544
Intro –

1) Vulgarity for Charity

Also Eli on Cleanup on Aisle 45 Episode 44 – Wednesday

2) LAM – Rittenhouse
3) House censures Paul Gosar, 223-207

The resolution approved by the House will remove Gosar from the House Oversight and Reform Committee, which Ocasio-Cortez also serves on, and the Natural Resources Committee.

Liz Cheney was one of two Republicans to vote for it, and in retaliation the Republican Party of Wyoming voter 31-29 to kick her out of the party. I think this is just a symbolic vote, I don't really care, Liz Cheney is still terrible, she's just not bending the knee to Trump.

A. CRASH! – Presidential Commission on the Supreme Court

-We had a segment on the materials that got cut for time because my notes were basically 20 pages of WTF?!? This is what happens when you put the enemy on your commission; shockingly, they gut it from the inside.

You can & should attend this open meeting of Biden's Commission on the Supreme Court. Keep asking this question until they answer: "Why didn't you even look into the role of the Federalist Society in selecting dangerously unqualified ideological hacks as part of a deliberate effort by the right-wing to take over the judiciary branch?"

https://www.whitehouse.gov/pcscotus/public-meetings/november-19-2021-pcscotus-meeting/

Follow-up: "Is it because multiple members of this committee are members of the Federalist Society? Why didn't you recuse yourselves?"

"What is the Committee's response to Sen. Sheldon Whitehouse's brief in the *New York Pistol & Rifle Association* case that persuasively shows that the Roberts court uniformly reaches conservative policy outcomes in close contested cases?"

William Baude – who we broke down his dishonesty on this show, plus Jack Goldsmith
Caleb Nelson, a law professor at the University of Virginia, and Jack Goldsmith, a law professor at Harvard, are no longer members of the panel, the White House confirmed.
https://news.bloomberglaw.com/us-law-week/bidens-supreme-court-commission-looses-two-conservatives

You're in good company
https://thehill.com/regulation/court-battles/582025-democrats-call-out-biden-supreme-court-commission?rl=1
-Sheldon Whitehouse

A. Updates in 1/6 Commission

MORE on Tuesday including a BUNCH of new information that surfaced in the John Eastman bar complaint

1. Bannon

-Bannon indicted on Friday, 2 misdemeanor counts – failure to give testimony and failure to provide documents

Indictment: https://www.justice.gov/opa/press-release/file/1447811/download

Press release: https://www.justice.gov/opa/pr/stephen-k-bannon-indicted-contempt-congress

These are both charges under 2 USC 192, that's a misdemeanor, but it's the only law that applies here.

https://www.law.cornell.edu/uscode/text/2/192

It says "**Every person who having been summoned as a witness by** the authority of either House of **Congress to give testimony or to produce papers upon any matter under inquiry** before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, **or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months**. And yes that old-timey language of "common jail" lets you know this is a 1938 law, which is when Congress stopped enforcing their subpoenas themselves by sending out the House Marshal.

-Generally no jail time and everything you read will say "no one has ever served jail time for this" – that's right, and you can listen to this past Wed Cleanup with me and Eli – which you should anyway – to discuss the three people previously indicted under this statute in the last 30 years.

BUT there's a big difference here, that isn't like any of the other cases. Uncle Frank's case: Eric Holder

-comparisons with Eric Holder, who was held in contempt over Operation Fast and Furious, which was a failed gov't effort with respect to Mexican drug gangs. Darrell Issa turned it into his personal crusade.

5 material differences

a) Holder actually testified fully and truthfully to the House Judiciary Committee – this was about getting him additional documents and testimony

In October 2011, the Justice Department released 7,600 pages of documents on Operation Fast and Furious. Republicans claimed some of those documents indicated that Holder had been sent early memos about Fast and Furious and therefore must have known about it before early 2011, which is when he'd testified he'd learned about it to the House Judiciary Committee;[122][123][124][125][126] a later report from the Justice Department's independent inspector general found that Holder had "no prior knowledge" of the operation before early 2011.

Later reports – put a pin in it – showed that Republicans were just making that up. Holder did not know.

