestic violence, unlawful combination or conspiracy that hinders the execution of the laws of the states. And the federal government impedes the course of justice so forth. It really allows the president to do whatever the president wants with the army and the military. So that's kind of the heavy guns that they have been laying the rhetorical groundwork for by calling this an insurrection and things like that. But they have not yet explicitly invoked.

Josh Barro:

So I'm just trying sort of game out where we're likely to see this going forward. It sounds like in one way or another, the president likely is going to have significant legal authorities to use the National Guard and the military domestically for some of these purposes if he wishes to do so. I think one of the reasons that he wishes to do so is essentially a political purpose that the showdown that he's having with Newsom, I think he thinks accurately is probably politically favorable to him right now. Is this also substantively useful for their enforcement efforts? I mean, the context for this is this really significant ramping up of interior enforcement of immigration by ICE, where they're trying to increase the number of arrests that they're doing. They are taking a broader approach that is not particularly focused on people who've committed other criminal offenses. I mean, literally Steven Miller was like, go to Home Depot parking lots and pick people up. And that's what has driven some of the protests that the administration is then responding to. Does the military actually help them achieve that? Is the military actually acting as a force multiplier for ICE here in such a way that they're going to want to do this repeatedly around the country?

Ken White:

Not unless the military starts being used for sort of the mundane day to day sweeping up people at restaurants and Home Depot and in court after immigration proceedings

and things like that. So the limiting principle is staffing and where to put people once they've been arrested. I mean, here in Los Angeles they were infamously, and this is what generated some of these protests, just sweeping people up in immigration court and housing them in basement rooms without light or bed or food or water families and things like that. So the limiting things are the facilities they have available to take people into custody and the people they have to take them. So to that extent, yes, but I don't think it's really a force multiplier in the sense that they don't have an armed opposing force or anything like that. They occasionally have protestors trying to get in their way and exercising civil disobedience. But the only, I think it is primarily political. And as you point out, there's certainly some people who are, rah rah, this is great. But there are also other indicators that this is unpopular and at least some, it really depends on how you ask the questions about the President's immigration policy.

Josh Barro:

Speaking of that civil disobedience and these efforts to impede these arrests that ICE is undertaking around the country. This has been a hobby horse for the administration. Obviously, judge Hannah Dugan arrested up in Wisconsin with that allegation that she assisted a criminal defendant and finding his way out of the courthouse. And there's a lot of fact specific stuff in that case about he went down a public elevator, did she actually really impede anything? But in any case, they're very focused on this question of, are people getting in our way as ICE tries to make arrests? And so in California, you had a union leader, David Huerta, who runs the California affiliate of the Service Employees International Union, and on June 6th, he was arrested at a protest of ICE raids. And this has been a huge political disruption in California. Huerta has now been released pending, I guess pending his trial. But it sounds like David Huerta was in fact involved in attempting to disrupt these federal law enforcement operations. Did he commit a crime

Ken White:

Plausibly? Yes. I mean, it was classic civil disobedience, but the whole point of civil disobedience often is that it does violate the law, and it's a question of how the government's going to treat it. So Huerta was at the scene of one of many places where ICE raids at businesses resulted in protestors and the government's trying to make it all shadowy and sinister, that there's a network that's reporting where the ice raids are happening. Well, that's because they're not subtle. I mean, they roll up in their SUVs with sirens blaring and they start going in and they're all up with their guns and their vests and all this type of thing.

Josh Barro:

And that's not illegal, right? No, not at all. You're allowed to tell people like, Hey, there's a law enforcement operation happening, here

Ken White:

You are. But this is where we get into this conspiracy charge. So Huerta and other people showed up and he and other people were deliberately sitting down and blocking the driveway and the gate that was being used to bring ice vehicles in and out of this business area where people were being raided, they had gotten search warrants for these particular locations in order to go in and be able to interrogate people and arrest potential unlawful immigrants. And so he went there and the agent describes how they're shouting insults to intimidate them, and it's all pretty weak stuff. But eventually he says that you're in the way of the gate. We can't get in and out if you don't move. And Huerta says, what are you going to do? You can't arrest all of us, which is nice and defiant. But also, and I got in a fight with a few people about this basically has the effect of handing them an element of the offense that you are intentionally impeding government operations.

