

Kimberly Atkins Stohr:

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Jill Wine-Banks:

Welcome back to #SistersInLaw with Kimberly Atkins Stohr, Barb McQuade, Joyce Vance, and me, Jill Wine-Banks. On today's show, we're talking about some big news. First, we'll talk about the January 6th hearings, Cassidy Hutchinson, witness tampering, Cipollone Subpoena, and then we'll move on to the Supreme Court to the good news about Justice Jackson. Ketanji Brown Jackson has become the first black woman to sit on the court and we are all very proud of that. We'll talk about the Supreme Court's decisions, which we're not so happy with, the environmental protection agency being gutted, the praying coach, the independent state legislature theory and the stay in Mexico decision.

Then we'll talk about lawyers who are paid by the subject of the investigation rather than by their client. And as always, we look forward to answering your questions at the end of the show. But before we get to that, I wanted us to talk a little bit about our reflections on July 4th, but particularly July 4th, this year, our holiday plans, and also what we think about American freedom at this very moment, post row, post expanded gun rights and the good news with justice Jackson on the court now. So Kim, why don't you start us off on that? What are you thinking about?

Kimberly Atkins Stohr:

Oh my goodness. For a lot of ways, for me, Independence Day has always been a fraught holiday because for so many people in our nation it hasn't meant the same, freedom hasn't meant the same. It's a summer holiday. It is important. I am a proud American despite everything that's going on. And I usually play the Destiny's Child song, Independent, all the women independent and really party. But it's just really hard right now because it's really... When my editor said what the plans were for the papers, editorial pages for Independence Day I and a bunch of other people laughed. It came right after Dobbs. And it's just how can we celebrate independence knowing that the bodily autonomy of half of the nation's residents has been rolled back in a way that affects all of the nation's residents. So I am melancholy. I am bittersweet this holiday. What about you, Joyce?

Joyce Vance:

I think about the same, so bittersweet that Barb and I are actually taking our first real vacation, our first trip that doesn't involve taking a kid to school or visiting a kid at school. I can't say we intentionally planned for it to be over the fourth. It just worked that way. And I'm glad because I'm not sure that I'm in a fireworks mood this year. What about you Barb?

Barb McQuade:

Yeah, I also am finding myself in a reflective mood, but I refuse to allow people I consider the enemies of freedom to steal patriotism from me. I think that so often people confuse jingoism with patriotism and I consider myself to be a very proud patriot. I'm looking forward to fireworks. A few years ago I started reading on the 4th of July, Frederick Douglass, what to the slave is the 4th of July? A friend of mine who teaches at the law school named Sherman Clark shared with me that he reads that every 4th of July and Kim, I think that is your thoughts about American history of freedom has not been the same for everybody.

And this year I am going to read something else. I'm going to read what I consider to be one of the greatest American speeches ever. That is Joyce, the one you and I heard Barack Obama give in Selma about American exceptionalism. And he talked about all of the struggles that we've shared as Americans, but he said, what makes America exceptional is our ability to change. And he talked about examples in American history of people who had it pretty bad and made our country better. And so I hope to renew my faith in America and re-energized to continue the fight toward a more perfect union.

Jill Wine-Banks:

That is really inspirational Barbara. And I think that's something we should share with all our listeners posting a link with that so that we can all read that. When I started reflecting on this thought back to 1976, which I know is a long time ago, but it was the 200th anniversary of independence. And I was living in Washington. It was right after Watergate and Richard Van Vanessa, who was my trial partner in Watergate and our spouses went to the mall to watch the fireworks. And it was really inspirational. And I'd rather think of that this year when I could so easily fall into a despondent despair over where we are now.

And I want to recommit myself to fighting the good fight to getting the equal rights amendment passed so that women are part of the constitution in a full and complete way, and voting rights are protected and the Supreme Court stops being the political partisan mess that it is now. And let's just keep working for those good outcomes because that's what we're all about. And I know we'll all keep on working for that.

Barb McQuade:

This has been your bicentennial minute. Do you remember those in 1976?

Jill Wine-Banks:

I loved those so much.

Barb McQuade:

They were awesome.

Joyce Vance:

Patriotism animates so much of our lives and I know maybe some people think that it's silly or sappy, but especially having worked in government or being a lawyer standing up and saying, may it please the court I represent the United States. It's so hard to watch what's been going on at the court. And I so needed to hear your words today to get a little bit of fire back.

Jill Wine-Banks:

I don't know. I feel very patriotic, but I have to say someone has put me on a Republican mailing list and I'm now getting they're fundraising from descant, and they all call me patriot. And it's ruining the word patriot for me.

Joyce Vance:

Somebody did that to Barb's best friend. He started getting those text messages and so he would respond and he took great glee in responding, not obscenely, but he would say what he really thought

and send it back and I'm sure nobody ever read it, but it just tickled him. And it always made me laugh. It was his personal act of resistance. And I loved it.

