Jill Wine-Banks:

Welcome back to #SistersInLaw. I'm Jill Wine-Banks. This week we'll be giving you an update on Chauvin and his sentencing, doing a roundup of recent SCOTUS decisions, and an explainer on conservatorships and what it's meant for Britney Spears. And as always, we'll be answering some of your questions at the end of the show. And there's one piece of news that we didn't cover in that listing, and that is the suspension of the law license of Rudy Giuliani, and also the lawsuits that are pending and where he had to testify brought by Dominion for over $1 billion. Who'd like to start us on that conversation?

Joyce Vance:

We waited so long for it and now nobody will take the bait.

Jill Wine-Banks:

Well then I'll talk about it because I was very excited to see. First of all, he was admitted the same time I was to the New York Bar, which I hadn't realized, and I'm sort of ashamed of. I obviously took my ethical obligations much more seriously than he did. And I bet all of us did when we were taking the bar exam and thinking about going through character and fitness, did you really think about everything you did and what consequences it might have? I bet you did.

Kimberly Atkins Stohr:

Absolutely. I remember when I was getting ready to graduate law school, and I took two separate bar exams at two different times. I took Massachusetts and New York. And leading up to both of them, and knowing the ethical obligations, there were some friends who I really liked who sometimes engaged in conduct that wasn't always great. And I would stay away from them for a while, I was like, "I can't hang out with you all. I have to be admitted to a bar. I don't want to do anything that could give anybody any idea that I am not qualified for this." I took it super seriously.

And as an attorney, of course, I always took those ethical obligations tremendously seriously. To see someone lying repeatedly, obviously, and knowing, look, I don't know if I would say I'm surprised, but I know that bar licensing authorities aren't always good at this. They're usually good in cases where someone's money was stolen, someone stole money from their clients, or they didn't pay their dues, or they did something else or they were convicted of a crime, then it's easy for a bar licensing authority to discipline. But when it's something that's like, "Well, they said something that isn't true," they're just not set up for that and they're not used to it. It's really refreshing to see that in this case they're coming forward and taking on that role, and I hope that, that continues.

Jill Wine-Banks:

To your point, Kim, I think that maybe we should talk about some of the specific allegations, because the court really made it clear that it felt there was uncontroverted proof that he had lied on a number of occasions to the court and to the public. Barb, do you want to talk about that?

Barb McQuade:

Well, sure, Jill. And one of the Canons of Ethics for Lawyers is Candor to the Tribunal, that means telling the truth in court, as well as telling the truth to your client and in public. And the opinion that suspended his license pending a hearing in 20 days cites him for a number of inaccurate statements. I mean, outright fabrications, him talking about dead people voting in Pennsylvania, that he said to a Pennsylvania court.

And also repeating the allegation that dead people voted in Georgia, or that ballots were added to ... With zero basis for these statements. Sometimes in litigation, lawyers will make statements that turn out not to have been true or turn out to have been unintentionally false. But what the court says here is that there is just no basis whatsoever for some of these statements.

Like Kim, I am gratified to see the bar authorities in the court in New York taking this very seriously. I get requests from bar admissions officers all over the country for our recent graduates who are applying to become lawyers, and they take very seriously this inquiry into character and fitness. I know our students take it seriously, the bar admissions officials take it seriously and I think we all as lawyers take it seriously.

When someone abuses their position as a lawyer, as an officer of the court, the way Rudy Giuliani has, I think it tarnishes the wall licenses of all of us. And so I think that rather than any thin blue line, I am ready to say, "Hold people accountable when they violate those important Canons of Ethics."

Joyce Vance:

I could not agree with that more. And what jumped out at me about this memo, that was issued by the New York appellate division that suspended Giuliani, is they took this really unusual step of suspending his license before they make their final decision. And they lay out the standards for doing that. They can only do that if the allegations against him are uncontroverted, that means that they're just clearly true and he doesn't have a response.

And the court spends some time laying them all out. And Barb, you talked about this notion of dead people voting. It may hit me different than it hits you all because that's the historic complaint made against black communities in Alabama when people want to initiate fraud proceedings. "Oh, there were dead people voting down in Green County." And so I heard that from Rudy. I was glad to see that in this opinion, they went to such great pains to lay out that it was uncontroverted that these allegations were not true.

And it seems to me that they're in so much detail in this suspension order that Rudy is going to lose his license to practice law permanently. I mean, the next time he's going to be in a courtroom, if ever, is when he's a defendant in his own case, I suspect. And I sort of wonder, if Republicans had not had the courage in the wake of this election to speak with the forthright manner that this opinion speaks, and to say there's simply no truth to these allegations. And they are designed to diminish people's confidence in the outcome of this election, and that's unacceptable.

I mean, talk about drawing a bright line. That's what they say. We can't condone Giuliani's conduct because he's trying to undercut confidence in our elections. And our elections are secure, it's unacceptable conduct. And so we're going to suspend them now while we consider what we should do permanently. If Republicans had, had that level of courage, maybe this country wouldn't have been dragged through the whole mess of the big lie.

Jill Wine-Banks:

I think that's the most important thing to me is that the court is saying that this is a danger to the community if he is allowed to continue to practice law. And therefore, we are suspending him pending a full hearing. Although they have also said that they've given him an opportunity to contest the allegations, and that all he does is say, "Well, I have plenty of affidavits," but he hasn't shown any.

He's been called to put the proof forward, and he can't do it. And what I'm hoping is that the American public, both Democrats or Republicans, will see that. And that members of Congress who have continued to defend what we're calling the big lie will suddenly have no defense left, and they will be

forced to admit that there was no fraud in this election. Kim, we've had a really busy week and we have a lot of news of the day and of the week. Let's start with the sentencing hearing that happened today. Why don't you start us off on that discussion?

Kimberly Atkins Stohr:

Yes. Today, Friday, when we're talking, Derek Chauvin, the former police officer in Minneapolis who was convicted of murder for the killing of George Floyd, was sentenced, and he received 270 months or 22 and a half years. That was an upward departure from the sentencing guidelines, which the judge said had to do with a number of aggregating factors, including the particular cruelty of his actions and also the abuse of his position as someone of authority as a police officer.