So they arrest him, and he's charged with Title 18, United States Code Section 3 72, which is a conspiracy to obstruct or impede a federal officer in the course of their duty. And the conspiracy being obviously he's doing it in coordination with other people, and it's a real felony. It's a serious felony. The guidelines are fairly low, and it's something where it's unlikely he would actually do time in my estimation. But there it is. So all of this stuff is, again, they do not have the resources to charge everyone in a protest here with something like that. We saw how the difficulty of the January 6th events, the huge difficulty of charging hundreds and hundreds and hundreds of people there in dc, the same thing applies here. You can't logistically do federal charges against everyone. So arresting someone famous like this, someone prominent, is kind of to encourage others.

Josh Barro:

Well, I mean, but another thing we saw with the January 6th prosecutions is that if the Department of Justice really cares to surge a lot of resources into some project, it can do so. And they didn't charge every, but they charged everyone who set foot in the capitol, hundreds and hundreds of people. And so I realized that these protests nationally involved more people than were involved at the riot in January 6th, although I

don't know how many people nationally actually are committing crimes interfering directly with the ICE operations rather than simply protesting them. It seems like they can't prosecute everyone, but if this administration is really focused on prosecuting a lot of people, it could bring a lot of prosecutions that DOJ otherwise ordinarily might not bring, right?

Ken White:

Yes. Although they'd run into trouble. So I mean, this basically took over the DC office for a significant period of time. You might remember, and here in Los Angeles, it would do the same. It would also be, I think, more difficult to retain federal prosecutors in this case than it would be for the January 6th prosecutions. I think trying to go after people for anti-ice protests is going to be even less popular, particularly in Los Angeles. And it really depends on how aggressive they're going to be. There's a whole array of potentially criminal acts from things like actually setting stuff on fire or actually throwing something at a federal agent through stuff like this, the deliberate civil disobedience standing in the way of cars all the way down to being the person who calls in, where the eyes people are going on a conspiracy theory. So there's a really vast array of people that they could go after, and I'm not sure they can even make a dent in it.

Josh Barro:

Let's talk about some appeals court action that the administration has been crowing about. This has to do with those A, A tariffs, the global tariffs, that cornerstone of the president's trade policy. There had been a couple of different court rulings, one from district court in Washington dc, another from the Court of International Trade, saying that the tariffs that the president had imposed are illegal, at least the ones that don't apply to specific categories of goods, saying that this particular 1970 statute that he cited that allows the president to regulate trade in certain circumstances doesn't actually allow him to impose tariffs unilaterally. So there was that decision. There was a thought that a lot of those tariffs were likely to go away, and then there were appeals immediately, of course. And the Federal Circuit Court of Appeals has issued a stay, and you have the president and the vice president out. The courts are standing up for us here, yay. But this is a stay pending an appeal that's going to happen pretty quickly. So in a few weeks, there'll be an argument before the federal circuit about was the court of international trade that these tariffs were illegal. So we're still talking about these tariffs could go away in a matter of some months if that decision is unfavorable to the administration.

Ken White:

Yes. Well, first of all, Josh, I'm happy to give you the opportunity to say a EPA again because it gives you such clear joy. So yeah, the court initially, the federal circuit initially did an administrative stay, which is just a stay while we decide whether or not we're going to stay. And now it's given a stay through the appeal. And basically they say that there are two components to this. They say there are substantial arguments, which means that they, in their view, there are at least some plausible arguments on the government side that the tariffs are permissible and that the balance of equities permits the tariffs to go forward. I'm not sure how they balance those equities, but that's what they say. It's a very brief order. They did set a very quick briefing schedule. Arguments are going to be the end of July. You can expect a decision in August. So that is pretty accelerated, but that means at least two more months of these tariffs, which does of course have a dramatic impact on the entire national economy.

Josh Barro:

Right. The federal circuit, I don't think we've ever talked about the federal circuit on this show before. I always think of patent and trademark stuff goes to them. If I recall correctly, what does the federal Circuit do?

Ken White:

They do a lot of federal issues, things that are specific to the federal government, and those include intellectual property things, patent stuff. And you're right, we don't talk about a lot because a lot of them are painfully dull, or at least to those of us who are not IP experts who understand what's happening, but they have a lot of power in a lot of the cases, which often involve the operation of the federal government and its agencies are actually very important.

Josh Barro:

Is that, I know there's a liberal majority on the DC circuit. Do we have a sense of what the ideological alignment of the federal circuit is?