In April 2012, Issa announced that his committee was drafting a Contempt of Congress resolution against Holder in response to the committee allegedly being "stonewalled by the Justice Department" on additional documents.

b) Holder made numerous offers to reconcile – including offering them *all* of the documents they wanted if they would just stop

On June 19, 2012, Holder met with Issa in person to discuss the requested documents. Holder said he offered to provide the documents to Issa on the condition that Issa provided his assurance that doing so would satisfy the committee subpoenas and resolve the dispute. Issa rejected the offer. Holder then told reporters "They rejected what I thought was an extraordinary offer on our part."

On June 20, 2012, the Oversight Committee voted 23–17 along party lines to hold Holder in contempt of Congress for not releasing the additional documents the committee had requested.

c) sitting president had a legitimate claim of executive privilege

On June 20—the same date as the Oversight Committee vote—President Obama asserted executive privilege over the remaining documents requested by the committee.[133] While Democrats argued that Holder was carrying out his constitutional role by honoring the executive privilege claim, on June 28, 2012, House Speaker John Boehner scheduled a vote on the contempt resolution anyway. Holder became the first U.S. Attorney General in history to be held in both criminal[134] and civil[135] contempt. He was held in contempt by the House of Representatives in a 255–67 vote, with 17 Democrats voting for the measure, 2 Republicans voting against the measure.

DOJ declined to prosecute the attorney general on the contempt charge, citing the fact that President Obama had asserted executive privilege.

d) Holder turned all of the documents over to an independent IG investigation

In September 2012, after a nineteen-month review, the United States Department of Justice Office of the Inspector General cleared the Attorney General of any wrongdoing with regard to Fast and Furious, stating that there was "no evidence" that Holder knew about the operation before early 2011. The report did cite fourteen lower ranking officials for possible disciplinary action.[142] Holder responded to the internal investigation, saying "It is unfortunate that some were so quick to make baseless accusations before they possessed the facts about these operations – accusations that turned out to be without foundation and that have caused a great deal of unnecessary harm and confusion."

e) that investigation published most of the documents & Congress ultimately got them

In August 2014, federal judge Amy Berman Jackson ordered the Justice Department to provide Congress with a list of the previously withheld documents.[145] In October 2014, Jackson rejected a House bid to hold Holder in contempt of court, stating that it was "entirely unnecessary."[146] In January 2016, Jackson tossed out Obama's executive privilege claims but stressed that her ruling wasn't based on the merits of the claim, but instead on the fact that many of the documents had by then become public as part of the 2012 inspector general's report.[147]

I think if we got that from Bannon people would be plenty happy.

2. Also last Thursday, we got you a *tiny* last-minute update on the appeal of Judge Chutkar's ruling requiring the National Archives to turn over Trump documents to the 1/6 commission.

PER CURIAM ORDER [1921975] filed ORDERED that an administrative injunction be entered and appellees the National Archives and Records Administration and the Archivist be enjoined from releasing the records requested by the House Select Committee over which appellant asserts executive privilege, pending further order of this court. It is FURTHER ORDERED that the motion for an expedited briefing schedule, which the court construes as a motion to expedite consideration of the appeal of the district court's order denying the motion for a preliminary injunction, be granted. The following briefing schedule will apply: **Appellant's Brief November 16, 2021 (12:00 noon);** Joint Appendix November 16, 2021 (12:00 noon); **Appellees' Briefs November 22, 2021 (12:00 noon); Appellant's Reply Brief November 24, 2021 (12:00 noon). Oral argument will be held before this panel on November 30, 2021, at 9:30 a.m. Before Judges: Millett, Wilkins and Jackson**.

Remember that Justin Walker and Neomi Rao are on the DC Cir now, so you can draw a panel with multiple idiots on it.

Trump brief filed, his lawyer is seditionist grifter Kraken moron Jesse Binnall and it's as bad as you would expect a brief written by Jesse Binnall to be.
https://openargs.com/wp-content/uploads/2021.11.16-Trump-brief-archives-1-6.pdf

1. "In his capacity as 45th President of the United States" – I don't want to skip lightly over this. This is a sovereign-citizen level stupid, and I mean that very specifically.