Jill Wine-Banks:

I did that once. And then I realized that no one's reading it and that the best thing to do is just delete.

Kimberly Atkins Stohr:

Hey Barb, the Supreme Court isn't doing that much to help with climate, but what can we do?

Barb McQuade:

Kim, that's a great point. I think in light of what the Supreme Court has done, we all need to do our own share to protect our environment. And did you know that only 9% of plastic actually gets recycled? No matter how much we put in our recycling bin at Grove Collaborative, they believe it's time to ditch single use plastics for good. Grove carries hundreds of products aimed at replacing single use plastics across your home and personal care routine. And by 2025, Grove will be 100% plastic free. And like Grove companies concentrated cleaners and refillable glass bottles, they're friendlier to the planet and twice as effective as the leading natural brands.

Joyce Vance:

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Kimberly Atkins Stohr:

It was quite the explosive week for the January 6th committee when surprise witness Cassidy Hutchinson, who was Trump's former chief of staff, Mark Meadow's top aid, took the stand and gave jaw dropping testimony about Trump in the days leading up to and on the day of the insurrection. So Jill, as I watched that testimony this week, I thought about you because I was thinking first of all, how must this have compared to the most explosive moments of the Watergate Hearings? What was your take?

Jill Wine-Banks:

I agree with you. It was really dramatic. Her being a live witness testifying was really important, much more powerful than the depositions, transcripts and videos that were played, even though those were also very good. And because there was really some new news that was revealed by that, and some evidence not only against the president for knowing that his supporters were armed and violent and

that he wanted them in that condition to March to the Capitol and that he wanted to lead them there and make it even worse than it was. I thought was really powerful.

And it also struck me, here was a 26 year old woman who was standing up for truth and standing up to the president, which all of the older sophisticated men were afraid to do. And she was telling the truth about not just the president, but her boss, for example. And I thought how brave she was. And the same thing was true with John Dean who was older than she was by eight or nine years at that point, but still was only in his 30s when he was testifying against the president of the United States and all the top other people.

And then I thought she's an even better witness because she isn't a co-conspirator. John Dean was guilty. He was a co-conspirator. So her credibility is almost impeccable as a result of that. And then I thought, yeah, but the big difference is back then there was bipartisanship, Democrats and Republicans were listening and paying attention and were influenced by it. The end result was that Nixon was not only impeached, but he would have been convicted if he hadn't resigned. And he was told by the Republicans that he had to resign or he would be convicted at a Senate trial.

And then I got depressed because that's not where we are today. So here you have this powerful testimony, and it's not just her testimony, it was the whole hearing which laid out an overarching conspiracy with many tentacles and different aspects. And they've proved in very good way as you would in a closing argument, they've put together, here's the evidence about the fake electors. Here's the evidence about the pressure on Pence. And she was the icing on the cake who put it all together. So it was terrific and it somehow also reminded me of Alex Butterfield and the shock that was because although he had told the committee about it on a Friday, it was the best kept secret in Washington. And no one knew about it until he testified in public on Monday. So that was pretty dramatic. And we found out about it the same way that all Americans did from the television, from watching the hearings. Yeah.

Kimberly Atkins Stohr:

Joyce, as I was watching, I was also pulling up federal statutes, criminal statutes to see what if corroborated the allegations from Hutchinson could lead to, things like incitement of an insurrection, seditious conspiracy, witness tampering, just to name a few, if there is other evidence backing up what she described, particularly as Jill pointed out the fact that Trump knew, I think the biggest headline was Trump sent what he knew to be an armed mob to the Capitol. How bad could the news be for Donald Trump and other people?

Joyce Vance:

Yeah. She really put Trump in much closer proximity to the violence than I think anything that we've heard directly so far. And of course her testimony is powerful because it's under oath. But the way I look at her, I find her to be a very interesting witness because I think she's the kind of witness who leads you to other witnesses. Some of her testimony is about stories she was told or conversations she overheard. It's on really important issues, like as you point out Trump's awareness that people in the crowd were armed or his desire to give armed people access to areas that should be secure. And of course his level of anger when he was told he couldn't go to the Capitol that day.

So it's really powerful evidence as the committee appeals to the jury of public opinion, but in a criminal prosecution, evidence only counts if it's admissible, and a lot of Hutchinson's evidence could be excluded as hearsay. Hearsay is just a statement that's made out of court by someone other than the witness to it that's being offered to try and prove the truth of that statement. And although there are a

lot of exceptions, hearsay is typically not introduced into evidence, but that does not take away from Hutchinson.