And so I want to start with you, Jill, actually. We watched this sentencing, hearing take place today, and I think that it was a lesson to a lot of people who maybe haven't seen sentencing hearings before. And it began with victims impact statements. And I want to get your thoughts about what those are, the purpose of that. And what you saw George Floyd's family say today.

Jill Wine-Banks:

It was, I thought, a very moving presentation. It started with his very young daughter who was appearing via a phone system in the courtroom. And she was adorable and compelling in talking about the absence of her father and saying, "If I could, I would tell him I love him and I miss him." That can't help but move the judge. But the judge of course said, "I am not moved by emotion, I am making my decision based on the law and the facts."

His brothers had similar stories and they were equally wonderful. They have been very visible in all of the proceedings and outside of the courtroom as well. But we also heard from two of the prosecutors who I thought were really outstanding witnesses in summarizing for the judge exactly why the upward departure was necessary. They made it clear this is not an ordinary second degree conviction.

And that if there was ever a case where you would have an upper departure after a second degree murder conviction, this was it. And they spelled out how the cruelty occurred, how children were present, how it was done as part of a group of officers. They made it very clear that an upward departure was necessary. And so it wasn't a surprise to me when the verdict was announced that it was 10 years more than what the expected or the ordinary routine sentence would have been.

Kimberly Atkins Stohr:

Yeah, right. And Joyce, today, we also heard from the defense as well in this hearing, and I want to get your thoughts about it. I mean, the witness was Derek Chauvin's mother, who testified. And also the defense attorney talked about the fact, acknowledged the fact that this case has changed the world, and to use his words, based on the social justice movements that were spurred from the killing of George Floyd, but that the sentence guidelines should be followed, that, that is something different than what was happening in the courtroom. Give us your take about the defensive strategy.

Joyce Vance:

In hindsight, now that we can all breathe a sigh of relief over this sentence, I think it's clear that the fight was always about whether the judge would stick to the guideline sentence or whether he would depart upwards. And that's something we've talked a little bit about on the podcast in the past. It's a feature of federal sentencing. It's a feature of sentencing in Minnesota state law. It lets the judge consider

additional factors that occurred when this crime was committed that aren't fully taken account of in assessing the guideline range.

And the judge asks himself the question, "Well, given the presence of these facts, should I issue a higher sentence?" Minnesota law is actually pretty strict and offers some constraint on upwards departures. Here, the judge before this sentencing had found that there were four aggravating factors that he could consider. He used only two of those, the excess of cruelty that was used here and the fact that Chauvin abused a position of trust in his 20 plus page written order where he decided to depart upwards.

And he had this order written before sentencing, we didn't know that until he told us that during the sentencing. But now in hindsight, we know that really the defense was going to have a tough job to do here to change the judge's mind, and they just didn't do it, Kim. Mamma essentially testified about his innocence. A jury had already convicted him of murder, but what she wanted to do was go a step back and defend her boy, and that was never going to be a winning strategy here.

I thought it was very telling that she didn't express any compassion for the Floyd family. She didn't offer any apology for what had happened. And I'll just say I know we're not supposed to talk about emotion in sentencing, but that sort of broke my heart for George Floyd's family. And I thought the notion that Chauvin spoke was a mistake by the defense.

If he didn't have anything productive to say, he should have never taken his mask off and stood in front of that family and the judge, and steady sort of hemmed and hawed. Well, there's stuff that's going to give you comfort down the road that I can't talk about today. And I don't know about you all, but my reaction was, "What are you ever going to say at this late stage that's going to give this family comfort?" Not an effective defense strategy, the judge wrote a really great opinion, very heavily justifying his opinion based solely in the facts in the law. This sentence stands up on appeal.

Kimberly Atkins Stohr:

Yeah, I was so surprised not only at the fact that the mother did not acknowledge ... I mean, listen, often you see family members of defendants speak. And what they usually say is, "Look, this ..." To the victims family is, "Look, I know this destroyed your family, but it's destroying our family too." And that's something that is fairly common. She didn't acknowledge them at all, and that didn't go unnoticed when the family members spoke afterwards, they noted that, that she didn't speak to that.

And usually what you often see for defendants who are convicted is an expression of contrition, an expression of remorse, really throwing themselves at the mercy of the court, and we saw none of that. It was this cryptic message from Derek Chauvin that was weird. I'm with you 100%. And-

Jill Wine-Banks:

I agree completely, but I was even more appalled by the mother's testimony when she said, and referring to his father and I probably won't even be here when he gets out, and we won't get to talk to him. Yes, they will. They can visit him in jail and talk to him. The Floyd family will never get to talk to George again, because he isn't around, and that really set me off. That was, I think, one of the lowest moments.

And the fact that, as Joyce has said, the comments from the defendant not expressing remorse and not even saying anything that would be comforting, but saying condolences. That's so easy to say, that's not the same as remorse.

Kimberly Atkins Stohr:

... Yeah. And in the end, we have the 270 month sentence that's more than a hundred month upward departure from the sentencing guidelines. Barb, what did you think of that sentence? Did it match what you were expecting and does that seem like justice to you?

Barb McQuade:

Yeah, I think it's close. I would, if I were the judge, I probably would have given just a smidge more and I'll explain my methodology. The statutory maximum in the case is 40 years, but Minnesota is a mandatory sentencing guidelines jurisdiction. And so we know that a couple of months ago, Judge Cahill already had a hearing where he made findings about these aggravated factors, which Jill talked about, abuse of a position of trust, in particular cruelty, committing the crime in front of children and the like.

That meant that the sentencing guidelines in this case, which are calculated at 12.5 to 15 months could be doubled. And so that meant that the new maximum was 25 to 30 years. As we heard the defense argue, there are something they call the Minnesota trauma factors, which are also mitigating factors. You're supposed to look at what are the aggravating factors and also the mitigating factors.

