I'm Josh Klein and I'm Elise Hu.
We host a podcast from Accenture called Built for Change.
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From New York Times Opinion, this is the Ezra Klein Show.
Hey, it is Ezra.
I am on book leave, but our guest this week is my colleague,
the Times Opinion columnist, David French, whose work I have learned a ton from and whose just way of comforting himself in public life I've often quite admired.
He began his career as a lawyer.
He has deployed with the US military.
He's the author of many books, including Divided We Fall, America's Secession Threat and How to Restore Our Nation.
And I'm excited to see what he does here behind the mic.
I hope you enjoy it too.
I met Ken White the first day of law school.
We bonded immediately.
We were both Star Trek nerds.
We were both already losing our hair.
And we were both fascinated by criminal and constitutional law.
Neither of us ever lost that fascination.
And Ken went on to become one of the nation's most respected legal voices on both the criminal justice system and the First Amendment,
which is why I wanted to have him on the show today.
As much as I love to talk about free speech,
this conversation is going to focus on criminal justice,
specifically the four cases against Donald Trump.
Most recently, we've had the sweeping Georgia indictment regarding Trump's efforts to overturn the election.
Before that, we had the more narrow federal January 6 case,
which also focused not just on January 6,
but Trump's efforts to overturn the election.
And before then, we had the Florida case involving the handling of classified documents relating to the national defense.
And last and least, we have the Stormy Daniels Hush Money case.
Ken has unique insight into all these cases
as a defense attorney and former federal prosecutor.
He can dive into both the prosecution and defense strategies
in all four cases against Trump.

Where are they strong? Where are they weak?
Has the prosecution or defense made any mistakes?
If you find Ken insightful, and I know you will,
you can hear more from him on his own podcast
co-hosted by Josh Barrow called Serious Trouble,
and you can read him at his sub-stack called The Popat Report.
As always, you can email the show at ezraclineshowatnytimes.com.
Ken White, welcome to the Ezra Klein Show.
Thank you so much for having me, David. It's great to talk to you.
Well, I'm really looking forward to this episode.
And, you know, one of the goals is to help listeners
be conversant in the big issues in each one
of the criminal cases against Donald Trump.
This is not about diving in deep, deep, deep into the details
because each of these cases are going to ultimately end up
with records running in the thousands of pages.
There's going to be twists and turns.
This is much more of a broader view.
And we're going to be ambitious.
We're going to walk through each one of the four
major criminal cases against Trump in the reverse order
of their filing.
So we're going to start with Georgia.
Then we're going to go with Jack Smith, January 6 case.
Then we'll go with Jack Smith,
Documents Case out of Mar-a-Lago,
and then we'll end up with the Bragg indictment out of Manhattan.
And the goal is to hit what are the big issues?
What's the prosecution sort of best case?
What is the defense's best case?
Which case is most dangerous to Donald Trump and why?
So, Ken, let's start with Georgia.
You have a career as a prosecutor, a federal prosecutor.
You have a career in defense.
You've been on both sides here.
So I'm going to ask you to put on your both sides hat.
And let's sort of start with Georgia.
Talk a bit about how ambitious this case is and why.
How is it that prosecutors may arguably have more flexibility
here in the Georgia case than maybe in the federal cases?
Well, David, the Georgia RICO case
is a lot more ambitious and a lot broader
because they are very deliberately

cobbling together a bunch of different conspiracies
into one big charge.
So that's, I guess, what RICO is designed to do
to allow prosecutors to take on organizations
and groups of people that are doing diverse things wrong
and tie it all into one charge or one set of charges.
So what's really notable about the Georgia RICO indictment
is how it takes a bunch of different,
what you would normally call different conspiracies
to do different things allegedly wrong
in connection with the election,
people who are not interacting with each other.
You know, when you and I were taking criminal law
back in the last millennium,
this would be described as different spokes on the wheel,
people who are completely disconnected from each other,
all doing illegal things towards sort of a general goal.
And that winds up putting together a lot of people
who don't seem like they really go together
in terms of what they're doing
and putting together some pretty wildly different conduct,
which is why you're seeing some very strong motions
to sever out defendants in Georgia.
That's one way the indictment there is different.
The other way it's different is that
it reflects a very different sensibility
about the politics of it.
So we'll talk more about the DC indictment by Jack Smith,
but that one reflected a sensibility
that we're gonna very explicitly say
some things Donald Trump was allowed to do
and were legitimate and that's fine,
but these things were illegitimate.
The Georgia RICO indictment just leans into everything,
throws it all in the same pile,
does not make much of an effort to explain
or advocate about the distinction
between legal politics and illegal fraud.
One question about the Georgia.
So in RICO, you're somewhat famous online for many reasons.
One of them is for loathing RICO
and maybe not necessarily loathing RICO,
but loathing overuse of RICO.