-copying things like "Bennie G. Thompson, in his official capacity as Chairman of the House Select Committee to investigate 1/6" (the first line of the defendants) because when you're a present-day official, you are responsible in two different "capacities" – as a person, that's your "individual capacity", and as a representative of the office you hold, when you're doing your job – that's your official capacity

SO if a Senator comes up and kicks you in the shins, you'd sue her in her "individual" capacity, because kicking you in the shins is not a part of her job. But if the same Senator defamed us in the course of doing her job, we'd sue her in her "official" capacity.

"Former president" is not a capacity. This is just dumb.

2. The arguments are terrible

On *Mazars*-

a) (p. 20-22) **only good argument** – you can't use a Congressional subpoena to investigate *criminal* wrongdoing; that's the function of the Executive Branch (the DOJ). This was the argument made, and lost, in *Mazars* (Trump tax case) because when the President is committing crimes, it's a pretty easy inference

b) (p. 19) You have to cite to a law you're trying to pass. No, not the law, never been the law, and they say *Mazars* makes it the law which is super dumb because there was no pending legislation in *Mazars*! It can be contemplated litigation. And Judge Millett is on the panel here and was on the panel in *Mazars*, so this is triple dumb.

<u>1/6 Cmte Argument:</u>

Argument being made by the 1/6 Committee: we're going to recommend legislation to revise the Electoral Count Act – you know, the one John Eastman wrote an entire memo about how vague it was and how Pence could subvert it? And so we need to know ALL the ways they were trying to subvert it to craft legislation that avoids all of their dirty tricks.

That's gonna carry the day

c) (pp. 23-29) – try to apply the same "no legislation" argument plus the argument that these subpoenas were super broad to the *Mazars* four factor-test. This is relitigating the facts on appeal and will go nowhere

Four *Mazars* factors:

The first Mazars factor is "**whether the asserted legislative purpose warrants the significant step of involving the President and his papers**." Id. at 2035 (internal quotations omitted); second, **requires courts to "insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective**," id. at 2036; third, "**courts should be attentive to the nature of the evidence offered by Congress to establish that a [request] advances a valid legislative purpose**," id.; and fourth, courts should **assess the burdens imposed by the request because the records stem from a rival political branch with incentives to use the records requests for "institutional advantage**."

-There's a super good argument that *Mazars* doesn't apply when you're not the President! --
See generally Trump v. Mazars USA LLP, 2021 WL 3602683 (D.D.C. Aug. 11, 2021). There, the court held that even when dealing with requests for documents related to a non-incumbent President, Congress must still show how the requested documents will "uniquely advance its legislative objectives."

On privilege:

d) Argument is (p.35) "It can only be invalidated pursuant to a demonstrated and specific showing of need"

That's the stupidest thing Jesse Binnall has ever put in print. No. Privilege can be invalidated when you release the records into the public. We just learned that from Eric Holder. And you can do that by deciding to waive them. That's all we have here.

e) Applies to the prior president – it can – that doesn't answer the question of who gets to *waive* it.

Irreparable harm – no
Balance of Equities – no – but we're not getting there.

3. Q Anon Shaman sentenced – 41 months
https://www.cnbc.com/2021/11/10/trump-capitol-riot-cases-fairlamb-sentenced-qanon-shaman-up-next.html

https://www.cnn.com/2021/11/17/politics/jacob-chansley-qanon-shaman-january-6-sentencing/index.html -- 41 months

Exactly what we predicted; helped that it was the exact same judge.

B. Rittenhouse verdict?

1. dismissal of jurors drawn by lot – selected by Rittenhouse

???
-usually you designate the alternates first and then dismiss them
-WI is different, okay
-been this judge's practice since 1984
-what would the prejudice be?