Things like he served as a police officer, he did not have any criminal history, those things mitigate. The worst, absolute worst death under these circumstances could have been 30 years. This one was pretty bad, so I would have put it somewhere between 25 and 30. I would probably edge to the upper end, closer to 30, and probably not quite the max. That was the state's-

Joyce Vance:

You do not want to go in front of Judge McQuade, man. She is a heavy sentencer.

Barb McQuade:

... Yeah, maybe it is a prosecutor's bend. But I think you start with the guidelines, and then you look at the case in front of you to decide where within that range this case falls. And if the guidelines are 25 to 30 months, I think the sentence should fall toward the higher end of that. So that's where I would have put the sentence. but nonetheless, in light of the history of police officers getting away with very lenient sentences or being acquitted, or as the defendant asked for a sentence of probation, I think 22.5 years is a substantial sentence.

And of course the judge has to think about a number of things. I think sometimes the public thinks solely about public safety, and that's what defendants often argue. My client doesn't pose a risk to anybody else if they were to be released, but that's not the only factor that a court has to think about. They have to think about things like deterrence. "What message am I sending to other police officers when they're engaging in conduct? I want them to be cognizant of the fact that if you kill somebody, you might get 22.5 years."

There's the idea of promoting the respect for the rule of law. Not just making sure that George Floyd and his family are made whole, but making sure that the community understands that this is a serious crime, that there are serious consequences for police officers who commit these kinds of crimes. And this idea even of retribution, a fair sense of punishment. Because without, that people lose respect for the law and feel compelled to take the law into their own hands.

So all of those things combined, I think, push the judge toward a serious sentences. As I said, I would have imposed a sentence a shade higher, but I think 22.5 years is a substantial sentence, especially when we consider that Derek Chauvin still faces charges from the Department of Justice in federal court.

Kimberly Atkins Stohr:

Right. That case is still pending. And Barb, I really appreciate that because it can be difficult. I will speak for myself, just the trauma of this case and the trauma of seeing so many incidents of police brutality, what it has done for me. It turns off my lawyer brain a little bit and turns on my human black woman heart. And what generally happens in cases like this, on days like today, just like in days of the Chauvin verdict, is that I brace myself for justice not to happen. And I'm often braced and prepared for that.

What I thought was going to happen, I was really prepared for a 12, or 13 or 15 year sentence. I was actually surprised by this. It does not mean ... I think I'm going to have to take some time and reflect about whether I think this is justice or not. But it's that expectation that justice will not be coming that I was actually surprised.

And also the buildup of the judge, his words before he actually announced the statement, I thought he was giving excuses as to why it was going to be low. And so right up to the end, I was not expecting that much. And the fact that it was what it was, was surprising to me. And I'm going to have to sit on it a little bit, and reflect and meditate to figure out whether this feels like justice to me.

Jill Wine-Banks:

I hope it will give you some comfort that it is 22.5 years. In Chicago, a police officer shot in the back a suspect 16 times, and he was a teenager, Laquan McDonald. And that officer, Van Dyke, was sentenced to six and three quarter years. Now, the big difference to me is the cruelty of the Chauvin murder of George Floyd, which took time, and there was plenty of time to reverse, whereas Van Dyke shot.

And I am told that once a police officer starts shooting, sometimes the adrenaline makes them just keep their finger on the trigger explaining supposedly, not to me, but supposedly, the 16 shots. But I would say 22.5 is a lot better than the six and three quarters. And that maybe it is sending a message to all other police officers that they better be very careful and not do anything that crosses the line.

Joyce Vance:

It's really interesting that the judge started his remarks by saying that he wasn't trying to send a message to anyone, that he was just ruling based on the facts and the law, because this sentence inevitably sends a message. And I'm with Barb, I think it sent the right one. But it is, Kim, it's so hard when you go into these cases, and Jill makes this good point about even when you get to sentencing, the sentence doesn't always seem just. It's just clear that as a country we have to do better in this area. We can't let today be the end. We have to keep trying to make the system work in a more just way.

Jill Wine-Banks:

Joyce, I know you've been using Function of Beauty shampoo, and so have I. And I loved it so much that I've just ordered their facial cleanser. What about you?

Joyce Vance:

I really love the shampoo. I like how manageable it makes my hair feel. And I'm even letting it grow a little bit longer because it's been so easy to keep control of with Function of Beauty.

Jill Wine-Banks:

Yeah, it does everything that they promise. When you do the quiz, you get to say the three most important things in haircare for you, and then they match the formula so that it does all of the things you want it to do.

Joyce Vance:

It really does work. If you don't love your hair, break up with your current hair care routine. Try Function of Beauty instead.

Jill Wine-Banks:

Every ingredient Function of Beauty uses is vegan and cruelty-free, and they never use sulfates or parabens. You can also go completely Silicon-free. Function of Beauty offers completely personalized formulas for body and skincare as well, so you can customize your beauty routine from head to toe.

Joyce Vance:

Never buy off the shelf just to be disappointed again. Go to Functionofbeauty.com/sisters, take the quiz and save 20% on your first order. That applies to their full range of customized hair, skin and body products.

Jill Wine-Banks:

Go to Functionofbeauty.com/sisters to let them know we sent you and get 20% off your order. That's Functionofbeauty.com/sisters, or look for the link in our show notes. As part of our very busy week, we've had some major Supreme Court action. And we want to try and do a roundup of the Supreme Court's decisions this week. So Joyce, why don't you start us off?

Joyce Vance:

It's June, that means another Supreme Court term is about to end. Every year the court begins to hear cases on the first Monday in October, that's sort of an important day for Supreme Court watchers. And then we get decisions throughout the year, and they're usually announced in the courtroom with all of the justices present. But because of COVID, this year, they're just being posted on the Supreme Court's website at a designated time.

It's been a little bit strange this year. Usually the court continues to announce cases through the last week of June. Very rarely the court will go into July. That happened last year, only the third time that it's happened since 1988. But if you've been watching these cases come down, including the ones that we'll discuss today, you may have noticed something a little bit unusual.

And Kim, I want to ask you about this, because you're not just a former lawyer, now a reporter, you have been a Supreme Court reporter. Can you explain to us, is my perception accurate? And if so, why does the Supreme Court seem to hold all of the big cases for June?