But there's some interesting distinctions here
between Georgia RICO and federal RICO.
Could you walk through some of these differences
between the Georgia RICO statutes
and the federal RICO statutes
and why the prosecutor here might have thought
that RICO was in fact an appropriate method
for charging this case.
So the federal RICO originally designed
to go after organized crime is very rule-bound,
very picky, very complicated.
So every crime or cause of action in a civil case
has its elements, its building blocks,
like the recipe for all the things you have to do
to prove this particular crime.
The RICO elements are extremely convoluted and lengthy
and few cases actually make it.
And it's so common for civil litigants
to bring civil RICO charges
as sort of an exclamation point or basically an emoji.
This is really serious.
It's RICO in fact,
that many federal judges have special RICO orders.
It's like, so you think it's RICO?
Well, here's a sheet with 20 questions I have for you.
By the time you're done answering them,
we'll show it's not RICO.
So the federal RICO charges are characterized
by how hard it is to prove and how complicated it is.
And that's why you don't see it in a lot of federal cases
because there's so many more flexible
and straightforward federal criminal tools.
The Georgia statute is a different story.
The Georgia courts have not imposed a lot of this
sort of rule-bound elements type of approach.
They've taken it more like a general conspiracy
without a lot of complicated requirements.
And a lot of the Georgia court of appeals opinions
considering RICO convictions are kind of frighteningly,
kind of that sort of sounds like what the good statutes about.
Not imposing a lot of technical requirements on it.
So that makes it very appealing
as sort of a super conspiracy statute.

As a result, it is used astoundingly broadly in Georgia.
RICO is used in Georgia the way conspiracy is used
in many other locations.
And it's used in a way that I think in my view is intentional
to make cases that are functionally impossible to defend.
So you have cases that go on for months
and months and months.
You know how expensive litigation is,
David, as well as anybody.
And very few people can afford lawyers
for months and months and months,
let alone also not working because you're in trial.
So you have things like this trial
of the rapper young thug
and some people accused of being in a gang with him.
It's been going on for eight months.
Doesn't even have a jury picked yet.
The case where Fulton County DA Fonnie Willis
went after a education cheating scandal.
That was treated as a RICO and those trials,
the one that went to trial went on for like six, seven months.
So it allows the prosecutors to put together
big, functionally impossible to defend cases.
So first I wanna ask you what you think about the wisdom
of this charging approach in this case.
Because one thing I think listeners need to know
is that often prosecutors overcharge
as a deliberate strategy that they're gonna,
as I've used this illustration before,
they throw charges in an indictment
like you might throw croutons on a salad,
which then creates this incredible list of charges
with lengthy prison sentences attached to convictions.
And essentially you take a defendant
who may not have an enormous number of resources
as you noted and you put them
in this incredibly difficult box,
which is if you go to trial on this monster
of an indictment, you cannot even begin to imagine
the amount of jail time you could face.
Or I have this little plea deal for you here
that's a lot better that you're not going to face
nearly the kind of prison terms

that you could potentially face with a jury.
And we can just get all this settled and deal with this
and move on to the next case.
And that kind of approach isn't applicable here for Trump,
maybe for the others, but for Trump, that's not applicable.
So what do you think of the wisdom of this charging approach?
I think there is definitely an element of politics here.
So the DA of Fulton County is an elected position.
There are political overtones to the whole thing.
It's an ambitious DA.
Those are the circumstances
in which big ambitious cases get brought.
I think that this is designed to be a case
that is functionally impossible
to be defended the way it's charged.
You simply can't take 19 aggressive people
with aggressive lawyers to trial in a giant case at once.
It would go for years,
particularly when you've got personalities
like Rudy Giuliani and Donald Trump in the same indictment,
that's just going to make it go even more circuits-like.
And the judge presiding over this
has already basically pointed this out.
So I think it's a great way, great's the wrong word,
effective way for a prosecutor to coerce
a lot of the smaller players in the case
to plead guilty or even to cooperate to flip.
I think it's a great way to get on the scoreboard
and to bring attention to the charges
and eventually wind up with something less.
I don't know if it's like if your purpose is
to identify what Donald Trump did wrong
and come up with a just result
if it's necessarily the right way.
But this is a very typical state prosecutor tactic.
Do you think there's an overreach here?
Well, this is maybe partially a matter of style or taste,
but I prefer the approach that Jack Smith took in DC
to be very explicit about the things that Donald Trump did
that were permissible and legal
and part of legitimate politics and litigation,
and then leaning into explaining very much what wasn't
and identifying calling those things out