Ken White:

The thing is people don't pay as much attention because it's the federal circuit and it is perceived, I think incorrectly as not having ideological issues before it. But in fact, it does all the time because the operation of the agencies at the federal government is a very ideological question. But my sense is that right now it is not solid one direction or the other.

Josh Barro:

Okay. And then there's another appeal where the administration got a favorable stay, which was the Associated Press litigation where you had Judge Trevor McFadden, who is himself a Trump appointee, had ordered the White House to let the AP back into certain events because the nakedly unconstitutional reasons for which the White House was punishing the ap. And of course, the big countervailing factor in this case is that we're talking about things where ordinarily the White House has a lot of discretion about which media outlets it feels like talking to or inviting, especially into small settings. And so now we've had a panel of the DC circuit that has said, for now we're going to allow the White House to bar the AP from a lot of these things that it was told to let them into. With the exception of events in the East Room. The East Room is a big room in the White House where they have large press events in the idea as well. If it's in the East Room, you can kind of fit everyone in there. You can't bar the AP from that. But other things with smaller cadres of reporters, the White House can go back to saying, fuck off ap.

Ken White:

This is only a state decision, but it suggests that this panel is going to rule in the administration's favor. And speaking of God not loving people, the AP really drew the panel of the damned here with two of the hardest line Trump judges on the DC circuit who issued an opinion that more or less rejects the entire premise of the case. So Josh, you and I talked about, well, wait, if these are private spaces, doesn't the president have complete unfettered discretion? And the point of the decision below was to some extent, even if the president has extremely broad discretion, it's possible to exercise that in a way that is explicitly retaliatory or antis speech. And these two judges in this decision, because they're getting at whether or not the government's likely to prevail on appeal, basically reject that proposition. They say that the Oval Office Air Force one Mar-a-Lago are not at all in any way public spaces.

So there is no retaliation analysis. Keeping someone out is not an act that can be First Amendment retaliation. They're not entitled to be there, and we're not going to quite

reach that decision as to the East Room because it's much bigger. It's more plausibly someplace that's not a pure discretion area, but they are signaling that yes, absolutely, if the president of the United States does not like an op-ed in a paper, the president of the United States can say, I'm excluding this newspaper from now on because I didn't like that op-ed into these spaces because they're private presidential spaces.

Josh Barro:

And I would not. Again, and this has been the weird thing about this whole litigation for me is that politicians do this all the time where they don't like the coverage in some outlet, and so they don't give an interview to that outlet, or they don't invite them to come on some ride along thing with a small number of reporters. It sort of seems like classically government speech to me, the president can decide which media outlets to talk to about which things,

Ken White:

But usually it's not the president. And even when it has been the president, usually the president hasn't been a swaggering bully about it. That was a whole point of, I think the AP situation. It was so petty and ridiculous that the AP was being punished simply for not agreeing to rename the Gulf of Mexico into the Gulf of America and really not agreeing to bend the knee and do whatever Trump says. It's a demonstration of power. And basically these judges are like, yeah, well, he can do that.

Josh Barro:

We have an update on Kmar Abrego Garcia after months of insistence from the administration that this guy's out of our hands. He's an El Salvador and citizen in custody in El Salvador. I can't make him appear in this courtroom. I don't run El Salvador, et cetera, et cetera. Anyway, now El Salvador has agreed to send him back, but he's been sent back to the United States and has been indicted, federally indicted in Tennessee over a sort of human smuggling type of claim. And so it seems contextually clear that basically the administration didn't want him back here until they knew they could put him in criminal custody in the United States, which they have then done. And so I guess there's a couple of interesting angles on this for us. One is that it appears that the chief of the criminal division in the US attorney's office in Tennessee quit over this prosecution. It's not obvious to me from the description that they're wrong, that he committed some sort of federal crime here. It's just the obvious political choice from the

top in Washington to bring this prosecution that they otherwise would not have is probably what bothered him.

Ken White:

Yeah, this was the guy who was deported, kind of mistakenly in that there was a judicial order that he was entitled not to be deported

Josh Barro:

To El Salvador.