2. Gun count

Motion to dismsiss
https://quincy-network.s3.ca-central-1.amazonaws.com/wp-content/uploads/sites/11/2020/12/Rittenhouse-Motion-to-Dismiss.pdf

held sub curiae with extreme skepticism – didn't rule
Section 948.60(2)(a) of the Wisconsin Statutes establishes that "Any person under 18 years of age who possesses or goes armed with a dangerous weapon is guilty of a Class A misdemeanor."

https://docs.legis.wisconsin.gov/statutes/statutes/948/60

Section 948.60(3)(c), however, conditionally exempts possession of rifles and shotguns from criminal penalty and inclusion under section 948.60. Wis. Stat. § 948.60(3)(c) specifically provides that 948.60(2)(a) "applies only to a person under 18 years of age who possesses or is armed with a rifle or shotgun if the person is in violation of s. 941.28 or is not in compliance with 29.304 and 29.593." (emphasis added). Accordingly, it is only criminal for a person under 18 years old to possess a rifle or shot gun if: (1) that person is in violation of 941.28; or (2) that person is not in compliance with 29.304 and 29.593.

3. Mistrials
   a) With prejudice – that's for the line of questioning we described – NOT GONNA HAPPEN
   b) Without – argument that they didn't get the hi res version of the video played in court

-intentional and prejudicial – seems unlikely but ?
-note what this would mean re: how its going

4. Breaking news – MSNBC

"I have instructed that no one from MSNBC News will be permitted in this building for the duration of this trial. This is a very serious matter," Schroeder said.

A rep for NBC News confirmed that a freelancer for the news organization received a traffic violation, but denied that the individual was trying to get in contact with the jurors.

5. Jury instructions

https://context-cdn.washingtonpost.com/notes/prod/default/documents/fe1459b2-7c34-4d03-8d23-43ab71b5e599/note/59bb6750-6912-4372-90d2-ce0eb485ae6e.#page=1

[go through]

6. Predictions?

Michael O'Hear

https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-149

-lead jury to a result

-

545

Pre-Show: V4C

A. AWW

1. AWW – Yugoslavia

-one unambiguous error
-deserves not to be summarized in a single dependent clause

Not sure, but historian/Croatian Petra Patjak wrote in:

-especially interesting as Croatian given Yugoslavia's leader, Tito (1946-80) was Croatian

In episode 539, while discussing Dan Tana's case, Andrew opined that Yugoslavia "should never have existed" and that post WWII everyone was like "stick all the [Southern] Slavs in one country and call it Yugoslavia". However, that's not quite how it happened.

Andrew's Note: My unambiguous error – I went back, I did say WW2, I meant to say WW1.

Since the beginning of the 19th century, there were serious ideas about cultural (and possibly political) unification of various Slavs. **Those ideas originated among the Southern Slavs themselves** (Serbs, Croats, Slovenes, etc.), meaning of course the wealthy and educated elites. They were not imposed from the outside (by the European powers of that time). On the contrary, the idea of Slavic unification was seen as **in opposition to imperial powers** of that area (Austria-Hungary, Russia, Ottoman Empire, Italy).

Andrew's note: That needs to be understood in light of Pre-World-War I politics at the time, in which smaller national populations were allocated to preserve the balance of power between large empires.

After WWI, the leading Slavic politicians were mostly in favor of creating Yugoslavia (again, in opposition to other countries seeking to take over their territory - on their own they would have been easy to "pick off"). **Yugoslavia was created by those Slavic politicians, in 1918** (it was renamed "Yugoslavia" in 1929). It had the "blessing" of the world political leaders at that time, since Serbia was on the winning side (the Entente), and the Serbian government was in favor of creating Yugoslavia. Also, it was seen as giving the peoples the right of self-determination (as advocated by Woodrow Wilson).

After WWII, the Southern Slavs again decided to stay politically united, following their joint struggles against fascists of various kinds in WWII and their joint commitment to socialism and non-nationalism.

After the fall of the Berlin Wall and the Soviet Union, various critiques of Yugoslavia prevailed, as well as rising nationalism among the peoples of Yugoslavia. **They decided to separate** (in some cases, followed by war).