as opposed to the approach Fannie Willis took,
which is much more throw it all in there
and call out everything and really not make an effort
to kind of avoid the appearance of attacking
protected speech or protected politics.
So I think because all of this,
it's not a normal criminal case.
This has historic implications.
It's gonna have a greatly exaggerated impact
on the way Americans understand the legal system
and criminal justice system and that type of thing.
And so to kind of go this kitchen sink approach to me,
I think risks diminishing the credibility,
the whole enterprise of holding Donald Trump accountable
for things that he did that were illegal.
Now there's another aspect of this case
that I think is interesting,
and that is we've talked about the RICO aspect,
but there's a lot of charges
that are related to specific Georgia statutes
that prohibit lying to public officials.
And these Georgia statutes are different
from the federal statutes that Jack Smith charged
on January 6th.
And it strikes me, Ken,
and I'd love your thoughts on this,
that these statutes are easier to prosecute
because what they're essentially doing,
if you look at some of these statutes,
they essentially say this,
if I lie to you, let's say you're a public official,
and I lie to you about a material fact,
and it's within your jurisdiction,
on a matter within your jurisdiction.
So if you're the Secretary of State
and I'm lying to you about voter fraud,
and I'm talking to you in your capacity
as Secretary of State on a matter within your jurisdiction,
I've committed a crime.
I've committed a crime.
I don't have to show that I had an intent, for example,
to deprive someone of their civil rights
or an intent to defraud the federal government.

It's just the lying about the material fact
to a public official within their jurisdiction, crime.
That seems to be, in my view,
the absolute strongest element of this indictment.
Well, sure, it's probably also the element
that carries the lowest possible sentence
of all the different charges, and rightly so,
because we shouldn't heavily punish things
that don't actually have a bad impact.
I think you're right, and I think that the Georgia statute
seems to have a very loose concept of materiality.
That is, how much does your lie matter?
And in both cases, it seems to be,
is the lie the sort of thing
that could hypothetically matter
in a scenario we can imagine,
which is pretty easy to prove.
So yeah, a lot of the smaller things,
the lesser charges are there
that I think are going to be easier to prove,
even given how loosey-goosey George Rico is.
That's one of the reasons
that prosecutors throw those in a lot of the time,
is you're looking for the jury to be sort of saying,
okay, well, this big one's complicated.
Let's just compromise by convicting me on these easy ones
and throwing out the big one or something like that.
And that's strategically why they do it a lot of the time.
So let's talk about this word
that has been mentioned an enormous amount
as soon as the January 6th prosecution started, intent, intent.
Yes.
I think I've seen more internet arguments about intent
in the last two months
than I'd seen in the preceding 20 years.
But let's talk about the intent element in Georgia.
And then by golly, we're going to talk about
the intent element in the federal case.
So if you're trying to describe,
what is the intent that prosecutors
are going to have to show in Georgia,
how would you describe it,
both for the more simple statute that we just outlined

and for sort of the bigger Rico and conspiracy charges?
And then we'll table for a minute exactly the intent
in the Jack Smith January 6th cases.
But what's a brief summary of the intent element
here in Georgia?
So it really varies charge to charge.
On the false statement type of charges,
you've got just a requirement that you knowingly lie.
So you have to say something and know it's a lie.
You don't necessarily have to have an intent,
that's fraudulent, an intent to deceive.
You just have to know that the thing you're saying is untrue.
The Rico and conspiracy and some of the other things
that sound more like obstruction
are going to require some sort of specific wrongful intent
and agreement to violate the law
and agreement to do something wrong.
So generally the more sophisticated the crime,
usually the more sophisticated the mental state.
So some of the crimes are just gonna have to show people
knew they were lying.
Others are gonna have to show that they had fraudulent
intent, the intent to deceive or to fraud.
And some they're gonna have to show
that they intentionally joined an agreement
to do something against the law.
They agreed to commit a crime.
So it depends on the particular charge there.
So if we go, let's say the simple lying charge,
you don't have to prove that Trump knew he lost.
Even if he genuinely thought he'd won,
if he genuinely thought that Georgia was his,
but if he's told a lie in making that case,
he can be convicted.
Whereas the more broader the conspiracy
and the Rico charges, you're gonna have to show
some intent beyond the simple lie.
Right.
And this is something where I think that all of us
who are in the business of being pundits
and talking about all this
have probably over complicated a little bit.
We've been talking about for years how hard it is

to prove intent or knowledge in Donald Trump's case
because of how he processes facts and how he views things
and how he doesn't really sort of see life from truth
or distinguish it the way that we mortals do.
But it's easy to over complicate this.
You don't have to show that he knew he lost anything.
You only have to show, even if he believed he won,
that he pursued that goal through lies
or through fraudulent means
that he tried to get people to violate their oaths of office,
that he tried to get people to do things that were illegal
or that he lied to them in the pursuit of that.
That's much easier.
It's easy because there's a big difference
between the public narrative of what happened
after the election and what these charges actually say.
So even the Georgia indictment
which is much more ambitious and sweeping
and considerably less subtle
kind of concedes that the point is
the illegal way he went about it.
The crime is not believing against all evidence that he won.
The crime is pursuing that belief through fraud and lies.
Right.
Yeah, there are two things that have kind of driven me crazy
in the public conversation.
One is the argument, we don't have to prove intent
because I'm thinking can just read the statutes.
Now, what intent you have to prove
varies from statute to statute.
What do you have to show?
That's one that drives me crazy.
But another one is, well, oh gosh,
if we have to prove intent,
then how can you possibly convict him?
But intent elements are extremely common
in criminal charges and prosecutors prove intent all the time.
This is not a magic get out of jail card to say,
no, I didn't mean it or I didn't mean to tell a lie,
you have to equip me.
Am I right in framing it like that
or am I missing something?
You are.