Ken White:

And the administration's stance was sort of, well, yeah, it was a mistake, but too bad. There's no remedy. And a lot of the administration spokespeople were saying he's never going to be here again under any circumstances. But now they brought him back and it's clear that they put together this federal criminal case in Tennessee against him with that expectation. It's based largely on a 2022 traffic stop in Tennessee when he was driving a bunch of people. And the allegation is that he was smuggling illegal immigrants and that he's part of a smuggling part of a conspiracy and that he's a gang member and that he's specifically smuggling gang members and so on. And that's what their stance is. The resignation of the chief of the criminal division is pretty big. It's pretty unprecedented. So the criminal division of any US attorney's office obviously is the one that handles all the criminal cases. It's generally sort of the 800 pound gorilla of the office compared to the civil division. And the head of the criminal division is one of the top three people in the office, basically. And every indication is that this person who did not get to be the chief of the criminal division in Tennessee by being some sort of soft on crime leftist thought that something was happening that was inappropriate.

The way this indictment is put together, commentators have noted that it seems to contradict facts from the police reports of that 2022 traffic stop and the whole chain of events makes one very suspicious that they kind of threw together a criminal case that is somewhat bogus.

Josh Barro:

And so what will that look like if they then take it to trial? I mean, I guess it depends on what evidence comes out in the meantime.

Ken White:

Yeah, I mean, they're probably going to look into try to get discovery into all this stuff, but as we've seen in the past, trying to argue, basically the government singling me out for political reasons is an extremely hard road to walk because you have to generally show not just that you're being singled out, but there are other people who have done similar things who are not singled out, and that's usually the one where you can't find or produce evidence. So it's going to be an uphill road for him, but we don't know yet whether or not the evidence is any good. I mean, if they just threw this together, then it may be very tenuous that this is what he's actually was doing. Another thing I'd note is the way the administration is handling this continues to show that they basically discarded a lot of the Department of Justice regulations and traditions in terms of how they talk about things. So Pam Bondy, the attorney general going on TV talking about this, went on a rant about how Abrego Garcia is like he's a child groomer and a gang member, and he's smuggling these terrible people into the country, basically a rant accusing him of doing all sorts of terrible things, only some of which are even mentioned in the indictment, which is just completely inappropriate against DOJ policy against DOJ tradition. So it's more of a strong departure from the way the department's been run.

Josh Barro:

Does that undermine their case at all? I mean, I assume that Abrigo Garcia's attorney will argue that that's tainting the jury pool, that it's interfering with his right to a fair trial. Is he likely to get either any relief from that or at least to get the judge to be annoyed with the Department of Justice for the way it's handled this?

Ken White:

I'd say it depends on the judge, but the standard is already, as we've discussed it for pretty unfavorable for a defendant by design, you'd really have to make a pretty extraordinary showing that Bondy's rhetoric did taint, the jury poll did harm him, and probably the judiciary in Tennessee is going to be more conservative than the judges we've been seeing making other rulings in places like DC and New York and California. So I think it's a tough road for him.

Josh Barro:

Meanwhile, the young Thug Rico prosecution has finally completely come to an end. This thing had mostly fizzled out. Young thug took a plea that ended up with time served, and you have to go away from Atlanta and live somewhere else. The very last defendant in this case, a guy named Christian Eppinger, took an Alfred plea. An Alfred plea is when you say, I acknowledge that you have enough information to convict me, but technically you don't admit to the crime.

Ken White:

Correct. So you're saying, I don't admit to anything, but I admit that you can convict me.

Josh Barro:

And so he got a 40 year sentence, which sounds a lot, but he's already in prison on a 45 year sentence that it's concurrent with, so it's another Fannie Willis spent many years on this, lots of resources. Literally, it took a year to seat the jury in this case, and it's sort of an unimpressive haul at the end of all of that,

Ken White:

Right? And they did not ultimately convict anyone of the murder that was at the heart of the whole thing. They built it around. And so that's of Donovan Thomas, and he was the person whose murder was sort of the centerpiece for the DA and for the whole RICO theory. No one got convicted for being part of that. Two people who went to trial got acquitted. They were crowing that 19 out of 28 people were convicted of something. But that's not actually very impressive for state prosecutors as a percentage. And all this is after spending a year picking a jury and all sorts of shenanigans like a judge getting removed and witnesses backing out, and it's really egg on the face or should be at the DA's office, but they are predictably trying to spin it as a big win.

Josh Barro:

Meanwhile, we have some civil litigation. The proud boys or several of the proud boys who had been prosecuted related to January 6th have now sued the government. These guys that either they were pardoned or they had their sentences commuted as part of Donald Trump's much broader amnesty for January six rioters. And so they say

that the whole prosecution violated their rights. And I guess this is another one of these situations where the lawsuit is bogus, both because they committed bad acts and also because good luck getting relief from the federal government even when the federal government did. Do you wrong? But it's an opportunity where Donald Trump, I guess he can just hand out a settlement if he feels like it, like he did with the estate of Ashley Babbitt.