The fact that she told the truth puts the pressure on the people who are part of the stories that she tells. People like the White House Council, Pat Cipollone, or the Secret Service Agent, Tony Ornato, who actually took a leave of absence from the secret service to go take this political job in the White House. There's pressure on them. There's pressure on Mark Meadows and so many others. Everyone that she has information about is now much more directly implicated. And while Congress may not have a lot of fire power when it comes to enforcing its subpoenas, if we're talking about a criminal investigation, DOJ absolutely can, does, will insist upon enforcing subpoenas. So these folks won't be able to duck and say, "Oh, I don't feel like coming. It's a Thursday and I have to get my nails done," or whatever the lame excuses we've been hearing from people are. I think Hutchinson opens the floodgate.

Kimberly Atkins Stohr:

Yeah. And Barb, one point that Joyce was making was about her telling the truth and she seemed to me like a very credible witness. But at least some of the details that she gave, and again, this was about, she testified as to what she was told about the former president's behavior in the car after his rally or as the crowd was marching to the Capitol, has made some call into question her credibility. So talk a little bit about witness credibility generally and how it applies to her. And what do you think about her testimony?

Barb McQuade:

So the story that has been refuted is the one that she told about having heard from the people in the car, the head of the secret service detail as well as the deputy White House chief of staff that when told they were not going to drive Donald Trump to Capitol Hill, but instead were going back to the White House, that he lunged for the steering wheel. And then when the driver grabbed his hand and said, "Mr. President, please don't grab for the steering wheel, we have to go back." He lunged for his secret service detail head. And as she said, he pointed to his clavicles, which I guess are his collarbones, right? And it has been reported that didn't happen that that was made up.

So as you said, Kim, I think one thing that is really important here is she didn't say it happened. She said she was told it happened. Now it may be that Tony Ornato, who is the White House deputy chief of staff made it up. Maybe he embellished it or maybe it did happen and now he's falsely denying it. So we don't know. But I think one thing that's really important here is it really doesn't matter. This is such a side story to the main plot line. The main plot line is Trump really wanted to go to the Capitol and planned to go to the Capitol and was very upset that he couldn't go. Whether he lunged for the steering wheel or not really doesn't matter. The important part of the story here is that he wanted to go to the Capitol because that suggests that there was a more premeditated plan than perhaps we've previously known about.

When it comes to witness credibility, it is important that people tell the truth all the time. And sometimes if you can catch them in a lie in a small detail, it can be used to undermine their credibility about bigger things. But I think this one is not important. And as Joyce says, I see Cassidy Hutchinson's main role here in leading to other witnesses. Most of her testimony was hearsay in second hand. At a trial, in a criminal case, she would not be the witness, you would use him or her to get to Mark Meadows and Pat Cipollone, and by the way, Rudy Giuliani.

And remember there was one detail that came right at the beginning of the hearing that I think maybe has been overlooked a little bit, but that story where she says, she's walking Giuliani to the car on the evening of January 3rd and he says to her, "Cass, I can't wait until January 6th, can you? It's going to be so great." And she says, "What are you talking about?" And he said, "Oh, it's going to be great. Trump's going to be at the Capitol and he's going to look so strong."

All of that suggests that there was a little more there than we know so far. And so I think she's off stage. I don't think she testifies whatsoever, but I think that as you investigate, you put lots of people in the grand jury, many of whom never see the witness stand in the actual trial, but are really important to advancing the investigation because they tell you who the firsthand witnesses were.

Jill Wine-Banks:

So I do think she will testify because there were tidbits that she heard herself from potential defendants. So assuming that they are defendants, then it would fall within a hearsay-

Barb McQuade:

Quit contradicting me. I'm going to throw my lunch at you.

Kimberly Atkins Stohr:

The ketchup is on the wall.

Joyce Vance:

I actually had a very serious point to make though about Rudy, Barb. Because I noticed that too. I think Rudy's just going to say, "I thought it would be a great event for people to wear these new slip-on sandals that I'm now apparently promoted." Did y'all see that ad on the [inaudible 00:20:30]. Oh my God, it's worse than the MyPillow guy. He's now like, "Buy these sandals for 49/95. Use code Rudy. It was unbelievable.

Jill Wine-Banks:

So I bought a ketchup bottle, Kim.

Kimberly Atkins Stohr:

That's good.

Jill Wine-Banks:

That's my contribution to this.

Kimberly Atkins Stohr:

All right. So all you guys, we know that Pat Cipollone who figured prominently in Hutchinson's testimony has now been subpoenaed. Does he have an actual executive privilege claim? He was White House counsel at the time and he clearly was in communication with the president. What do you guys think? I'll start with you Barb and everybody can chime in.

Barb McQuade:

Yeah, I think he has probably some executive privilege claims as well as some attorney client privilege claims, but not everything. And that's why I think that there is room to negotiate topics that he can talk about. For example, if there is a third party present for any of these conversations and the privilege is waived. And so to the extent Mike Flynn is in the room or Roger Stone is in the room, none of those things are going to be protected by the privilege. Also-

Kimberly Atkins Stohr:

Or even if Cassidy Hutchinson was?