A lot of what this reflects is this sort of public sensibility
that Trump is so sort of norm shattering
and outside of normal political practices
that the normal doesn't apply and that he's just,
there's also this perception that he's always skated
and he's gonna skate again no matter what.
But I think we're starting to see that sort of just
plotting methodical putting on your case against him can work.
We saw that in Eugene Carroll's defamation case.
We're seeing it in other instances.
And yes, all the time prosecutors prove
beyond a reasonable doubt, intense when it's disputed.
You know, the most common bread and butter
federal charges of wire fraud and mail fraud
require you to prove there's a fraudulent scheme
that you intended to do a fraudulent scheme.
And where Trump is his own worst enemy
is his tendency to talk a lot and say things a lot
which are now being brought to bear very effectively
to help prove intent.
So when you're talking about how do you prove
that someone intended to do something
that they had fraudulent intent,
you do it the same way you decide
whether your teenager is lying to you.
Right.
You analyze what they say to you in the case of Trump,
if you've got him saying something to Mike Pence
like the problem is you're too honest,
then that's exactly the sort of thing you lead with
is they say he knows that what he's doing is dishonest.
So there's some things in the past that we've talked about
that people wanted him to be prosecuted for,
particularly during the Robert Mueller era
where the intent was gonna be hard to do.
But these things, he's talked his way
into a lot of the evidence against him.
Let's move on to Jack Smith, it's a good logical next move.
How would you sort of in a nutshell
describe the distinction?
What's different about the Jack Smith case
versus the Fani Willis case?
The Jack Smith case in DC is brought

by an experienced federal prosecutor
for federal court and it shows,
federal court is very different than state court.
Much more formal, generally,
prosecutors can still get away with a remarkable amount,
but not as much as they can in state court.
Federal judges are tougher taskmasters
to slightly over generalize the court is more concerned
with being rule bound and with protecting
constitutional rights and it's probably the forum
you'd often rather be in as a defendant.
I'd certainly rather be defending the DC case
than the Georgia case.
So Smith seems to be both more concerned
with the fact that he's in federal court
and he can't get away with as much
and he has to be more careful of these distinctions.
He also seems to be more explicitly concerned
with the eyes of history being upon him
and that type of thing with making something
that is more overtly avoiding the appearance
of being deliberately political.
Even though, frankly, I think everyone who thinks
it's political is going to, no matter how you frame it
and everyone who thinks it's not,
it's gonna think that no matter how you frame it.
So it's narrower, it's more specific
and there you've got this general conspiracy
to defraud the United States.
This is the plain vanilla conspiracy statute
used all the time, but there's a clause in there
instead of just conspiring to violate a federal law,
there's a clause for conspiring to defraud the United States
and to cheat the US and that's what he's going with here.
He's going with a conspiracy to obstruct
and actual obstruction and a conspiracy against civil rights.
Some of these people express surprise
when Smith came out with them thinking,
this is sort of very aggressive and forward in legal theory
and really historically it's not.
There are arguments on all of these
for why the law is wrong,
but the law for the last century

has fairly clearly shown that these are all theories
that work, that you can defraud the United States
by interfering with one of its proceedings by deceit,
that you can obstruct an official proceeding
by submitting fake things to it and things like that
and that you can have a conspiracy against rights
through election fraud by trying to fraudulently interfere
with accounting or processing of votes.
You can argue that all those cases are wrong
and that they interpret the statutes the wrong way,
but I don't think you can seriously argue
there isn't legal precedent for all these theories.
Yeah, I think that's a very key distinction
because the arguments that I've seen
from those who are defending Trump,
if they're honest arguments, what they're saying is,
I acknowledge the precedent is against us,
but the precedent is bad precedent
and this current court would not, in fact,
apply the law in the same way.
That seems to be the core of the argument,
but the fact remains that as of this moment,
the precedent does indicate that each one of these charges
is sort of solidly within historical practice.
You mentioned this whole thing
about how we think the Supreme Court would go
being very central to the theories
of the law, the critics of the DC indictment.
And certainly this is a conservative court.
It has overturned a lot of precedents.
I do not see this court as being super eager
to help Donald Trump in these sorts of situations.
This court did not do the things
that Trump partisans hoped it would in connection
with the 2020 election or any of the subsequent litigation
and the kinds of theories people are sort of,
I would call it wish casting,
that the court will step in and narrow
some of this federal criminal law
is not actually the way this court is generally working.
They've stuck their neck out for some things
that are Trump policy goals,
but not so much for Trump as a litigant.