Some people today would characterize Yugoslavia as a country that never should have existed, or that it was stifling the independent development of it's peoples. However, **that is a fringe view, mostly associated with extreme nationalistic ideas.** Historians agree that Yugoslavia was an indigenous (Slavic) idea, and that it probably was in their best interest, despite all the problems it had.

Btw, "Yugo" in "Yugoslavia" is anglicized version of the Slavic word "jugo", which means "south", therefore "Yugoslavia" meaning "The Land of Southern Slavs". Linguists usually divide Slavic peoples into Eastern (Russians etc.), Western (Czechs etc.) and Southern (Serbs etc.). Interestingly, while they are Southern Slavs, Bulgarians at that time didn't have substantial political ties with the other Southern Slavs, so they weren't a part of Yugoslavia.

2. TWR – Hillsboroguh

It was interesting to hear your brief references to the Hillsborough disaster in your recent episode. I really hope that you can find a couple of minutes to pay tribute to the efforts of the Hillsborough community since the tragedy; their reaction to the tragedy and what they have achieved is remarkable:

1 - Community Spirit:
The Liverpool team (whose fans were killed) attended as many funerals as possible - the Manager (Kenny Dalglish) managed to attend four (4) in one day! A remarkable support.

2 - Fight back against the media lies about the fans
4 days after the tragedy, the Sun newspaper ran a front page story falsely claiming that fans had caused the tragedy, and hindered the emergnecy response. The whole city (both Liverpool and their sporting rivals Everton) immediately boycotted the paper. The boycott *continues to this day* 32 years despite numerous mea culpas from the Sun; now locally known as the Scum. This boycott is so successful and widespread has affected the overall political views of the city. (It is less Eurosceptic than comparable cities).

3 - Change in stadia design
Hillsborough caused a review of stadium design in the UK and led to all major stadia having their standing terracing removed in favour of all-seater stadia. A permanent legacy.

4 - The community has fought and won for legal reviews overturning erroneous early verdicts:
The community had to fight against a legal system that was (and I suspect remains) massively inadequate in dealing with such occurrences where the authorities have caused deaths via their gross incompetence. They have overcome the legal systems favourable ear to authority that was in-built, what I (a layman) perceive as a lack of legislative provisions for such events, the active smears against the victims, officialis changing statements to suit themsevles etc etc. After 27 years (?!) the community managed to overturn previous verdicts to get a ruling of unlawful death for the (now) 97 victims. Belated criminal charges were filed against the officials, but the trials collapsed or ended in acquittal.

5 - Inspired a local legend
The youngest victim (Jon Paul Gilhooley, 10) had an 8 year old cousin called Steven Gerrard: He referenced the tragedy as motivation in becoming a footballer, and is now a legend on Merseyside after 17 years with Liverpool, and 114 caps for England.

To me, Hillsborough is one of the darkest stains on the UK legal system (inclusive of law-makers, lawyers, law enforcement and the laws themselves) and its administration. The officials who were so inept at their duty as to allow development of lethal conditions then smeared the victims, changed their stories, and managed to delay any effective reviews until such time as a successful prosecution became impossible. They roam free.

As I said - hope you have time to pay tribute to the activism of the remarkable group of survivors and victims families. I think they won't get the justice they deserve, but what they have achieved is remarkable and inspirational. There are 97 direct deaths and 750+ casualties, and other deaths by suicide for which PTSD from the events on 15 April 1989.

3. TWW – Fentanyl

[answer]

B. UPDATES!

1. John Eastman CA Bar Complaint

He has been subpoenaed by 1/6 – need to see if he responds

https://statesuniteddemocracy.org/wp-content/uploads/2021/11/Supplemental-Letter-to-State-Bar-of-California.pdf

Since we filed our complaint six weeks ago, a great deal of new information has emerged that strongly confirms the allegations of unethical conduct in the Complaint and underscores the need to investigate them. These revelations highlight the need for the bar to undertake a thorough review. Perhaps the most striking piece of new information is that quoted above, from a draft oped by Greg Jacob, the former Chief Counsel to Vice President Mike Pence. Mr. Jacob has served extensively in government under Republican presidents and is now a partner in a leading national law firm.2 Mr. Pence was the target of Mr. Trump's and Mr. Eastman's campaign to hijack or disrupt the electoral count, and Mr. Jacob was an eyewitness to Mr. Eastman's role in it. Mr. Jacob's words as an eyewitness—that Mr. Eastman's, and his colleague Rudy Giuliani's, conduct involved "a web of lies and disinformation" and "snake oil…wrapped in the guise of a lawyer's advice"—are substantively identical to those of our October 4 Complaint, which was based on public information. If there were nothing more than Mr. Jacob's recently published account, the case for an investigation would be exceptionally strong. But there is a great deal more.