Jill Wine-Banks:

Or even a secret service agent.

Barb McQuade:

There you go. I also think that the courts have already determined in this case, that learning what happened on January 6th outweighs executive privilege and so it will yield in certain circumstances. Attorney client privilege is one that is absolute, but it has to be communications for the purpose of seeking legal advice. And there could be lots of things there that don't qualify. And of course, Pat Cipollone's client is the process of the presidency, not Donald Trump, the man. And so I think that looking through that lens could open the door to a lot of testimony. He may not be able to answer every question, but he can probably answer a lot of questions.

Jill Wine-Banks:

And Barb, I agree with everything you've said, but I would weigh all of those factors and say there's no executive privilege, no attorney client privilege that he will lose. It will take a long time. And I also want to go back to your credibility question, Kim, because one wrong statement can be used to undermine credibility. And I know we worry during Watergate, once we found out there were tapes, we knew we had to ask for them, but we also knew there was a chance it could destroy our case. If there was anything that John Dean had already testified to that proved to be inaccurate, it could really be devastating. It turned out he had a flawless memory and everything was accurate, but it is one of those things that I'm sure...

I know I've had a trial where the defendant took the stand and made a stupid statement that I just didn't believe. And I asked the agent to go and investigate, and sure enough, they found the person he had allegedly talked to in Washington, it was his alibi. I couldn't have been there. I didn't do this crime because I was in Washington talking to the head of the Department of Labor. And it was an irrelevant point, but I heard a juror when I put on rebuttal testimony say she caught him in a red-handed lie. And I knew that was the end of his case, that no one was going to believe him. So it is an important factor on credibility to make a mistake.

Joyce Vance:

I think that's right. And not to beat a dead horse here, but Hutchinson made multiple statements to investigators for many hours and then she testified, right? And so if you're a defense lawyer, you're going to go and comb back through those earlier statements before she testifies at trial to see if there's inconsistencies or if there's omissions. And if she testified to things in the public hearing that she didn't say in those early sessions, the defense lawyers will hound her and they will say, "Well, why didn't you say that originally if it's true? That can be a very powerful argument."

And that's where I think there's this very interesting nexus between her switching lawyers, the fact that she was being threatened to stay on board and it may actually be easier to rehabilitate her testimony and to also insinuate that anything she left out was because she was concerned about the threats. This is going to be a very interesting situation to watch. Barb, is so nice to Pat Cipollone. I would personally go pick him up, put the cuffs on him and make him go testify. He has no attorney client privilege, right? He's the White House's lawyer, the presidency's lawyer. An executive privilege, Trump hasn't even asserted it. So Trump would have to assert it.

Barb McQuade:

And Biden has waived it.

Joyce Vance:

Right. Which is why Trump is not going to assert it, because he doesn't want Biden to override him. I think he didn't assert it-

Barb McQuade:

Yeah. He didn't assert it for [inaudible 00:25:16].

Joyce Vance:

The whole issue is a non-starter. Until Trump asserts it, it's not in play.

Kimberly Atkins Stohr:

Yeah. Hey Jill, have you ever wanted to implement a better culture at a company?

Jill Wine-Banks:

I have. And I've had experience at Motorola, which was a great place to work. But I also worked at a company that was trying to help small and mid-size businesses be better workplaces. It was called Winning Workplaces. And we tried to help all small and mid-size companies be better businesses. And I also tried to do it when I was at the American Bar Association to bring camaraderie and a better culture to a fairly large office at the ABA. And if you are someone who runs a small business or a large one or works in the corporate world, the bad news is that one complaint against your company can turn your world upside down. The good news is Bambee is here to help small business owners implement good HR practices.

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Barb McQuade:

Well, the Supreme Court wrapped up its term this past week, perhaps one of its most consequential terms in decades, really, but I want to start by focusing on one really good thing that happened at the Supreme Court. Kim, I know you were on MSNBC with me just before I was on your commenting on it. And I was coming on right after we watched live as Ketanji Brown Jackson was sworn in as the 104th Justice of the US Supreme Court. So can we just spend a moment reflecting on that? What did you think of it?

Kimberly Atkins Stohr:

Oh, it was monumental. Even though this week was full of a flurry of a ton of news that felt bad, it was one moment. And I was particularly moved after the chief justice delivered the constitutional oath that the judicial oath was administered by Justice Breyer. His last act as a Supreme Court justice swearing in his former clerk to be an associate justice and to take his seat. That was just clearly such a special moment for both of them. It was a great moment for the country. It's a great moment for black women everywhere, but also for everyone because this court works better when it better reflects our nation. So it was really, really-

Barb McQuade:

It was. I agree with the symbolic value of that. So Justice Breyer was losing his power as he was giving it to Ketanji Brown Jackson. It was like their hands were up and you could see lightning bolts going between them as he pay... Yeah. He gave her his powers. I love it. So may she reign for a long time with good wisdom and solid reason.

