

570

Pre-Show

1. NY AG motion to quash by Trumps – oral argument
Going on while we record the show

Today, a court ruled in our favor that Donald Trump must appear before my office as part of our investigation into his financial dealings. No one will be permitted to stand in the way of the pursuit of justice, no matter how powerful they are.

2. NFL "Hires" Loretta Lynch

a)

-serious

-she's a partner at Paul, Weiss which is a Coat Factory law firm

-she was engaged by the NFL to investigate the Dan Snyder sexual harassment allegations

From SI:

<https://www.si.com/nfl/washingtonfootball/news/washington-commanders-owner-daniel-snyder-alleged-sexual-harassment-congress#gid=ci0298ef7f1000278e&pid=dan-snyder-roger-goodell>

An ex-employee of the Washington Football Team told members of Congress on Thursday that team owner Daniel Snyder harassed her at a team dinner then tried to force her into his limo, hired prostitutes at an event at his home, and was involved in hazing an employee who is an recovering alcoholic.

Tiffani A. Johnston, a former cheerleader and marketing manager for the team, was one of six former employees participating in the House Committee on Oversight and Reform's roundtable discussion, which explored the team's toxic culture and the NFL's overseeing of alleged sexual harassment and misconduct at the franchise.

"I learned on one specific occasion that when I was asked by my boss to attend a networking event (and oh, to dress "cute"), it was actually an orchestration by him and Dan Snyder to put me in a compromising, sexual situation," Johnston said. Johnston said she once remove Snyder's hand from her thigh during dinner and that afterward, Snyder attempted to push her into his limo.

One woman, Rachel Engleson, said every day for eight years. Another, Emily Applegate, said 515 times (or every day for the year and a half that she worked there).

Snyder on Thursday responded to the hearing, acknowledging "misconduct which took place at the Team and the harm suffered by some of our valued employees."

b)

-Listener Q from Karin Layton

As a reluctant Broncos fan, I am up to date (unfortunately) on Elway news. I am not a lawyer so I'm dying to know if you could theoretically defend Elway's accusation of being racist in showing up to Flores' interview hungover by pointing out Elway is (frequently rumored by locals to be) an alcoholic and shows up to all his interviews like that. Like- I know this is ridiculous and they won't do this, but if you had some proof from say Fangio that Elway was also hungover during his interview, could you actually use that as a real defense?

-whole team, not just Elway, but.. yes

c) NFL and black quarterbacks

Nathaniel Dixon

A 2015 study in the Journal of Sports Economics showed that when controlling for age, experience, and performance, Black quarterbacks were roughly twice as likely to get benched after a start than white quarterbacks.

A 2017 Washington Post investigation showed that Black quarterback prospects are often subject to racial stereotyping in scouting reports:

"A white quarterback prospect is more likely to be discussed in terms of intangible internal qualities for which he himself is responsible. He is smart, displays intelligence, and understands the game. He is a leader with command of the huddle. He is consistent, calm, and poised. He is credited for his production. He is good or even outstanding. He appears to fit the prototype. In contrast, a minority quarterback prospect is more likely to be discussed in terms of physical characteristics, to be judged erratic and unpredictable, and to have his successes and failures ascribed to outside forces. We learn about his hands, his weight, his frame, his body, parts of which are often either big or lean"

The relationship of this language to race is also quantifiable:

"For example, we estimate that for a white prospect at the average weight of 223 pounds, there is a 6 percent chance that his report will use the word 'weight.' For a minority prospect weighing 223 pounds, the chance is much higher: 27 percent."

This delightfully snarky article from the New York Daily News (I'm as surprised as you) marks a 2017 matchup between two white journeyman quarterbacks, Ryan Fitzpatrick and Josh McCown, with a combined record of 68 wins and 116 losses. The author shows how mediocre and terrible white quarterbacks are given chance after chance to stick around in the league, while highly touted Black QBs like Robert Griffin III, Vince Young, and Jarmarcus Russell are quickly cast aside as "busts".