Not the 'sting' video you might have seen on Rachel Maddow – I'm not convinced that was great

The bulk of the new information relates to Mr. Eastman's central role in Mr. Trump's effort to hijack or derail the Joint Session of Congress that met to conduct the electoral count on January 6, 2021. We continue to learn about the many moving parts of that operation, many of them designed and orchestrated in accord with Mr. Eastman's false legal advice. Mr. Eastman also appears to have had a larger role than previously understood in both public and private efforts to pressure Mr. Pence, and the new incidents that have emerged confirm his indifference to the truth and to upholding the Constitution. We review that information, together with Mr. Eastman's recent public defense of his actions, in Part I.

New Info

(i) Two memos

New Reported Information About the Organized Campaign to Derail the Electoral Count Mr. Eastman drafted his two-page memorandum3 setting out a legal strategy for derailing the electoral count on Christmas Eve, and his six-page memorandum4 on January 3. 5 We discussed each of those memoranda in detail in our October 4 Complaint.6

Mr. Eastman cited several instances of alleged statistical anomalies in the vote totals in support of his argument, but the sources for his claims included an anonymous author and a suspended Twitter user named DuckDiver19

(ii) "War room"

To implement its strategy, the Trump campaign also established a "war room" at the Willard Hotel in Washington, D.C., in early January. According to the Washington Post, the war room "sought to make the case to Pence and ramp up pressure on him to take the actions on Jan. 6 that Eastman had advised were within his powers."11 The war room's activities included "finding and publicizing alleged evidence of fraud, urging members of state legislatures to challenge Biden's victory and calling on the Trump-supporting public to press Republican officials in key states." 12 From January 3 to January 8, Mr. Eastman stayed at the Willard Hotel and was actively involved in the "war room."13 Other participants in this "war room" were Mr. **Giuliani**; former chief White House strategist Steve **Bannon**; former New York City police commissioner Bernard **Kerik**; a retired Army colonel who specialized in psychological operations, **Phil Waldron**; and a Tea Party activist known for submitting baseless fraud claims in court, **Russell Ramsland**. 14 In total, the Trump campaign spent more than $50,000 on rooms and suites in the Willard Hotel in early January.15

Dunno who Waldron is. Ramsland you'll recognize from the Kraken litigation

(iii) Pressuring Pence's staff

Greg Jacobs – Pence staffer – drafted an op-ed he never wrote because they're all cowards

After the Secret Service escorted Mr. Pence out of the Senate because of the incoming violent insurrectionist mob, Mr. Jacob emailed Mr. Eastman to criticize him for pushing the Vice President to stop the proper certification of those votes. Mr. Jacob wrote to Mr. Eastman, "Thanks to your bull----, we are now under siege."31 Mr. Eastman responded: "[t]he 'siege' is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so that the American people can see for themselves what happened," apparently referring to former-President Trump's false claims of voter fraud.32 After the insurrectionists were finally cleared from the Capitol building and Mr. Pence and the Joint Session of Congress returned to the House chamber, Mr. Eastman still did not relent. Instead, he kept up his pressure campaign, writing another email to Mr. Jacob saying that Mr. Pence still should not certify the results, using the insurrection as a new justification.

Given the insurrectionist attack on the Capitol, lawmakers had spoken about the attack before they returned to counting the votes. Mr. Eastman told the Post that the point of his email "was **they had already violated the [E]lectoral [C]ount [A]ct by allowing debate to extend past the allotted two hours, and by not reconvening 'immediately' in joint session after the vote in the objection . . . [it] seemed that had already set the precedent that it was not an impediment**." In his draft oped, Mr. Jacob wrote that by sending the email at that moment, Mr. Eastman "displayed a shocking lack of awareness of how those practical implications were playing out in real time."