Jill Wine-Banks:

That was really moving, but I don't know if anybody saw representative Clyburn and his daughter Anne Lawrence. Wasn't that moving?

Barb McQuade:

It was amazing.

Jill Wine-Banks:

Yeah. They discussed the nomination. They discussed his endorsement of Biden and how it led to this moment. And I was moved to tears by that. I was moved almost to tears by seeing her sworn in. That was an amazing live event.

Joyce Vance:

I have to say for anybody who didn't see this clip, you should go back and find it because Clyburn of course extracted the promise from Biden during the debates and said, "I think you need to go ahead and

say that if you get a seat, you'll put a black woman on the court," and Biden of course does it. And in this interview with Lawrence O'Donnell, Lawrence draws out this story that Clyburn does it because his daughter who's an activist says, "Wouldn't this be a great thing to do?"

And then Lawrence turns to the daughter and says, "Did you think your dad would go back and say that to Joe Biden during the intermission?" And she gets this look on her face like every child who has ever been mortified by a parent. And she's like, "No, I didn't think he'd go backstage and do that." I think it's one of my favorite TV interviews I've ever seen. What a lovely family. He had lost his wife just a few months before this, and you just see their mom's spirit passed on in this daughter's work. I love everything about this week. It was such a good counterbalance to all of the substantive stuff that the court has been doing, the procedural stuff, the new justice. I'm with you, Barb, long live to them.

Barb McQuade:

So that was a nice thing. So now let's go back to throwing our lunch because I want to talk about some of the decisions that the court handed down this past week. Kim, the court got back to that praying football coach. How'd that one turn out?

Kimberly Atkins Stohr:

Yeah. Again, do you remember the separation of church and state? This court really does not. It does not. So this was the case of the Washington State football coach, Joseph Kennedy, who was reprimanded, suspended by a public school district for praying during football games, openly praying with the students. I know if I was on a team and my coach was doing that, I would feel compelled to do something, join in. It would be really hard for me just to walk away and think that was all voluntary. But the court ruled that the firing, the suspension of this coach not only was it not something that the district had to do in order to, as they claimed, keep the wall between church and state solid because of the establishment clause. They ruled that this amounted to a violation of this coach's freedom expression rights also found in the First Amendment and essentially amounted to discrimination against religion.

So again, this is the court, not only just picking sides between two parts of the First Amendment, but really going a step beyond and really putting their thumb on the scale toward one side while completely ignoring the other side. What usually is supposed to happen when I learned in law school is that when you have two competing constitutional interests like that, the First Amendment, the establishment clause and the free exercise clause, you try to balance those interests to try to make them both work and for each of them to infringe on the other, not too much. And if the state is applying a rule equally, then you can't just willy-nilly claim, well, my religion and you win. It's called play in the joints.

The court has taken all the play out of the joints. It's very clear that if anybody makes a religious at well not, if anybody, if somebody doing a Christian prayer makes a religious exercise claim and it goes to this court, they are going to win, regardless of whatever else the constitution says.

Joyce Vance:

For everybody who ever watched Two-A-Days, the football practice show that did a season at Hoover High School in Alabama, I am just waiting for the Friday afternoon Juba prayers by the Muslim coaches and players in Hoover, Alabama, because this case says that they can do it.

Kimberly Atkins Stohr:

Bring out the prayer roads.

Jill Wine-Banks:

Yeah.

Barb McQuade:

Very disturbing. Well, it got better as the week went on. That was only Monday. Then we got an-

Joyce Vance:

We have this real dark humor about the court going on.

Barb McQuade:

Later in the week, we had a case involving the EPA. Joyce, why don't you tell us about that one? This is a big case about administrative law.

Joyce Vance:

This is a case about administrative law. It's also a case about hamstringing climate change. And although it's hard and complicated to understand because it's administrative procedure and administrative law, which is a tough and of a dry subject, it really matters a whole lot. The holding in this case essentially says that the EPA can't set targets for moving to cleaner fuel because Congress didn't explicitly say it could that, of course the name of the agency is the environmental protection agency, which is a big clue about what kind of power they should have. But the Supreme Court, this conservative majority blew right past that. And the decision is really a bad one. It means everything that EPA does to try and slow climate change and protect us, it now gets challenged by red state attorneys general and by other groups that are determined to send us into the abyss.