Kimberly Atkins Stohr:

Yeah. It's not just that the justices are a bunch of procrastinators when it comes to the big cases in the year. Maybe they may or they might a little bit, but I don't think that, that's really what it is. What happens is, throughout the year from September to about April, or in the case of this year, May, is when arguments are held. Oral arguments are held in each case. At the end of that week, when the case is argued, the justices get together and they take a vote as to what they think how they decide the case.

And then after that, the opinion is written, and that's the rub, right? So it depends. If it's a unanimous decision that's pretty clear cut, you can assign it to someone, they write it, everyone signs on it, and that opinion can be issued pretty quickly. But if it's a contentious decision where people, where it's evenly divided five to four, maybe there's someone still in place, someone writes a dissent, changes the mind of somebody, that person can flip and then new decisions need to be written. Or if people are writing a lot of lengthy descents to a case, I'm looking at you, Samuel Alito, it takes a lot of time for those opinions to be written, for them to be circulated among all the other justices and signed off, and for those opinions to finally come out.

So that's why earlier in the term you see a lot of unanimous decisions, because those are the easy ones to come out. And it's later in the term when you get to some of the hot button, five, four opinions that have a lot of dissents and a lot of concurrences, just because those take more time. So that's why June is always a big fiery opinion month at the SCOTUS.

Joyce Vance:

That is such a great insider view of what goes on at the court. And Sam Alito take note, Atkins Stohr is coming for you. I love this quote from Chief Justice Roberts, who once gave an interview talking about the conference procedure. And he said this, he said, "Anytime you get nine people together, whether it's at a party or it's in the conference room of the Supreme Court, you do have to maintain some order, or it does kind of degenerate into squabbling pretty quickly."

So it's good to know that Supreme Court justices are just like my kids at the dinner, right? I mean, his job is apparently the same as mine, which feels like herding cats some days. But that takes us into the substantive cases that were decided this week. And Barb, I'd bet a lot of people in Ann Arbor we're focused on the same case that people in Tuscaloosa Roll Tide were focused on, this was the NCAA case. And student athletes had sued the NCAA over restrictions on non-cash compensation. Can you talk about what that actually means and the effect that it will have on college athletics?

Barb McQuade:

Yeah, I will, but first I have to give you a head tip for your insider lingo, NCAA. It's very Tuscaloosa of you.

Joyce Vance:

Roll Tide.

Barb McQuade:

Yeah, the case is called NCAA versus Alston, brought by former college athletes. And so the NCAA is, of course, the main governing body for college sports. And a group of athletes sued the NCAA to challenge a restriction. There was all these rules about amateurism to protect the athletes and the integrity of the sport. But this particular set of rules prohibit colleges and universities from providing benefits beyond tuition, room and board and textbooks.

So if you're a scholarship athlete, that's all you can get, which has some value. But as these universities are making mega bucks off of athletes, there has been some pushback to expand those benefits to athletes. And so in this case, it was a unanimous 9-0 opinion. The court held that this rule, this restriction, violated federal antitrust laws. And so the opinion on its face is actually pretty limited. It applies only to the restrictions that were challenged in this lawsuit. And those restrictions were things that banned only education-related benefits, like lab equipment or laptop computers or scholarships for graduate school, and things like that.

Going forward, colleges and universities may pay for those types of educational benefits for student athletes without any penalty from the NCAA. But the real significance of the case, Joyce, and the reason that people are talking about it in places like Ann Arbor and Tuscaloosa, is that it likely paves the way for some bigger challenges, like paying salaries to athletes or allowing athletes to make money off of their name, image and likeness. And this is one area that's getting a lot of attention.

I can remember Jalen Rose. You probably know who he is. He's a former NBA player and he's now an ESPN host, but he played basketball at Michigan. And I remember he once complained that when he was a student, he would see his own Jersey for sale in the window of the sport shops across town. And while the university, and the manufacturer and the store were all making profits off of it, the only one not making a profit off of it was him. He got nothing.

Meanwhile, he didn't have enough money to go to a movie. He was getting his tuition, and his room and board, his books paid for, but he had zero pocket money while all these people were profiting off of his name and likeness. And so allowing athletes to control their own naming, image and licensing rights would permit athletes to share in those profits.

You could imagine they could profit from the use of their image in video games. It would permit them to endorse products, to make paid appearances at camps and events, just like other famous people can. There are some people who are concerned that this will open the flood gates in a way that could kill the goose that lays the golden eggs. Universities say that the revenue they generate from football and basketball is what allows them to fund the so-called non-revenue sports, like basically everything else, women's sports and sports like swimming and track and field, and tennis and all of these other sports.

But they still have to cut sales In TV revenue and other ways to generate proceeds. So no doubt, this really could very well shake up college sports, but even the NCAA must comply with the anti-trust laws. Even if it does kill the current model, we're going to have to find that new equilibrium. So exciting day in sports for student athletes.

Joyce Vance:

It's a pretty fascinating case, and I don't think we've heard the last of that situation. Is that your take too, Barb? Do you think there's more litigation coming?

Barb McQuade:

Yes, I think we're going to see a lot of challenges to these other types of rules that defines amateurism. Brett Kavanaugh wrote a concurrent opinion where he really mocked the NCAA for this idea of protecting athletes from the evils of money by protecting the amateurism in sports. And so I think that we're going to see challenges now to all of these rules that the NCAA has had in place for a long time.

Joyce Vance:

Well, Jill, let's do a time machine thing here and go back to episode 14 of the podcast back in May. We talked about the Snapchat cheerleader case, or as Barb called it, give me an F, when it was argued before the Supreme Court. The issue involves student's First Amendment rights when they're off of campus. And as I recall at that time, you led us through a really great detailed discussion of Tinker, which is the precedent that's in place that the court in the Snapchat cheerleader case had to reckon with.