I think that the faith that are going to do that
is misplaced.
Before we leave the January 6 cases,
let's talk a little bit about this attempt
to remove some of these cases from state court
to federal court.
You very helpfully outlined some of the differences
in practice in federal court
and why defendants often like to be
in federal court versus state court.
But let's walk through this removal argument in Georgia.
Sure, well, removal is bringing a case
that was filed in state court into federal court.
And criminal removal, there's a statute
and its origins are uncertain.
Even the cases that talk about it say,
we're not entirely sure what the point of this is,
but it seems to be there wants to be some sort of bulwark
to keep the state from interfering with federal business
through criminal prosecutions.
So there's a statute that says a federal official
charged with a crime in state court
can remove it to federal court
and they'll have a burden to keep it there
of showing that they were a federal official,
that the things they're charged with
are of or relating to the color of their office
to their official business
and that they have a colorable,
that is plausible federal defense,
a defense under federal law.
And so Mark Meadows is the first one really
to have his effort in this case assessed
by the federal judge who's looking at it.
And Judge Jones has kind of got something
of a wide open field here.
A lot of these issues have not been thoroughly litigated.
And he asks one of like almost like a philosophical question.
It's like, what is the heart of the Georgia case?
What is it that has to be related to your office?
And where he kind of comes out is
the heart of the Georgia case is the allegation
of a RICO conspiracy and agreement to violate the law.

Particular pieces of evidence that aren't themselves crimes
are not the heart of the case.
And so therefore, even if one or two of those
are things that arguably are related
to Mark Meadows color of office,
that doesn't make the whole thing related
to his color of office.
He's not supposed to be doing political things.
That's not his function and so on.
This could go either way in front of the 11th circuit.
It could even go either way
in front of the United States Supreme Court.
You've got all these competing interests.
You've got these ideas of federalism
or generally federal courts don't interfere
with state courts, particularly in criminal cases.
On the other hand, you've got the supremacy clause
and the idea that the federal law reigns supreme.
And then you throw all the politics on top of that.
And I have no idea where this is gonna come out.
And one thing that I think is important to emphasize
is even though if this case is successfully removed,
it's still going to be prosecuted
under the Georgia state statutes
and under Georgia state precedent.
So all of the Georgia state laws
that are at issue in the case
are still going to be the laws at issue in the case.
Now there are gonna be differences
in the rules of the federal court
and there's gonna be differences in the jury pool
that you draw in the federal court,
but they're still prosecuting these state criminal offenses
in that federal court, even if it's removed.
They are unless the judge determines
that there's a federal defense that precludes it.
So the precedent seems to suggest that
if the judge determines that there's a federal immunity issue
and holds like a hearing and resolves substituted facts
and that type of thing,
then that could be in effect dismissing the case.
But again, that's a heavy lift for Mark Meadows
and the others here because it's hard to explain

why this stuff is actually related to their job
and why it's necessary and proper.
["The Laws of the Federal Court"]
Let's move on from January 6th to documents
and I'll set it up like this.
It's really interesting to me if you've seen
all of the back and forth of all of the various
legal experts weighing in on all of the aspects
of this case, even though there's a lot of disagreement,
I've seen some general agreement that goes like this.
The Manhattan case involving the Stormy Daniels
hush money payments is the weakest case.
A lot of fights over whether the Georgia case
or the Jack Smith January 6th case is more dangerous
to Trump, where I kind of literally go back and forth
on that in my own mind as to which one is sort
of the more dangerous case for Trump.
And then there's this consensus
where you sort of bring up the documents case
and they go, oh yeah, that one's the strongest case.
And it's really hard to find somebody
who would say anything other than that.
Where do you stand on this sort of consensus
that the documents case sort of is in a class by itself?
It isn't a class by itself
because it's a very different set of facts.
And because Donald Trump in absolutely classic client form
has absolutely sunk himself with his mouth
by repeatedly saying things that undermine
any potential defense he has there,
saying and doing things.
So he is the classic client who cannot keep his mouth shut,
who keeps saying things that lock him into stories,
that preclude defenses, that admit things, stuff like that.
On the other hand, the countervailing factor
is that it is in Florida with a different jury pool
where the hope of at least getting one juror
to hang the jury seems to be much more plausible.
And in Judge Eileen Cannon,
he has a judge who has previously been willing
to really go out on a limb for him to a notable extent.
You know, one of so many he appointed someone
whose decisions in the case

where she basically shut down the investigation
after the search warrant of Mar-a-Lago
were very widely seen as being without sound basis and law.
And you know, draw from that what you will.
So those things protect him there,
but in terms of which case I think is like
the simplest and strongest, the combo,
that probably is the documents case.
There is widespread consensus that his defenses,
that he can, you know, declassify things with his mind
or that they're automatically declassified
when he takes them, that those are nonsense.
They are not taken very seriously
except by the most partisan commentators.
And the record of the things he said
in front of other people, his braggadocio,
his throwing around of papers,
that type of thing is just great intent evidence.
So I think that case is extremely dangerous to him
and really what's standing between him
and probable conviction in that one
is a Florida jury and Judge Eileen Cannon.
Let's talk about the judge for a minute.
You were very polite in your description of,
I believe you said no sound basis
at the risk of using another legal term of art.
I would say that her original decision
that essentially halted the parts
of the Mar-a-Lago investigation was either bonkers town
or in the suburbs of bonkers town, it was so bad.
And in fact, it was sternly rebuked
by the court of appeals.
Yeah, it was functionally lawless.
And the advocacy that led to it by Trump's attorneys
was so terrible that it was that much more notable.
The arguments were terrible
and the way she accepted them
and even did some other things they had even asked for
were terrible.
And federal courts of appeal are not very emotive usually.
It's bad news when they are.
But you can read between the lines,
the tone and of an opinion.