3. Durham filing from cleanup

-I did not expect this would hit the right wingsphere

A. Giuffre v. Prince Andrew

<https://s3.documentcloud.org/documents/21210538/2-15-22-giuffre-v-prince-andrew-notice-of-settlement.pdf>

Plaintiff Virginia Roberts Giuffre brings this action against defendant Prince Andrew, Duke of York, for battery and intentional infliction of emotional distress. In short, she alleges that the late Jeffrey Epstein and others trafficked her to Prince Andrew who took advantage of the situation by sexually abusing her when she was under the age of eighteen.

Settlement text:

Virginia Giuffre and Prince Andrew have reached an out of court settlement. The parties will file a stipulated dismissal upon Ms. Giuffre's receipt of the settlement (the sum of which is not being disclosed). Prince Andrew intends to make a substantial donation to Ms. Giuffre's charity in support of victims' rights. Prince Andrew has never intended to malign Ms. Giuffre's character, and he accepts that she has suffered both as an established victim of abuse and as a result of unfair public attacks. It is known that Jeffrey Epstein trafficked countless young girls over many years. Prince Andrew regrets his association with Epstein, and commends the bravery of Ms. Giuffre and other survivors in standing up for themselves and others. He pledges to demonstrate his regret for his association with Epstein by supporting the fight against the evils of sex trafficking, and by supporting its victims.

-last month, there was a substantive ruling in the case
<https://www.leagle.com/decision/infeco20220118603>

Prince Andrew relies mainly, although not exclusively, on a 2009 agreement between Ms. Giuffre and Epstein that settled a different lawsuit, between Giuffre and Epstein, that defendant now argues released him from any liability to Ms. Giuffre.

Ms. Giuffre and Epstein entered into the 2009 Agreement, entitled Settlement. Agreement and General Release, pursuant to which Giuffre voluntarily dismissed her action against Epstein in exchange for \$500,000.³⁰ The defendant argues that Ms. Giuffre's claims against him are barred by the terms of the 2009 Agreement.

The 2009 Agreement is the crux of defendant's motion. It contains six and a fraction pages of substantive text consisting of nine individually labeled provisions. These are an agreement to dismiss the Florida Case (§ 1), a one and one-half page provision captioned "general release" that contains additional covenants beyond the releasing language (§ 2), a payment section (§ 3), a confidentiality provision (§ 4), covenants dealing with maintaining Ms. Giuffre's anonymity (§ 5), a "no contact" covenant (§ 6), a provision relating to governing law and enforcement of the agreement (§ 7), a clause concerning attorneys' fees (§ 8), and a collection of miscellaneous provisions (§ 9).

The 2009 Agreement is far from a model of clear and precise drafting. Both sides agree that Epstein and Ms. Giuffre agreed to its language. It must have meant something to them. But Ms. Giuffre and the defendant in this case disagree emphatically as to what it meant with respect to both issues.

So in the release, the "First Parties" (generally, Ms. Giuffre and some others) released "Second Parties" (generally, Epstein and some others) and **any other person or entity who could have been included as a potential defendant ('Other Potential Defendants')** from all, and all manner of [claims] that said First Parties ever had ... or may have, against Jeffrey Epstein, or **Other Potential Defendants**....

Prince Andrew said: I'm an Other Potential Defendant! Which may be the first time someone has been eager to say "I probably committed criminal wrongdoing"

The defendant insists that he was among the "Other. Potential Defendants" and therefore was released by Ms. Giuffre from "all, and all manner of," claims that she "ever had" against him. Ms. Giuffre maintains with equal adamancy that he was not among the "Other Potential Defendants" that the parties to the 2009 Agreement had in mind.

The defendant argues that the nexus is supplied by plaintiff's complaint in the Florida Case.⁴⁹ It charged Jeffrey Epstein, to quote the defendant in this case, with "sex-trafficking and sexual abuse."⁵⁰ It alleged that girls whom Epstein trafficked were abused by others, including unspecified "royalty."⁵¹ That, defendant submits, is enough.