I think I ranted about uncertainty in these rules, and how horrible it was for there to be uncertainty about what was permissible speech. How did we do? The Snapchat cheerleader case has

now been decided. Is this speech that occurs off-campus protected speech? And what do you think about the future of bright-line rules and the First Amendment in this area?

Jill Wine-Banks:

It's a complex question. And maybe just to remind the audience, Tinker was a case that first established that students had First Amendment rights. And this was students in 1969 wearing black armbands to protest the Vietnam War. This was a case where a student was angered by not making the varsity team and used some vulgar language in a Snapchat posting to complain about the school, the coach and the cheerleading squad.

But the court did a very clear thing, they said absolutely even off-campus, there is some ability of the school to control speech when it is severe and serious harassment or something like bullying, but that ordinarily, speech off-campus is protected speech. And Judge Breyer wrote a very, very clear opinion saying that there were three bright lines that said this speech is protected. One is that the school, when you're off-campus, doesn't act in local parenthesis, which is Latin legal talk for in the place of a parent, says it's up to the parents to control foul language that's not on the school grounds, not up to the school.

And that if you could bar all off-campus speech, students would lose all of their First Amendment rights. That they would have no time when they could be free to talk, and that, that would be an unfair burden on their First Amendment rights. And thirdly, they said, in this opinion, that it's a marketplace of ideas is so essential to democracy and that you have to allow even unpopular speech to be heard. And that the school has an obligation affirmatively to make sure that it teaches that unpopular expression is protected under the First Amendment.

And so in this case, they said that definitely the school violated the student's First Amendment rights by taking her and punishing her for having done what she did, and taking her off the team for the full year. They disagreed with the circuit court, the appellate court that had decided before and the reasoning, but they reached the same conclusion as the district court and the circuit court. They all said it was a First Amendment violation. I think schools are now pretty much alerted to what limits there are on their barring First Amendment or punishing free speech, and that they will be more careful going forward and they won't bring this kind of action against a student.

Joyce Vance:

I worry that it's still a little bit in flux, and that the court said, "Well, in this case, we've decided that what the student did was okay, but you all are going to essentially have to litigate future cases one at a time to decide where the limits are." So I think there's still, at least for my taste, too much uncertainty, although this certainly does give some sense that the court will protect student's First Amendment rights off-campus.

Jill Wine-Banks:

I just was going to add that I agree with you that it's not 100% clear. But I think what was being said by Justice Breyer was, "We don't know about social media and how communications will develop, and so we can't foresee the future and predict every possible time when a school might not be able to bar First Amendment or could protect the students." They made it clear there has to be some serious disruption of the classroom or one of the other things that are limited, enumerated in the opinion. And I think it's true, we can't predict the future, so those things will be decided on a case by case basis.

Joyce Vance:

Barb.

Barb McQuade:

Yeah, I've had some great conversations about this case with a friend who's a high school swim coach, and she says, first, it's clear that none of these people on the court have ever had to run anything in their lives. And so I think that's an interesting perspective. They're looking at it from the perspective of the student and her free speech rights, but how about the coaches and teachers and administrators who are trying to have some team cohesion, and some chemistry and run a cheerleading program?

I do think the court gets the big picture right, that a student does not lose First Amendment protection just because the remarks were made online or off-campus, and that schools retain some right to restrict students speech, Justice Breyer says like bullying and threats. There's certainly a category of speech that should not be protected. But I just think they missed the mark in applying their test to this particular case.

As you say, Joyce, it's clear that we're going to have to litigate these cases one by one. One of the things that Justice Breyer says in his opinion is, "Well, there's no evidence that the posted remarks caused any disruption," and he kind of brushes that off. But I think he's perhaps underestimating the importance of team chemistry or the need for coaches and teachers to enforce team rules for the good of the team.

And so this case strikes me as being closer to that category of unprotected speech, like bullying and threats, than it is to the political speech of the wearing of the armband to protest the Vietnam War and Tinker. I mean, that is the marketplace of ideas and speeches. So my free legal advice to the teachers and coaches is this, as Joyce says, these are going to be case by case decisions. So if you want to discipline a student for speech that is disruptive, you need to document the disruption. Speculation of that disruption or violation of team rules is not going to be enough going forward.

Jill Wine-Banks:

I would add, you also have to add that there needs to be rules established, because one of the points in the decision was that they hadn't punished other students for vulgar language, for example, and so that they couldn't do it in this particular case. And so setting up the clear guidelines so students know what's allowed and what's not allowed also seems to be part of due process to me.

Joyce Vance:

You all are very smart. I feel like I learn a lot from you. And I appreciate that you've just made the point that there's a lot of uncertainty left in this area, despite this supposedly definitive Supreme Court ruling. And I think that, that takes us to the question of what's left in this term, Kim? I mean, what's the big case or cases that we're still waiting on?

Kimberly Atkins Stohr:

Well, there is one big case we're waiting on, and I will just make a point that we have heard ad nauseum that Justice Brett Kavanaugh is a girls' softball coach, a basketball coach, sorry. Basketball coach. So that they haven't run things, I think he would take issue with that, and he made a big point of that in the NCAA case. But the big case that is left is a voting rights case, which is very important right now.

Barb McQuade:

F that, Kim.

Kimberly Atkins Stohr:

So we have-

Jill Wine-Banks:

Wait till we get to Britney.

Kimberly Atkins Stohr:

... We have a voting rights case that is crucially important. Of course, we've talked a lot about the fact that the court gutted Section 5 of the Voting Rights Act, which gave the Department of Justice the ability to pre-clear new voting rules in states before they went into effect to make sure that they did not, that they would not violate rights, particularly on the basis of race. Now that is gone.

The only thing that is left is Section 2, which prohibits states and localities from imposing any qualification or prerequisite to voting, or standard practice, or procedure in a matter which results in the denial or abridgment of the right of the citizen to vote on the basis of race or color. What the court is deciding is basically what the standard for that is. And it comes out of Arizona. Surprise, surprise. And it involves two laws that were imposed there.

One was a regulation requiring out of precinct ballots to be entirely discarded, so if somebody's polling place change, for example. And they went to that place to vote. Rather than that vote being treated as a provisional vote, it just is not counted at all. That's one provision. And the other is a criminal statute that bars most people from returning early ballots on behalf of another person.