And the opinion overturning her
was fairly brutal in its explicitness.
So this is a judge who has basically gone
way out on her own doing crazy things for Trump.
You've practiced in front of a lot
of different district judges.
I've practiced in front of a lot
of different district judges
and they'll have varying temperaments.
But one thing that I have seen
is that if you're a district judge
who's operating within the broad norms
of the profession,
once a court of appeals has absolutely smacked
one of your rulings down
and done so reading between the lines
in a way that is almost screaming in all caps.
In my experiences, so long as the district judge
is still within those broad norms
of the legal profession,
in some ways they're going to be more careful
because at this point they're in almost a legacy moment here.
And so you saw recently Judge Cannon
just basically granted the prosecution's protective order
motion in the case appears to be adopting
a more careful approach to this.
How much do you think that that really brutal
court of appeals smack down in the document subpoena
and the search litigation?
Realistically, can we expect a more careful Judge Cannon
as a result of that judicial rebuke?
I think there's a number of factors
that lead to a more careful Judge Cannon.
First of all, there's just experience.
She is, and we can probably share this feeling,
preposterously young to be a federal judge.
I think she's only 42.
And that's very young to wield that sort of power.
And a lot of the time when you see a judge,
personally like that becoming a federal judge,
you see some sort of stumbling around at first.
When you see corporate lawyers or other lawyers
whose practice is not so much trial practice

becoming a federal judge, you see an acclimation period.
But often they become very good judges
because they learn this stuff and they learn it as a judge
and they become very careful about it.
Also, there's a community of judges and lawyers
that is different than the political community.
And so the experience of being a federal judge
appears to be broadly speaking sort of moderating.
It tends to move people towards that more
professional consensus middle in terms of things.
And part of that is your reputation
and how the court of appeal treats you
and that type of thing.
But part of it is just the community that you're part of.
The judges you interact with, you go to it for advice,
that type of thing.
Also, judges are human and a lot of the time,
like if a party leads a judge into error
and they get smacked down, judges will sort of
tend to resent that party a little bit.
They will often start thinking,
the last time I listened to you,
the 11th Circuit basically said in judicial terms,
I was being an idiot.
So why should I listen to you?
So I think all those factors will tend
to move her towards the center.
That said, a lot of my commentary about cases
and stuff is saying this thing you think is extraordinary
is not extraordinary.
This judge yelling at the prosecution
is not in the tank for the defense.
That's just the way judges are.
This judge doing this is actually doing
what judges all the time.
It's not such a big deal, calm down.
I can't really say that about Judge Cannon
based on that earlier case.
That was remarkable, totally outside of norms
to extent that makes me very concerned
about the way she's going to approach the rest of the case.
And it would be difficult to overstate
how easy it is for a federal judge to tank a case

if they want to.
Yeah, that's one thing I've tried to communicate
to people about that initial Judge Cannon ruling.
I was gobsmacked when I read it.
I mean, literally just absolutely gobsmacked.
And I'm also much like you can.
I spend a lot of time saying, whoa, hold on, calm down.
Everything is not running out of control.
What you're watching is the system in process.
And this is what the system looks like.
We're within norms.
But that ruling was well outside of legal norms.
Yes.
Now, she has not issued ruling since then
that have been outside norms.
The trial date that she set seems pretty reasonable to me.
The protective order that she just outlined
seems pretty reasonable to me.
So since then, she seems to have pulled in a bit.
But you're absolutely correct.
We shared the same view.
But let me do a little detour here
because when you're talking about judicial norms,
the Trump team has filed a motion for the judge
in the January 6th documents case
to recuse herself based on statements
that she made in other January 6th cases.
And I know you've looked at this.
This is the federal January 6th case.
What are your thoughts on the Trump team's recusal motion
and what the judge had said in that case?
I don't think it will succeed or that it should.
And I think it illustrates the difference
between what people think the rules for recusal are
and what they actually are.
Federal recusal is extremely narrow.
And in general, there are only two ways you get there.
One way is where the judge's comments
are simply so historically extreme and out of bounds
that no one can possibly take them seriously
as a neutral judge.
The other is if it's from an extrajudicial source,
the defendants are an extra neighbor