(iv) Lied about it in public – particularly in a shocking puff piece published by the *National Review*

CHARGE

In two memoranda that Mr. Eastman wrote, he advised that it was a "fact" that the Constitution assigned the Vice President exclusive and unreviewable authority (1) to violate the Electoral Count Act of 1887 (and the Concurrent Resolution of Congress incorporating it) by (2) rejecting certificates from governors of states that Biden had carried, even if there were no competing slates of electors from that state ("unopposed certificates") and (3) adjourning the Joint Session, (4) over the objection of both Houses of Congress and without subsequent judicial review.

DEFENSE

In public statements since the filing of the complaint, Mr. Eastman has offered three defenses to this charge: first, the memoranda do not accurately reflect the advice he actually gave; second, the advice he gave was accurate; and third, he gave the advice in good faith. We consider each of those defenses in turn.

(conditionality on display)

2. Activision

https://twitter.com/benfritz/status/1460641017586094081

Kotick's response

https://www.activisionblizzard.com/newsroom/2021/11/a-message-from-ceo-bobby-kotick

https://www.gameinformer.com/2021/11/16/report-bobby-kotick-knew-of-activision-blizzards-history-of-sexual-misconduct-employees

3. MWR: $750 million lawsuit filed – among dozens

https://www.nbcnews.com/news/us-news/750-million-lawsuit-filed-travis-scott-drake-behalf-astroworld-victims-rcna5850

4. MWR2: Britney freed!

C. Klobuchar/Cotton bill

Draft bill
https://www.cotton.senate.gov/imo/media/doc/antitrust_bill.pdf

SEC. 2. UNLAWFUL ACQUISITIONS. 7 (a) VIOLATION.—**It shall be unlawful for a covered** 8 **platform operator to acquire directly or indirectly**— 2 SIL21C25 0G0 S.L.C. 1 (1) **the whole or any part of the stock or other** 2 **share capital of another person engaged in commerce or in any activity affecting commerce**; or 4 (2) **the whole or any part of the assets of another person engaged in commerce** or in any activity 6 affecting commerce. 7

(b) EXCLUSION.—An acquisition shall not be unlawful under subsection (a) if the acquiring covered platform 9 operator **demonstrates by clear and convincing evidence** 10 that— 11 (1) the acquisition is a transaction that is described in section 7A(c) of the Clayton Act; 13 (2) the acquired stock, other share capital, or 14 assets **are valued at less than $50,000,000**; **or** 15 (3) **the acquired assets or the issuer of the acquired stock do not**— 17 (A) **compete with the covered platform or** 18 **covered platform operator for the sale or provision of any product or service;** 20 (**B) constitute nascent or potential competition to the covered platform or covered platform operator for the sale or provision of any** 23 **product or service;** 24 **(C) enhance or increase the covered platform's or covered platform operator's market position with respect to the sale or provision of** 2 **any product or service offered on or directly related to the covered platform; and** 4 **(D) enhance or increase the covered platform's or covered platform operator's ability to maintain its market position with respect to the sale or provision of any product or service offered on or directly related to the covered platform**. 10 (c) USER ATTENTION.—**For purposes of this Act**, 11 competition, **nascent competition**, or potential competition 12 for the sale or provision of any product or service **includes** 13 **competition for a user's attention**.