And the EPA's ability to act is very constrained. In this case, EPA was trying to set targets that would move folks away from burning coal, is essentially what it comes down to. And the issue was moot by the time the Supreme Court heard the case because market forces had intervened. The Trump administration had set aside the Obama targets, private forces stepped in and market forces were incentivizing this anyhow. And the Biden administration has said, "We're not going to go back and pursue those Obama targets. It's no longer necessary." And that is the kind of case where the court usually says, "Oh, the issue's moot. There's no need for us to make a decision here." And they dismiss it without deciding it. But no, they were so focused on doing this.

And the reason is that this case speaks far more loudly than just to the EPA. It's all about conservative's desire to dismantle what they call the nanny state. So yes, today it's the EPA, but now these folks are emboldened to challenge, for instance, public health measures or economic measures. And it's just an appalling decision. The last thing I'm going to say about it is this and Justice Kagan makes the point in the dissent far more beautifully than I ever could, but she essentially says.

I think she's been listening to Barb McQuade because she says textualism is pretty much a farce, right? And we all know it is, these guys are textualist when it serves the end that this conservative majority wants to reach. But when textualism doesn't work out so well for them like it doesn't here, they reach into their bag of magic tricks and they pull out another trick. And in this case they use the major questions doctrine. What's the major questions doctrine? You would be right to ask that question because the court doesn't use it very often. It's so rarely used. I don't think I was aware of it. Thankfully-

Barb McQuade:

It wasn't a thing when we were in law school, Joyce.

Joyce Vance:

... last year or so because in the last-

Barb McQuade:

No, they only invented it recently.

Joyce Vance:

It wasn't a thing for me as an appellate lawyer overseeing all of the civil appellate work that was going on in Alabama and also being in touch with appellate chiefs nationwide about the civil work we were doing. So you know when the major questions doctrine surfaces its ugly head? It's when conservatives want to put an end to the mandate that says you can't evict people from their houses during a pandemic. "Oh, major questions issue. Congress didn't mean to delegate that power. So there goes the end of evictions." And again, when Biden tries to mandate vaccination for large companies, "Oh, major questions, there's not this level of power. So no, you can't do that." Now, we've seen it used for a third time. And the third time really is the charm because it really damages our efforts to slow climate change.

Barb McQuade:

Well, I think what the court has done in this case is very similar to what we saw them do with the CDC and with OSHA, that you can't enact rules that will serve your mission because they weren't in the legislation per se. That means Congress has to anticipate every possible issue that might arise coming down the road. And it's just an absurd way to govern. It's just bad government. Well, Jill, how about one last one we can talk about? The Remain in Mexico case. What was that one about?

Jill Wine-Banks:

So this is a very complex procedural case, but the bottom line and what it really means is that asylum seekers who have been under the... Brisbee joins us in bemoaning the Supreme Court. It is definitely true. He knows when I'm depressed and he comes and he gives me kisses to try to revive me. But this has been a hard week. This decision was actually considered... It's interesting how cases have been labeled a win for Biden or a loss for Biden. And I would have to say that for example, the EPA case was not a loss for Biden. It was a loss for the country. And let's not say it was a loss for Biden, and this was a win for the country as well as for Biden.

Trump had put in play a policy that said you could not come into the country to raise an asylum claim. You would have to stay in Mexico if you came to that border and it went back and forth in several different iterations. But the Supreme Court now has finally said in a very interesting combination of the three liberal justices joined by Kavanaugh and Roberts, that they can come here, that he can lift the Remain in Mexico policy, and that asylum seekers can now come into the US to make their claim.

Now, this does mean that about 70,000 asylum seekers now in Mexico may in some way be allowed to come in. And obviously the government is going to have to do something about whether they house them, whether they detain them, whether they just leave them come in and show up for hearings on their asylum claims. This is going to be a major hurdle for the immigration services to handle, but it goes back to at least respecting the words of a statute that say may not must, but may. And it said that may means that it's up to the current president to decide whether they may enter for this purpose or

not. And that's really what the case is about. Asylum seekers will have some rights to raise their claims and that's important.

Barb McQuade:

Yeah. So we've had this, as we said, very consequential term with the Supreme Court. Over the summer they may or may not exercise their shadow docket, but the court has also given us a little bit of a preview of next term with some of the cases that it's already agreed to take up. We know, for example, that it has affirmative action on its docket, so one by one dismantling all of the policies of the past several decades. And this week, it agreed to take up a case for next term on the issue of independent state legislatures. And this is one that worries me a lot. Kim, can you tell us what that issue is all about?

Kimberly Atkins Stohr:

Yeah. I feel like the cert grant in that case was them laughing Dr. Evil's evil laugh and saying, see you in October, because it's really horrifying. It really is. So essentially what this case, what the court will determine, is whether something called the Independent State Legislature Doctrine. I can barely say it because it's something that... Yeah, requires that only state legislatures have the right to carry out elections in that state under the wording of the constitution. Now, the only time we have heard this before was in Bush V. Gore, this doctrine was invoked. But it was understood that Bush V. Gore for a lot of reasons was a singular case that did not have precedential value. It only involved that particular controversy. And for years, and years and years, it was never cited.