Basically, if somebody gets your absentee ballot and submits it for you, that's a crime. And the Democratic National Committee and some other folks sued, and are challenging that. And what the Supreme Court will decide is what standard plaintiffs have to meet in order to make a challenge that a rule can be violative of the Voting Rights Act on the basis of race or color.

This will impact directly what Merrick Garland announced in his lawsuit in Georgia, which is based on Section 2. It's a really, really big case. It will come out next week. We don't know exactly which day yet, but that's the one thing we all have our eye on.

Joyce Vance:

It's really interesting that Merrick Garland chose today to announce United States versus Georgia, which as you point out is a Section 2 of the Voting Rights Act case. Not something that DOJ has done a lot of litigation over, but pretty much all that's left after Section 5 was gutted in Shelby County versus Holder. And I noticed something interesting. When they spoke about the case this morning, DOJ was careful to couch all of their claims that Georgia had violated the rights of black Georgia voters in terms of the violation being intentional.

Section 2 is typically thought about in two ways. You can have intentional discrimination, but it's also illegal to put into place rules that have discriminatory impact. Garland though, and the other folks who spoke this morning, were very careful to say Georgia had, had high turnout in the election. In Georgia, the legislature took these intentional steps to keep black people from voting.

A lot of it is about the rules surrounding the use of absentee ballots. Although there's also a concern about this new rule that provides restrictions on giving water and food to voters who are

waiting in line, because that of course is an impact on largely black voters in neighborhoods with really long lines. And so I'm wondering Kim, or Barb or Jill, what do you all think?

I mean, it's so strange to me that Garland announces this case before Brnovich comes down, before they know what the new standard is. Is the fact that they've focused on intent in the Georgia case enough to make it survivable no matter what the court does in Brnovich?

Barb McQuade:

Well, I think they had to file this lawsuit kind of without regard to what's happening in that case, right? Because it could very well have been that, that opinion came out today or yesterday, and they clearly have been gearing up to file this lawsuit. I think that they are not going to wait and take their cues from others. Merrick Garland is neither waiting for the Supreme Court nor waiting for Congress. I mean, one of the things he has said is he would like to see the For the People Act passed, that would eliminate the need to file these lawsuits in individual states because that would guarantee voting rights on a national basis.

But again, you can't wait for Congress either. So I think he is not relying on other branches of government to do the job of protecting voting rights, he's just going and doing what he thinks is necessary. I also think he said in response to your question today in his press conference, that in addition to filing this lawsuit, they're looking at other states. And so I think that this is not only an effort to combat the law on the books in Georgia and get that thrown out, but also to send a deterrent message to other states, like my own state in Michigan, where similar legislation is being proposed. I think they saw some urgency to stop that in its tracks.

Joyce Vance:

Kim, if you've been eating your Magic Spoon cereal.

Kimberly Atkins Stohr:

I have, actually. I stole a Trek from my husband, Greg, in that for dessert after dinner, he would go and grab a handful of the cocoa Magic Spoon as like a dessert. And then I did that, and it's so good. I started doing that too. How about you?

Joyce Vance:

Yeah, well, cereal is my go-to late night snack. If it's a late and I'm having dinner, cereal is usually my call, and so Magic Spoon fits the bill there. As you know, it has zero grams of sugar, 13 to 14 grams of protein and only four net grams of carbs in each serving. And only 140 calories in a serving. It is keto-friendly, gluten-free, grain-free, soy-free, low carb and GMO-free.

Kimberly Atkins Stohr:

And I also love building my own custom set. With Magic Spoon, you can build your own box that you can make your own with a combo of cocoa, fruity, frosted, peanut butter and cinnamon. I like the cocoa and peanut butter together. Pro tip, that's a good one. And you can even mix and match to create amazing snacking and meal matches.

Joyce Vance:

Go to Magicspoon.com/sister to grab a custom bundle of cereal and try it today. And be sure to use our promo code, sister, at checkout to save $5 off your order. And Magic Spoon is so confident in their

product. It's backed with a 100% happiness guarantee. So if you don't like it for any reason, they'll refund your money, no questions asked.

Kimberly Atkins Stohr:

Remember, get your next delicious bowl of guilt-free cereal at Magicspoon.com/sister, and use the code sister to save $5 off. That's Magicspoon.com/sister.

Jill Wine-Banks:

For our last topic today, we have one that's a little unusual for our group, and we're going to be talking about Britney Spears and conservatorship. And I think that it's important, Barb, to have that discussion. You want to tee us up on that topic?

Barb McQuade:

Yes, you bet. Britney Spears was in the news this week as the FreeBritney Movement gained momentum. When we talked about doing the story, my first reaction about the personal life of a pop star was that it's a little too celebrity-centered for my taste. But my sister's persuaded me that there are actually some very serious legal issues involved here that are worthy of discussion. First, I'll give just a little background for those who do not follow the adventures of Britney Spears.

After her rise to pop stardom, she suffered a very public breakdown in 2008. And her father was appointed to serve as her conservator. It was to be a temporary emergency measure to help her address concerns about her mental health and potential substance abuse. Now here we are 13 years later, and at age 39, Britney Spears wants out of that arrangement.

And at a hearing this week in Los Angeles probate court, Britney Spears accused her father of abusive control of her life, forcing her to take medication and to work against her will so that she can generate money for him and others. Jill, let me start with you. Can you explain what a conservator or guardian is, and what probate court is?

Jill Wine-Banks:

Let me give a quick answer to that. A conservatory is the same as a guardian, and it is someone who is appointed when an adult is deemed incompetent. Someone who cannot take care of their basic physical needs or their financial needs. It's someone who cannot do the basic things of life. And in this case, there was an apparent need for someone to protect the finances.

Britney Spears has over 60 million in assets she has earned very substantially during her career and has been very successful. The Superior Court of Los Angeles county, which is in charge of this case, has now finally heard her speak out for the first time and object to the terms of the conservatorship. She says that it has been abusive and not protective of her, and that it has ruined her life.