From the plaintiff's standpoint, defendant's position is too extreme. As noted, the Florida complaint did not mention Prince Andrew. Moreover., Ms. Giuffre argues in substance that one "could have been included as a ... defendant" (1) only if that could have been done on the same basis as the claim in the Florida Case was made against Epstein — violation of one or more of the Section 2255 predicate criminal statutes — and even then (2) only if that person would have been subject to the personal jurisdiction of the Florida court.

Court says: **this is a factual dispute**, so I can't grant a motion to dismiss based on it.

Backup arguments:

- 1) I'm a third-party beneficiary to the agreement even if I'm not a directly released party – no you aren't
- 2) Dershowitz got off – Giuffre dropped her claims against Dersh when he showed her this release
- 3) Wasn't specific enough in identifying what sexual conduct – no

Often illustrates the dynamics – "take a crack at it" – lose on MTD, settle

B. Sandy Hook settlement with Remington
\$73 million

<https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html>

15 U.S.C. § 7901 – “Protection of Lawful Commerce in Arms Act of 2005”

<https://www.law.cornell.edu/uscode/text/15/7901>

Yes, Bernie Sanders voted for it

<https://clerk.house.gov/evs/2005/roll534.xml>

Subsection (a) – congressional findings

(3) Lawsuits have been commenced against [manufacturers](#), distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United [States](#) are heavily regulated by Federal, [State](#), and local laws. [examples]

(5) Businesses in the United [States](#) that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation’s laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United [States](#), and constitutes an unreasonable burden on interstate and foreign commerce of the United [States](#).

§ 7902

<https://www.law.cornell.edu/uscode/text/15/7902>

(a) In general - A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions - A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

§ 7903

<https://www.law.cornell.edu/uscode/text/15/7903>

(5) Qualified civil liability action. (A) In general. The term “qualified civil liability action” **means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product [firearm], or a trade association [NRA], for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party,**

-that is of course exactly what this lawsuit is about. And what a LOT of lawsuits were going to be about in the early 2000s -- modeled after tobacco

You know these are unreasonably dangerous. You sold them anyway.

So how did this lawsuit survive a motion to dismiss?
Exceptions to the law – super clever

7903(5)(A) continues “but shall not include”

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

- (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
- (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18;

-almost certainly intended to be a super narrow exception

This lawsuit argues that Remington knowingly violated the Connecticut Unfair Trade Practices Act Chapter 735a, § 42-110b
https://www.cga.ct.gov/current/pub/chap_735a.htm#sec_42-110b

(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

The lawsuit argues that because the AR-15 was designed for the United States military as a battlefield weapon to maximize fatalities, gun companies should never have entrusted the rifle to an untrained civilian public. The suit also **claims that the companies deliberately promoted the weapon with product placement in video games and macho militaristic marketing slogans that appealed to a population of mentally unstable young men — the same population that has used the gun to kill innocent people in theaters, malls, schools and churches.**

Remington had proposed settling with the families for \$33 million last year, as a trial date loomed. In July, Mr. Koskoff said the families turned the offer down because of its “glaring inadequacy.”

C. Cardi B

- 1) Morgan was wrong on IIED
- 2) Listener Q

GQ profile

<https://www.gq.com/story/cardi-b-invasion-of-privacy-profile>

Her favorite person is FDR, it's a super fascinating article, I think I'm a Cardi B fan.

- 3) "Loathsome disease"

James, who is a resident physician in Canada

I'm a resident physician working in Canada, and wanted to drop you a line to discuss herpes after the recent discussion on Cardi B. While it is obviously vile to spread lies about someone's health information, one thing that struck me is that Cardi B was lucky to not, in fact, have herpes. Herpes is incredibly common, with roughly 50-60% of the population being "serologically positive," meaning if you give them a blood test, they'll test positive. This is a reason we don't routinely test for herpes. Most people will only have a one-off active infection that actually results in sores (cold sores on the mouth or genital sores) but herpes lives in your nerves for the rest of your life and a significant fraction get repeated bouts of sores.

You might see sources saying that HSV-1 causes oral herpes and HSV-2 causes genital, and HSV-2 is far less common. While it is less common, that differentiation seems to be disappearing, and is no longer considered accurate in clinical practice.