Well, guess who started citing that case recently? Certain conservative justices on the US Supreme Court, which could have a huge consequence. What it would essentially mean is if there is a challenge to say redistricting maps being drawn, whether they were drawn by an independent commission or some other means, if there is a dispute over the vote efforts to stop votes from being counted, if there is a dispute over an effort by a state legislature to send their own electors to Congress for the electoral count as opposed to following the vote of the people, then there will be nothing that state officials or even state courts could do about it. They could not bring a challenge because the decision of the legislature would be unreviewable. Just think about that. That is one of the most frightening things I have ever heard, but the Supreme Court has decided to take up this case next year.

Barb McQuade:

Yeah. It's so contrary to every other aspect of our government, right? With checks and balances that there's no one part of it has plenary power like that. But Joyce, tell us how this independent state legislature's doctrine could affect elections going forward.

Joyce Vance:

I suspect that Justice Rehnquist, who as Kim mentions raised this in the concurrence in Bush versus Gore in a very limited contained fashion is rolling over in his grave to see it resurfacing in such a dangerous fashion. This is not a core democratic principle. This is a theory that circulated around the fringes, the same sort of fringes that people like John Eastman occupied when they came up with the plan for Trump to overthrow the 2020 election using state legislatures as the vehicle for declaring that the votes of Americans shouldn't be counted. And in essence, what this case has the potential to do is to make legal what Trump tried to do in 2020 in states like Arizona and Georgia and Pennsylvania and others to make that legal so that if Trump were say to lose in 2024, they could throw the votes back to red state legislatures.

I think we now have something close to 30 states where both houses in the legislature are controlled by Republican majorities, in some cases, Republican super majorities. And it wouldn't really matter how people voted. That's what's so frightening I think about the grant of cert in this case is the potential to say that votes don't count. I'm going to have a Pollyanna moment here. It disturbs me that the court took this case, but there's a part of me that hopes that Amy Coney Barrett and Brett Kavanaugh, who probably are forced to grapple every day with the legitimacy of their appointment to the Supreme Court, because both of those seats were handed out by Mitch McConnell through political maneuvering.

It would be so great to see the stand up and separate themselves from Trump who put them on the bench by taking a stand in favor of elections and voting and principles that they said in their confirmation hearings that they believed in. Look, I get Roe versus Wade, right? But I'm going to try to sleep every night this summer hoping that they will do the right thing, because if they don't, we are in deep trouble.

Kimberly Atkins Stohr:

Yeah. Well, I already can predict one justice won't do the right thing in part, because one of the folks pushing to have the election results in Arizona overturned was one Ginni Thomas.

Joyce Vance:

Kim, that's a great point and something we haven't really talked about. Thomas can't sit with any legitimacy on any case involving this. I don't know how he sits on this case. I think he almost has to recuse. The chief justices we've discussed, doesn't have the power to force him or compel him to recuse, but when eight members of your court insist that you protect the court's integrity, maybe that does have some impact. This is really a case to watch as much for how the court handles the issue of Justice Thomas as for the substantive matters here.

Barb McQuade:

We need a sitcom based on the inner workings of the US Supreme Court. Can you imagine they're all sitting around the table and no one is allowed to say out loud, "Clarence, you got to recuse, man," but they're trying to hint at it. They're saying things that rhyme with recuse, I don't know. Recluse and I don't know. They're all talking about it and trying to get him to take the hint, but he won't, he's just laughing and making jokes about pubic hairs on his diet Coke and-

Joyce Vance:

Barb.

Barb McQuade:

Remember that from an [inaudible 00:47:47].

Jill Wine-Banks:

Of course, one of the lowest moments of the court, except for where their numbers are right now, the opinion of the American people of the court is 20 or 30% support the court. It's horrible. And they are doing everything they can by making up doctrines or applying really radical theories like this Independent State Doctrine and using it effectively unfortunately, with this six three majority.

Joyce Vance:

Well, you heard it here.

Barb McQuade:

Well, Jill, let me ask you the horror story.

Kimberly Atkins Stohr:

The thing that's crazy about this is in the partisan. Remember the partisan gerrymandering case where the court decided that they did not have jurisdiction to even rule on partisan gerrymandering. One of the justifications was the fact that, "Well, no, that's really up to state governments, that's for state courts to work out." And then they're going to turn around and say, "Oh wait, no, no state courts don't have any power-"

Barb McQuade:

State courts, made court. They don't get us in.

Joyce Vance:

Y'all when this case is argued next term, we should do a whole episode and just go through the argument for everybody who doesn't get to listen to it because it is going to be so full of interesting, hopefully not frightening things.