and they hate them, that type of thing
from extrajudicial reasons.
Here, Judge Chutkin in some of the January 6th cases
where defendants were saying basically,
well, I was there because of Trump made comments
to the effect of, well, the person who inspired you
to do this stuff isn't in jail, maybe you should be.
So you can certainly see why that seems to show
some pre-judging of Donald Trump
and you could imagine a system where you argue
that makes her ineligible because she's expressed that.
But it's not extrajudicial.
So she's come to that conclusion based on the evidence
before her in court in related cases.
And that generally is not a basis for recusal.
And that's why a judge can hear a bunch of related cases
without having to recuse themself.
The thing is recusal is a doctrine
largely developed by judges and administered by judges
and they understand each other and judges,
how can I put this, they run their mouth a lot, okay?
And you can't always consume what they say
on a explicit or literal, any more than you can with Trump.
You know, federal judges emote as much as ones,
you know, the proverbial uncle at Thanksgiving.
And judges understand that.
And so they don't take each other any more seriously
with that type of rhetoric.
They don't see it as extreme.
They see it as just sort of, you know,
you got a black robe, you're sitting up there,
everyone's listening to you.
You're gonna say what's on your mind
and that's the way it comes out.
Yeah.
It is a unique experience and lawyers who are listening
to this will relate to the experience on being
on the receiving end of a judge who is venting.
And it's really unlike almost any other venting experience
that you'll ever endure
because you really are limited in your ability
as a practical matter to vent back.
But you know what, once you understand

that's just kind of the way they are,
you get used to it and not such a big deal anymore.
Yeah, exactly.
All right, well, let's end this with a discussion
of the first indictment brought against Trump
and that's the Bragg State Court indictment
related to the Stormy Daniels hush money payments.
And again, it's really remarkable
with all of the various competing legal arguments
in a hyperpolarized nation.
There is an absolute consensus
that this is the weakest of the cases.
And rightly so.
Right, and why is that?
So, I mean, there are a lot of sort of
rarely enforced, scarily flexible laws out there
that are rarely charged but could be
if a prosecutor just has it in for you
and wants to find some way to do it.
And this falsifying business records charge in New York
seems to be such a thing.
And the cases characterized by the way they went about it.
You know, they did these tons and tons of counts
just gratuitously, what is it?
34 counts of falsifying business records
for the concept that false notations were made
in various types of check ledgers and things like that,
indicating that money going to Michael Cohen
was for legal services as opposed to a way
to reimburse hush money to an adult actress.
And in addition to kind of being in,
and you can bleep this if it's inappropriate,
widely considered to be chicken shit,
which it kind of is.
It's a petty thing that they've made into a huge thing
and put 34 counts of.
I think it's extraordinarily hard to prove
Trump's individual understanding or knowledge of it.
Trump does not strike me as a generally accepted
accounting principles guy.
The thought that he personally directed
or was involved in personally directing
the way payments would be classified

and did so with fraudulent intent
seems like a much bigger lift than saying that,
you know, he lied to the Georgia Attorney General
or something like that, Secretary of State
or something like that.
It's complicated, it's nitpicky.
It's not the sort of thing you would really see him
getting his hands dirty with.
It's not the sort of thing you would even necessarily
see him as understanding very well.
So I think that it's a flailing around trying
to find a theory on which they could go after him
because they're so mad at him.
They've put so many resources in trying to get him.
So they find this, okay, well,
he treated this hush money as something
that actually wasn't, and you know, let's say that.
So kind of comes off as desperate to me.
Certainly when it seemed at the time as if it might be
the only criminal consequences of his long pattern
of illegal behavior,
it was very disappointing.
Now I think it's kind of more embarrassing
when you compare it to the other cases.
Yeah, you know, and just to sort of like nail down
the specifics, it really depends on a two-step process
because there's the step one which is,
did he falsify business records?
Which there's a pretty strong case that business records,
and I'm gonna use sort of passive voice here,
were falsified, but that's a misdemeanor.
Right.
Not only is it just a misdemeanor,
it's also misdemeanor that's probably time-barred.
It's probably where probably passed
the statute of limitations.
So to make this the more serious case,
you have to show that these business records were falsified
in furtherance of the commission of another crime.
Right.
And so you have to show that there's another crime
in play here, and that isn't really specified
with that much clarity,

at least in the initial charging documents.
And that's where they're just gonna have a problem,
a proof problem in that case regarding this other
extra step that is the one that A,
turns it from a misdemeanor into felony,
and B, at least stabs at dealing
with some of the statute's limitations issues.
Well, the statute limitations, as I understand it, David,
that their theory is that basically there's
a New York statute where if you're out of state consistently
for a period of time, the statute's told,
and so he was in Washington and Mar-a-Lago,
and I think that's their theory.
So from what I've heard, generally,
that's not considered to be as better defense.
But yeah, I agree with you that the extra step
of making it into a felony by having to connect
to some other crime is a problem.
Apparently they're thinking maybe it's campaign finance fraud,
which has even more exacting intent standards.
Often you have to know you're violating the law there.
Good luck proving that.
Or it might be under this weird New York statute
corrupting an election or whatever it is.
Those are big lists, but I just, to the very basic idea,
I think it's very hard to show that he is personally directing
how this is gonna be treated or that he cares.
Maybe they have Michael Cohen testifying.
He's gonna be a terrible witness,
his rehabilitation to or not was standing.
Maybe they've got some of the accountants
putting Trump in there, but yeah, I mean,
again, you've got a New York jury,
so maybe they're more adverse to Trump.
You've got state court, more loosey-goosey with the rules,
but still it's no question it's the weakest.
Okay, we've talked about all of these cases.
We have at least three trial dates right now
dating before the election.
And so let's just wind up with a brief discussion
of the trial dates.
Sure.
How many of these trial dates do you think will stick?