These people face a lot of stigma and misinformation that is damaging to their physical, emotional, and mental health. If someone with herpes doesn't have any active sores, then they should behave just as if they didn't have herpes - so yes, hug and kiss your children! The social media comments inquiring whether Cardi B should have been kissing her children made me sad for her, but made much much sadder for the literally billions of people worldwide who actually have herpes and face the same misinformation.

So TL;DR: most people have herpes, Cardi B was lucky to test negative, and please do kiss and cuddle your children unless you're having an active outbreak!

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Pre Show

BREAKING – 5th Cir injunction against United from putting employees with religious exemptions on unpaid leave. The court's holding is basically that the lower court has to reconsider the motion for the injunction under certain factors.

Missouri SB 666

-failed Transportation, Infrastructure and Public Safety Committee **on a 4-3 vote**
-so that's pretty narrow

D. MTG DAO

it's hilarious

I'm going to get the crypto stuff wrong but here goes

A **decentralized autonomous organization (DAO)**, is an effort to write corporate management rules into software. In normal corporate governance, 1 share is 1 vote. Here, they turn NFTs into tokens that give you a right to vote. Why? In theory, I guess, the tokens can reflect the work you've put into the DAO, but it can also just be what you buy. I think it's the more complicated you make it, the harder it is for people to see when they're being scammed.

So the idea is that the tokenization takes place via a crypto wallet, those transactions are on the blockchain and verifiable, and then everything the DAO does is also recorded on the blockchain, so.. you can have an anarcholibertarian utopia can have no leadership and no government oversight

Like all libertarian things, this is stupid and the minute someone breaks the rules, you want a government to step in and regulate it. This VICE article from 2 days ago
<https://www.vice.com/amp/en/article/xgd5wq/democratic-dao-suffers-coup-new-leader-steals-everything>

Democratic DAO Suffers Coup, New Leader Steals Everything

00000000000000

This sounds OK in theory, but a group called Build Finance DAO just suffered a coup in which one person amassed enough tokens to get a vote passed, then voted to give themselves full control of the DAO, then, using this power, took all of the money. In a sense, the DAO did replace a corporate activity with its own version: the hostile takeover.

The person had taken over the token contract, governance contract, minting keys, and the project's treasury. A wallet named Sudo.eth made the initial proposal to put themselves in charge and it failed after they were voted down in the project's Discord, but then transferred their tokens to another wallet and offered the proposal once more. The proposal passed this time because no alert was issued on Discord that a new proposal had been made, The Block reported.

The coup drained nearly \$500,000 worth of tokens from the project.

"The attacker was able to access funds in this way due to the structure of the Build DAO governance model. It is believed that the attacker took extra steps to stop evidence of their activities by way of disabling the gitbooks and the proposal bot," Build Finance DAO tweeted.

Thanks to their move to disable bots that would have alerted the community to the new proposal, it eventually passed. With sole control over the DAO, this person minted 1,107,600 BUILD (the DAO's token) and proceeded to drain the DAO's liquidity pools on decentralized exchanges Balancer and Uniswap. They then seized 130,000 METRIC tokens from the DAO's treasury, sold those, then minted another 1 billion BUILD, and went on to sell everything they could.

If this were a real corporation, you could sue, and there are rules that prevent you from doing this. But this is an imaginary thing so you're just screwed.

The funniest part of the article:

"It is with deep regret that we have to inform the community of this total and irrecoverable loss of BUILD DAO treasury assets through the deeds of one malicious actor," Build Finance added later in the thread. "Team members have made direct contact with the attacker but there seems to be no appetite for a dialogue, much less any reparations."

So: DAOs are dumb and bad and you should feel bad.

So of course someone wants to create a magic the gathering DAO. They've released a 7-page "white paper" as to what it is
<https://www.mtgdao.org/white-paper>

the problem they want to solve is

Most complaints are not about the game itself but instead are about managing the Magic card economy and related issues like "power creep". Wizards has built a great game that invites you to invest in its economy but it's hard to justify investing significant money into individual cards when the value of a card could change at any time. The reality is that individual cards are unpredictable investments at best, and many lose value.