14 (d) ROLE OF DATA.—For purposes of this Act, an 15 acquisition that results in access to additional data may, 16 without more— 17 (1) enhance or increase the market position of 18 a covered platform or covered platform operator; or 19 (2) enhance or increase the ability of a covered 20 platform or covered platform operator to maintain 21 its market position. 22

SEC. 3. DEFINITIONS. 23 (a) ANTITRUST LAWS.—The term ''antitrust laws'' 24 has the meaning given the term in subsection (a) of sec25 tion 1 of the Clayton Act (15 U.S.C. 12). 4 SIL21C25 0G0 S.L.C. 1 (b) COMMISSION.—The term ''Commission'' means 2 the Federal Trade Commission. 3 (c) CONTROL.—The term ''control'' with respect to 4 a person means— 5 (1) holding 25 percent or more of the stock of 6 the person; 7 (2) having the right to 25 percent or more of 8 the profits of the person; 9 (3) having the right to 25 percent or more of 10 the assets of the person, in the event of the person's 11 dissolution; 12 (4) if the person is a corporation, having the 13 power to designate 25 percent or more of the direc14 tors of the person; 15 (5) if the person is a trust, having the power 16 to designate 25 percent or more of the trustees; or 17 (6) otherwise exercises substantial control over 18 the person. 19 (d) COVERED PLATFORM.—**The term ''covered plat20 form'' means an online platform**— 21 (1) that has been **designated as a ''covered platform'' [by the FTC/DOJ] under section 4(a);** or 23 (2) **that**— 24 (A) **at any point during the 12 months** 25 **preceding a designation under section 4(a) or at** 5 SIL21C25 0G0 S.L.C. 1 **any point during the 12 months preceding the** 2 **filing of a complaint** for an alleged violation of 3 this Act— 4 (i) has at least 50,000,000 United 5 States-based monthly active users on the 6 online platform operator; or 7 (ii) **has at least 100,000 United** 8 **States-based monthly active business users** 9 on the online platform; 10 (B) as of the date of enactment of this 11 Act, **was owned or controlled by a person with** 12 **United States net annual sales of** 13 $**600,000,000,000 in the prior calendar year or** 14 with **a market capitalization of greater than** 15 $**600,000,000,000**, as measured by the simple 16 average of the closing price per share of the 17 common stock issued by the person for the 18 trading days in the 180-day period ending on 19 the date of enactment of this Act; **and** 20 (C) **is a critical trading partner** for **the sale** 21 **or provision of any product or service offered on** 22 **or directly related to the online platform**. 23 (e) COVERED PLATFORM OPERATOR.—The term 24 ''covered platform operator'' means a person that owns or 25 controls a covered platform. 6 SIL21C25 0G0 S.L.C. 1 (f) CRITICAL TRADING PARTNER.—The term ''crit2 ical trading partner'' means a person that— 3 (1) owns or controls an online platform; and 4 (2) has the ability to restrict or impede the ac5 cess of— 6 (A) a business user to its users or cus7 tomers; or 8 (B) a business user to a tool or service 9 that it needs to effectively serve its users or 10 customers. 11 (g) BUSINESS USER.—The term ''business user'' 12 means a person that utilizes or plans to utilize the covered 13 platform for the sale or provision of products or services. 14 (h) ONLINE PLATFORM.—The term ''online plat15 form'' means a website, online or mobile application, mo16 bile operating system, digital assistant, or online service 17 that— 18 (1) enables a user to generate content that can 19 be viewed by other users on the platform or to inter20 act with other content on the platform; 21 (2) facilitates the offering, sale, purchase, pay22 ment, or shipping of products or services, including 23 software applications, between and among con24 sumers or businesses not controlled by the platform 25 operator; or 7 SIL21C25 0G0 S.L.C. 1 (3) enables user searches or queries that access 2 or display a large volume of information. 3 (i) PERSON.—The term ''person'' has the meaning 4 given the term in subsection (a) of section 1 of the Clayton 5 Act (15 U.S.C. 12). 6 (j) STATE.—The term ''State'' means a State, the 7 District of Columbia, the Commonwealth of Puerto Rico, 8 and any other territory or possession of the United States. 9 SEC. 4. IMPLEMENTATION. 10 (a) COVERED PLATFORM DESIGNATION.— 11 (1) The Federal Trade Commission or Depart12 ment of Justice shall designate whether an entity is 13 a covered platform for the purpose of implementing 14 and enforcing this Act. Such designation shall— 15 (A) be based on a finding that the criteria 16 set forth in section 3(d)(2)(A)–(C) are met;