And there are times when someone becomes either physically, mentally or psychologically unable and does require this care. But I think we should talk about what did she say and how did she appear when we heard her in the courtroom? And so that should be, I think, a focus of what we talk about.

Barb McQuade:

Yeah, thanks. And Joyce wrote an interesting piece about this for MSNBC Daily. And Joyce, you make an interesting point about this case from a feminist perspective.

Joyce Vance:

It's not where I started, Barb. I was sort of like you. I don't follow Britney Spears and didn't know a lot about her career, and sort of resisted the idea of writing about this at first. And then I heard Jill to exactly your point, this bootleg tape. I think the hearing where she spoke wasn't supposed to be taped, but somebody did, and it was put out on the internet.

And this was a smart, intelligent, pretty angry woman who's speaking out. And the issue here, right, I mean we're 13 years into this conservatorship. Does she still need to be in it? Assume for the minute that she had some sort of emergency at the beginning of it and needed help for a while, why is she still in it after 13 years? I mean, we can think of people ranging from Michael Jackson to Kanye West, right? Who have pretty idiosyncratic lifestyles, but who don't have a conservator who's handling their affairs and making their decisions for them.

And it's the nature of the decisions that her father is controlling, what color her kitchen cabinets get painted, whether she can take out the IUD that's inside of her body, whether she can have more children, that really made me begin to view this in feminist terms. There's a history in this country in the 1800s and 1900s of taking women who were inconveniently getting in the way of what men wanted to do, labeling them insane and shipping them off to a mental institution, and that got them out of the way.

There's I just think too much of that overtone lingering when we look at this case to give us any level of comfort. And the other thing that I think is really disturbing here is that her lawyer, who she did not get to pick, by the way. There's no reason to not let her pick her own lawyer. That lawyer would still have a duty. The court would make sure that there was no abuse. But she can't pick her own lawyer.

And so in revealed court transcripts, her lawyer is very cavalier about her rights, very cavalier. You almost get a tone of snark off the printed page as he's discussing with the judge the fact that they haven't told her that she can challenge the conservatorship, but he's made $3 million off of her during this period of conservancy. We need to do better in this area, and I look forward to seeing what the judge does.

The last thing I'll say is the transcript is largely sealed, so maybe there's something here that makes it clear that she still needs to have this level of control over her life. But no one on her father's side, on the side of the conservatorship has spoken up and made that case, and that seems pretty telling to me at this point. If there was something there, they would have leaked it.

Barb McQuade:

Well, that is an interesting point. We never know all of the facts when part of the record is sealed. But it raises some difficult balancing questions, I think. I mean, Kim, certainly there are some people who need to have help managing their affairs, people who are elderly or have mental health issues. And yet, on the other hand, there are certain freedoms we expect as Americans, and we all have the human desire for agency in our own lives. I mean, how should courts think about striking that balance?

Kimberly Atkins Stohr:

Yeah. It's important to know that laws governing conservatorship are state by state, there's not a federal law, so different rules apply in different places. But generally speaking, it's exactly what you said, Barb, it's a balancing between the principles of protecting someone and autonomy. But there has been recently, and in part, based on a lot of claims of abuse of a conservatorship relationship, there have been some reforms that are moving closer to the ... Pushing that balance closer to more autonomy in cases.

Particularly in cases like this, where you don't have somebody who is elderly, you don't have somebody who is physically disabled, who literally was in an accident or something, and can't take care of their own affairs. Britney Spears is a 39-year-old grown woman, and so in that case, there is a movement to have autonomy be more of the presumption, as opposed to the need for the conservatorship.

But again, it's a case by case basis. And we don't know, as you and Joyce pointed out, we don't know everything about this case, but what we do know does raise some concerning questions. I mean, the issue of the kitchen cabinets may seem like something that's silly, but for me, that was really important. Think about somebody who is trusted with the ability to put on to headline months-long Vegas shows, to go on tour, to put out four albums, to make millions of dollars, to really have the fortitude and ability to choreograph these shows, but she can't choose what kind of cabinets she wants. That doesn't make sense to me.

And certainly, the fact that she can't remove her own IUD, according to her own testimony, allegedly. I guess we should say allegedly. She can't do that. That's horrifying. And I think that the judge really needs to weigh that in effect. And there are a lot of things that the judge could do. The judge can order that someone else be a conservative. Take her father out of it and put someone else in.

They can have her have a say, some sort of vote as to who that conservative could be. He can issue an order that allows her to have some control over some of her finances, maybe not all of them. It can be an incremental move toward making her more in control of her life. He can certainly allow her to take out her IUD if she wants. So we'll have to see what it is. But that has been the movement lately in terms of reform. And you have to think about this, conservatorship can be so ripe for abuse, particularly as in this case.

And I'm not saying that this is what it is, I'll throw another allegedly in there for good measure. But it's important to note that the father benefits from this conservatorship. He's not only paid as the conservator, but in all of these deals that are being struck for all this money that she's making, he gets a cut of it. I think courts should look very carefully when the conservator stands to profit off of being in that position.

And so this deals in cases where there's elder abuse, alleged disability abuse. It's really important, and I'm glad that we got to talk about it today, even though I am the Britney Spears fan of the bunch. I really enjoyed ... I didn't enjoy it because it's terrible, but it was not lost upon me when Britney Spears mother's attorney described Britney's relationship with her father as toxic. I died a little bit. But Jill, you have a thought.

Jill Wine-Banks:

Yeah, I just, I agree with everything you said, except I'm not following Britney Spears. But I think the amount of money that's involved here, the amount she's been able to earn gives her some credibility for being able to take care of herself. And I want to also point out that disability rights advocates find this to be a very important issue, because it is often used to take advantage of the disabled, and of disabled people.

And I think that we need to really follow this case very closely. There is supposedly, and there is in this case, an investigator appointed by the court who is supposed to do yearly checks and see whether the conservatorship is still necessary. But in this case, Britney's lawyer seems to have withheld information from her about her right to go and challenge it.