Yes, it's that you buy expensive and rare cards, and then Wizards releases new cards that obsoletes them.

These negative aspects are not exactly the fault of Wizards of the Coast. They are a for-profit company that has built a business model on selling packs. **In crypto terms, they operate in the world of fiat. Just like central banks, they exist and profit by building an ecosystem that builds demand, managing a perception of scarcity, and then printing and selling into the demand curve.**

That's the dumbest thing I've read in quite some time.

-mint currency that you use to buy NFTs of the cards you already own

The FAQ is golden, it has a question that says "What's fun here?" because this seems desperately unfun, and "So only rich players can win?" where the answer is "yes"

In any event – and this is like the goof troop (the "Spice DAO") that bought the copy of Jodorowsky's concept art and notes for Dune thinking they could make derivatives and sell a cartoon for a "fuck ton of money"

<https://kotaku.com/crypto-losers-buy-copy-of-jodorowskys-dune-have-played-1848370368>

-the DAO was going to collect money off of NFTs off of MTG cards – no

-the tokens would copy the card

Cease-and-desist

<https://mobile.twitter.com/mtgDAO/status/1491939395040997376?t=zkiNO20bFOLOHoYHlpZVXg>

Your enthusiasim for MTG is evident and appreciated. The team at Wizards is also impressed by the work you have put into developing a new format for playing MTG. Unfortunately, your intended use of Wizards' IP, including its trademarks and copyrights, would be unlawful.

You appear to be operating under the mistaken assumption that the project would be legal because you would allow the reproduction of MAGIC cards in the form of NFTs only by a player who had purchased a physical card, a card on Arena, or a card on MTGO. This is not correct. It is the exclusive right of the copyright owner to reproduce the copyrighted work, such as a MAGIC card, in any format. While there is an exception in the copyright statue for making a backup or "archival" copy in some circumstances, "this privilege extends only to computer programs and not to other types of works."

17 U.S.C. § 106

<https://www.law.cornell.edu/uscode/text/17/106>

6 sticks you have as a copyright owner – includes these three

the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in [copies](#) or [phonorecords](#);
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute [copies](#) or [phonorecords](#) of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

Our vision for mtgDAO is similar to a local game store. Here we would host tournaments, fund writers, and sponsor players. A DAO is the primary community building tool of web3. To forbid a Magic DAO is to forbid any authentic presence in web3. Ngmi.

As web3 becomes more popular, this attitude will not age well. WotC are digging their heels into the old world. Internet culture moves quickly and WotC is solidifying their position as dinosaurs on the brink of extinction. Catching up will only become harder. ngmi.

Also a weird thing where he assumes they're doing their own NFTs; it just says, yeah, we haven't decided whether we're going to do that or not. When you're an artist, and you create an NFT of your painting that's because YOU OWN ALL THE COPYRIGHT IN THE PAINTING. If I buy a print of the Mona Lisa, I can't NFT the Mona Lisa.

E. Sarah Palin

Part of the right wing's efforts to tee up a vehicle to overturn *NYT v. Sullivan* – terrifying. Gorsuch and Thomas are on board already.

“America’s Lethal Politics” by the editorial board at the NYT

<https://www.nytimes.com/2017/06/14/opinion/steve-scalise-congress-shot-alexandria-virginia.html>

June 14, 2017

Gabby Giffords

On January 8, 2011, Jared Loughner opened fire at a political rally for Democratic Congresswoman Gabrielle Giffords in Tucson, 26 Arizona (“the Loughner shooting”), killing six people and injuring thirteen others. Representative Giffords was seriously wounded in the attack. Shortly before the tragic attack, Sarah Palin’s political action committee (“SarahPAC”) had circulated a map that superimposed the image of a crosshairs target over certain Democratic congressional districts (evoking, in the view of many, images of violence). Giffords’ district was among those targeted by the SarahPAC crosshairs map.

The image had been publicized during the earlier political controversy surrounding the Affordable Care Act, but in the wake of the Loughner shooting, some speculated that the shooting was connected to the crosshairs map. No evidence ever emerged to establish that link; in fact, the criminal investigation of Loughner indicated that his animosity toward Representative Giffords had arisen before SarahPAC published the map.