Ken White:

Yeah, that's the thought that, and that's pretty much the naked request by the plaintiffs, give us money because we're your friends. We're your biggest fans. They sue under, they bring what's called Bivens Claims, which is named after a 1971 Supreme Court case that said that you could sue federal agents for violating your Fourth Amendment rights even though there wasn't a specific statute allowing that. And since the Supreme Court said that they have been steadily cutting back on it. And so now it's probably limited almost to its exact facts. So probably you can only bring a bivens action just for an unlawful search and seizure in violation of your Fourth Amendment rights, not for violation of any other rights so forth, not excessive force, not retaliation, et cetera. So under that understanding of the law by the Supreme Court, this case is probably going almost nowhere because the parts of it that are valid undercurrent law are very narrow. But again, the hope pretty clearly is that Trump will use it to get his Justice Department to reward them.

Josh Barro:

And then meanwhile, the Civil Rights Division has had a lot of upheaval and a clear political effort to reorient its functions around groups and messages that the administration finds more politically congenial. And so they have brought a civil case related to an independent coffee shop in Oakland, operated by a Muslim operator, and the shop they make a big deal out of it had beverages called Iced ADA and Sweet Soir named after a Hamas leader. So Hamas sentiments being expressed out of this coffee shop, which is not a crime because the United States, but the complaint does describe some actions undertaken by the owner of the shop that do sound like violations of Title vii. It goes to some length to make clear that a couple of patrons of the shop were discriminated against, not for political views, but simply because they were Jewish. And so it seems like a legally valid action that the administration is taken here. The kind of weird thing about this is that these were cases that were already brought by civil plaintiffs that had backing from major groups like the Anti-Defamation League. So it's not clear why the Justice Department was really needed here as a plaintiff. And you

have Pam Bondy's name herself on this civil rights complaint about this coffee shop in Oakland.

Ken White:

Yeah, so as you said, this is something that has some righteous components to it. I mean, the description here is that this guy was singling out Jews and abusing them and also accusing them of being Zionists, but it was pretty clear that the threshold that got you accused of being Zionist was being Jewish, and that a lot of the rhetoric was abusive on multiple levels, including explicitly about being Jewish. And that's illegal. You don't really have to get into the whole big political debate about whether anti-Zionism is antisemitism when you're doing some of the things this guy was allegedly doing. What's remarkable here, I guess, is the interest of the attorney general herself and her presence on the pleading on a very small single coffee shop in Oakland type of action, the involvement of the federal government in an action like that and the way they are rhetorically handling it. So when Pam Bond went on the news again, she again displayed sort of a total lack of rhetorical control, and she was saying, oh yeah, they have these drinks named like the Sweet Sinis R and the anti fada, and if you do that, we're coming after you. So she was very much focused on the sizzle and not the stake. She's focused on some of the pro-Palestinian or even pro Hamas type of rhetoric, which is absolutely protected stuff and making it clear they were going after that, which is really what makes it remarkable.

Josh Barro:

Yeah, it's an interesting contrast to the case with the attack in Boulder, the guy who threw the Molotov cocktails at the vigil for hostages held by Hamas, and that guy had a clear political motivation for that. And obviously throwing Molotov cocktails at people and seriously injuring them is a serious crime. In any case, the administration brought a hate crime action there. And the interesting thing with that legally is that you have to show that he targeted his targets on the basis of religion or national origin rather than political belief. And at least from the initial filings in that case, it's not super clear that they can demonstrate that in that case. This is an interesting contrast to this, obviously, a much less serious set of conduct here and a civil action rather than a criminal one. But this one, it really looks like DOJ went to great lengths to show that this was discrimination on the basis of religion and therefore squarely within Title vii, which is going to be a more challenging thing to show in some of the other cases.

Ken White:

Right. Well, they went to great lengths and they did it effectively in the complaint. In the complaint, less so in the rhetoric about it, which sort of calls into question their intentions.

Josh Barro:

Sure. I mean, but I guess to some extent, every administration has political priorities in decisions here, but I think it is showing very clearly what the set of political priorities is.

Ken White:

Absolutely,

Josh Barro:

Ken, I think we can leave it there this week. 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.