In your experience, when you see an initial trial date set,
like we have seen in some of these cases,
how often do these initial trial dates stick?
Is it actually the case that we'll have
multiple criminal cases of Donald Trump
in the height of the campaign?
Just transparently in where I'm coming from this.
I have been dubious that we will have
all of these things unfold in 2024.
I am also dubious they will all unfold.
I think given the way the judge's attitude,
there's an excellent chance that at least one will.
Judge Chutkin in DC and Judge Cannon in Florida
have announced trial dates that are in my view
pretty aggressive, much more aggressive
than I would expect for white collar cases
of this complexity.
So it is very routine for white collar criminal cases
to take a very long time to go to trial.
And the excuse is usually,
but you're on or there's millions of documents
and so forth, but these are complex cases
with tons of witnesses and players.
So the relatively early in 2024 dates we've gotten
in those two federal cases are aggressive.
And I think suggest that those judges
are not gonna let them delay forever.
Some federal judges are big believers
in what's called the rocket docket.
I gotta keep my docket moving,
so I don't care what you need or what you want,
you're going to trial.
And that's often used basically to coerce people
into settle civil cases or plead guilty in criminal cases.
But that suggests to me that the federal cases
are more likely to move forward.
I'd say particularly the DC one,
given Judge Chutkin's attitude there.
But in Georgia, it may be that these get split up
into a bunch of different little cases.
I think some of the ones related to Trump
are going to go to trial before the election.
I'm not sure if Trump's himself will.

And that's gonna, we're gonna see
once the judge starts ruling on his own motions
as opposed to his co-defense motions,
where that's likely to go.
But I think it is strongly likely
that at least one of these criminal cases
is going to go to trial before the election,
maybe two or three.
It's also possible that all four
are booted until after the election,
which would present in a very stark way
this idea that part of what's at issue in the election
is ultimately whether he is a practical matter
gets tried at all, at least in the next term.
As the head of the executive branch,
which includes the DOJ, if he wins,
he could direct the DOJ to drop all the cases against him.
Just wipe these away.
Or he could pardon himself.
Right.
Which I suspect would be his move.
There's controversy over whether that's legal,
but it's almost certainly a political dispute
that's not justiciable by the courts.
So yeah, that's very stark.
He can't, of course, pardon himself on the state claims,
but he could get rid of the federal ones.
And I think the federal ones
are probably the two most dangerous cases for him.
All right, Ken, at the ending of the Every Ezra Klein Show,
there are three book recommendations
that we ask our guests to make.
So what three books are you recommending to listeners today?
So I'm recommending three very different books.
One is Pax, P-A-X, by Tom Holland, not Spider-Man,
the British popular historian,
writing about the peak of the Roman Empire.
And he's got a fantastic narrative voice,
and he's one of those historians who really has a way
to make his enthusiasm for the subject matter
and the period jump off the page.
The next one is Shadow Docket by Professor Steve Vladik.
I'm sure you've read this one, David,

and this is the one about how the Supreme Court's
motion docket, how ruling on special emergency motions,
how the difference it can make in the law
in ways that are not immediately apparent to us
and sort of these big changes that are made
kind of behind the scenes in a way
that are not consumed the same way as opinions and cases.
And then finally, the third,
one of my favorite authors, James Elroy,
one of the most pessimistic and darkest authors
about America and what it's like.
His news book is The Enchanters.
He's got this infectiously pessimistic
down on everything voice.
He's kind of like, he's to drag net
and the notion of cops the way,
Game of Thrones is to J.R.R. Tolkett.
And he's sort of like the seedy side of it all exposed.
He uses language in a really interesting way
and I can't resist him.
Thank you so much for joining the Ezra Klein Show.
Thanks for sharing your expertise
and especially from my standpoint,
it's great to see you and it's great to chat with you.
So thanks for joining me.
It's good to see you again too, David.
It's like the fall of 1991 all over again
and first learning some of this stuff.
All over again.
Oh, those glorious days when we had hair on our heads.
Exactly.
Thank you, Kim.
Thank you.
This episode of the Ezra Klein Show
was produced by Roland Hu,
fact-checking by Michelle Harris
with Kate Sinclair and Mary Marge Locker.
Our senior engineer is Jeff Geld.
Our senior editor is Annie Rose Strasser.
The show's production team also includes
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