Six years later, on June 14, 2017, another political shooting occurred when James Hodgkinson opened fire in Alexandria, Virginia at a practice for a congressional baseball game. He seriously injured four people, including Republican Congressman Steve Scalise (“the Hodgkinson shooting”). That same evening, the Times, under the Editorial Board’s byline, published an editorial entitled “America’s Lethal Politics” (“the editorial”) in response to the shooting.

Still up!

How it reads now

Was this attack evidence of how vicious American politics has become? Probably. In 2011, Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a 9-year-old girl. At the time, we and others were sharply critical of the heated political rhetoric on the right. Before the shooting, Sarah Palin’s political action committee [circulated](#) a map that showed *the targeted electoral districts* of Ms. Giffords and 19 other Democrats under stylized cross hairs. But in that case no connection to the shooting was ever established.

Correction: June 16, 2017: *An editorial on Thursday about the shooting of Representative Steve Scalise incorrectly stated that a link existed between political rhetoric and the 2011 shooting of Representative Gabby Giffords. In fact, no such link was established. The editorial also incorrectly described a map distributed by a political action committee before that shooting. It depicted electoral districts, not individual Democratic lawmakers, beneath stylized cross hairs.*

2018: motion to dismiss – granted – but it was weird

The district court (Rakoff, J.), uncertain as to whether Palin’s complaint plausibly alleged all of the required elements of her defamation claim, held an evidentiary hearing to test the sufficiency of Palin’s pleadings. Following the hearing, and without converting the proceeding to one for summary judgment, the district court relied on evidence adduced at that hearing to dismiss Palin’s complaint under Federal Rule of Civil Procedure 12(b)(6).

You can’t do that.

Rule 12(d), therefore, presents district courts with only two options: (1) “the court may exclude the additional material and decide the motion on the complaint alone” or (2) “it may convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material.” The district judge took neither permissible route under Rule 12(d). The judge both relied on matters outside the pleadings to decide the motion to dismiss and did not convert the motion into one for summary judgment.

When presented with the Times’ Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court relied on Rule 43(c) to convene the hearing at which Bennet testified. The district court’s invocation of Rule 43(c), which addresses taking testimony at trial, was misplaced: that rule has nothing to do with the proceedings at the motion-to-dismiss stage. Following the hearing, the district court granted the Times’ motion to dismiss, finding that Palin failed to plausibly allege actual malice. This conclusion rested on inferences drawn from Bennet’s testimony at the plausibility hearing. Rule 12(d) provides: “If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”

Sarah Palin got to re-file her complaint and this time it went to trial

...and more weirdness

Judge Rakoff ruled that it was legally insufficient while the jury was still deliberating

Directed verdict or JNOV

Can you do that?

You can – it’s obviously rare. Meant to insulate him from having this come up again.

But that’s probably going to backfire

<https://www.buzzfeednews.com/article/davidmack/sarah-palin-new-york-times-jury-push-notifications>

Aware that news outlets were going to write about his decision, he repeated a warning to the jurors before they left for the day on Monday – **not sequestered** that he’d previously given them at the start of the trial: Avoid reading anything in the press about this high-profile case and instead come to your conclusions based solely on the evidence presented to you in court.

Received push notifications on their phones of “case dismissed”

The jurors — who included, among others, a museum docent, a creative director, a receptionist, and a hedge fund worker — were not sequestered during their deliberations, meaning they were free to return home each night, albeit under strict instructions not to talk about the case or conduct their own research.

F. Cawthorn

- since we discussed on 568
- the complaining witnesses have moved to intervene
- Cawthorn has opposed that
- Cawthorn has moved to consolidate and expedite
- the Board has opposed that

KRAKEN

<https://s3.documentcloud.org/documents/21049106/judge-parker-ruling-82521.pdf>

6th Cir appeal

<https://s3.documentcloud.org/documents/21199215/powell-brief-2022-02-07.pdf>

-hahaha read backwards