And so I think that the investigator maybe hasn't done his job. The IUD strikes me as going back to the age of when women were sterilized against their will, for whatever reasons men thought they

should be. And I think this raises some very, very serious issues that are important to all Americans. We've received some great listener questions this week.

If you have a question for us, please email us at Sistersinlaw@politicon.com or tweet using #SistersInLaw. If we don't get to your question during the show today, keep an eye on our Twitter feeds throughout the week. Sometimes we answer your questions there. Let's go to questions, and the first one that we're going to take is from Tom. "When Trump was going through his first impeachment, he had his bootlickers defending him, such as McConnell, Gates, Jordan, et cetera. So I'm wondering, did President Nixon have anything like that during his impeachment hearing? And if so, who were his bootlickers?"

That seems like an obvious question that I should at least start the answer to, and the answer is that there was actual bipartisanship during the Nixon impeachment. Republicans voted for the articles of impeachment. And Republicans when they heard the evidence that the prosecutor had gathered, including what was known as the smoking gun tape, went to the White House, met with Nixon and said, "You will be convicted in a trial in the Senate if you don't resign." And he resigned. The answer is yes, he had a lot of supporters. He won reelection by a landslide. He won 49 states, the popular vote and the electoral college. But in the end, facts mattered, and he didn't have what we would call bootlickers. Anyone want to add to that?

Barb McQuade:

No, I would say that, that's exactly right. And I would highly recommend that people listen to the podcast Slow Burn that had to do with Nixon. It's a fantastic listen-

Kimberly Atkins Stohr:

Yeah, that's right.

Barb McQuade:

... and you would understand exactly how things have changed in Washington from then to now.

Jill Wine-Banks:

Exactly. Another great question comes from Catherine in Hamilton, New Jersey. "Do you have any information and, or thoughts about the process of installing new US attorneys? My understanding is that none have been installed yet, and I haven't even heard whether nominations are pending in Congress. Are these Senate confirmed positions? Do the sisters know if any of the Trump era ones have even left, leaving someone as acting? Is it usual for this to go so slowly? Should we all be concerned?" And since we have two former US attorneys among our sisters, I'd like them to comment on this. Barb, you want to go first?

Barb McQuade:

Yeah. Well, first I should preface this by saying I don't have any facts, but I can tell you how the process usually works. Yeah, I have nothing inside other than what's publicly known. All of the Trump appointed US attorneys were asked to resign at the end of February, and so they did that. The people who are serving are either acting US attorneys. But what's important about that is those were the people who are likely the first assistants of the Trump US attorneys.

There's some thought that at least some of them may have a similar political vision as their bosses, or people who are court appointed US attorneys under some circumstances when there is a

vacancy, either the court can appoint a US attorney or the attorney general can appoint a US attorney. So some of those are still in place. Usually what happens, and I think this is going on now, is the senators do a internal process within their own states. They make recommendations to the White House.

The president nominates a US attorney, and then they have to be confirmed by the Senate. But Catherine is correct, that we have zero nominated US attorneys at the moment, and I think it is a little bit slow. Joyce, you were among the first US attorneys appointed in the Obama administration, and when was it that you were first nominated?

Joyce Vance:

I was in the very first group. Jeff Sessions, interestingly enough, was my Senator and pushed for me to be included in that first group. And so I was nominated in April, I was confirmed in August. I was actually in the office by mid-April as the acting US attorney. And I think that, that made me the first or second of the Obama US attorneys who took office even ahead of my confirmation. You can do that a little bit more fluidly with people who are already in the office.

It's correct, there are no Obama US attorney nominees yet. I would expect we'll start seeing those very soon. To some extent, the White House is a little bit reliant on the state senators to put forward their nominees, because every state has a process. And of course, that's pretty easy if you've got a state with two democratic senators. They just have to go through the process and make the decision, and send the White House a couple of names to choose from.

It can be more difficult in states that have one or more Republican senators, because there's a process called the blue slip, where the White House will give those Republican senators a blue slip, and they actually have to return that to the White House to show that they approve of that nominee. And increasingly in this era of political divisiveness, Republican senators are refusing to return those blue slips and holding up some of the nominations.

The Biden administration will have to decide here for US attorneys, same decision they'll have to face with appointed judges, whether they're going to continue to honor that blue slip process in the face of what appears to be a showing of bad faith. I think that there's one bright spot on the horizon. The acting US attorney in the District of Columbia is Barbs and my former colleague Channing Phillips. He was an Obama era appointee, worked in the Office of the Attorney General.

There are offices like that where DOJ has had the chance to put folks in, but it's very difficult to execute your priorities. For instance, today, Merrick Garland said he wanted every US attorney across the country to work with the FBI and with main justice components to work on these horrible situations where election officials or election workers are threatened, or even physically assaulted by people, that he wanted that to be a priority. It will be important for this White House to get their US attorneys nominated and confirmed if they really want people who will execute their priorities with a strong fervor for getting it done.

Jill Wine-Banks:

Catherine, I think that probably gives you a pretty good answer to your question and answers the one about, "Should we be concerned?" with yes, we should. We need to get this done. Thank you all for listening to #SistersInLaw with Barb McQuade, Kimberly Atkins Stohr, Joyce Vance and me, Jill Wine-Banks. Don't forget to send in your questions by email to Sistersinlaw@politicon.com or tweet them for next week's show using #SistersInLaw. And please support this week sponsors, Function of Beauty and Magic Spoon. You can find their links in the show notes. See you next week with another episode, #SistersInLaw.

Barb McQuade:
Can we end that segment with the song Toxic?

Jill Wine-Banks:
Yes.

Joyce Vance:
You guys.

Barb McQuade:
I don't know it. I don't know it, but it's [crosstalk 01:07:12]-

Kimberly Atkins Stohr:
Yes, you do.

Barb McQuade:
... Do I?

Kimberly Atkins Stohr:
With a taste of your lips, I'm on a ride.

Barb McQuade:
Oh, look at you.

Kimberly Atkins Stohr:
You're toxic, I'm slipping under. You know that song. Oh, baby, baby, how was I supposed to know?