Jill Wine-Banks:

I know, I hope your Pollyanna is right, but I'm worried that you're-

Joyce Vance:

It's a rare Pollyanna for me these days so I'm going to hold on to it.

Jill Wine-Banks:

Yeah.

Barb McQuade:

Yeah. I got to say Joyce, sweet Joyce, dear Joyce.

Joyce Vance:

I know.

Barb McQuade:

Did you not read Justice Kagan's dissent in the Dobbs case? Power not reason is the new currency of this majority.

Joyce Vance:

In December, we did an episode where we talked about Texas SBA and I said that as much as it pained me, I no longer had confidence or trust in the court. And I stand by that. I think that's held up pretty

well. But I'm hoping that self-interest will animate Kavanaugh and Coney Barrett's votes and that maybe this court will get something right.

Jill Wine-Banks:

I'm ER.

Barb McQuade:

Maybe so, but Jill, let me ask you if it isn't horrible enough, Jill, but here's the full picture here of just how horrible this could be. Could this Independent State Legislature's Doctrine be used as a defense to Donald Trump in its strategy to challenge the 2020 election?

Jill Wine-Banks:

Even worse, the answer to that is yes. And the answer is could it be used to challenge the 2024 election. And the answer is clearly, yes. This is a strategy, a theory that really doesn't exist. It was made up for reasons that are too difficult to even comprehend. But it has already been put forward as a defense and saying that this is why we heard the state legislatures were going to appoint the slate of electors because that's their power. And they're the only ones who are empowered for that.

And as we've already said, this is the end of your vote counting. If you vote and the state legislature is a different party than you and they don't like that you and the majority of your fellow citizens voted for a Democrat, that's the end of your vote. They're just going to appoint their own. So I think this is something that we need to really follow. I don't know whether a constitutional amendment is necessary or whether a federal law is necessary, but something has to put us out of our misery with the independent state legislature doctrine. And I hate to use the word doctrine because doctrine makes it-

Barb McQuade:

It legitimizes it, doesn't it? Yeah.

Jill Wine-Banks:

It's not. It's a theory. It's an argument that's being used and abused. It's really not a doctrine. Doctrine means that it exists for a long time and has some credibility in history and in the law and this doesn't.

Joyce Vance:

So here's an interesting legal question. Can someone, other than the client pay a lawyer to represent the client? The answer is typically yes. And sometimes that behavior is innocuous, a parent paying for a child's divorce or an employer covering an employee's cost for something that's work related. But other situations aren't quite that benign. Barb and I have both had this experience, right? A mob boss or a cartel leader paying for legal representation for someone who has worked for their criminal organization and is now under indictment in an effort to send the message that they need to stay in line. So Kim, why would I raise this question right now anyhow?

Kimberly Atkins Stohr:

Well, an interesting thing happened surrounding Cassidy Hutchinson's testimony at the January 6th committee. We learned that before she testified publicly, she actually got a new lawyer because her previous, well, we don't know if it's because, but it just so happened that her previous lawyer was paid

by Donald Trump's political pack. And then we also learned that about a dozen, according to the New York Times, other witnesses for the January 6th committee are having their legal fees paid by Donald Trump's political action committee.

Joyce Vance:

Who to funk it? So Jill, you're the sister with American Bar Association background. Can you talk with us about the rules that govern lawyers in this setting? When can you and can't you accept payment from a third party to represent the client?

Jill Wine-Banks:

So you can, but you have to remember that you, as the lawyer are representing the person who is your actual client, not the person who's paying them. And you can't accept compensation in certain specific instances if the client hasn't given informed consent. So you'd have to discuss it first with the client and make sure that they understand that someone else is paying and that it could compromise your independence. You have to also make sure that there's no interference with your independence. So when you accept money from someone else, you have to make sure that the lawyer-client relationship is with the actual client and that you are independent of the person paying you. And you have to make sure that information relating to the representation is protected so it remains confidential. It means that just because someone's paying you, you can't give them information.

And there is one little tidbit from what we heard on the witness tampering evidence that representative Cheney mentioned when she said, remember he's listening, he's reading transcripts. Well, how did he get those transcripts? Were the lawyers for people who he was paying their legal fees for turning over the transcripts? That would not be the proper thing to do. So we have to look at, did somebody violate that part of the rules? And basically is there an actual conflict of interest?

So in the case, for example, that you were talking about where the mob boss is paying to make sure that the witness doesn't say what he doesn't want the witness to say, that would be an actual conflict of interest. If it's someone who is being sued by someone and they're paying the witness, that's an actual conflict of interest. So we're looking for actual conflicts of interest and we're making sure under the ethics rules for lawyers that the actual witness has the best representation that person can have, and that they understand the risk that they're taking letting someone else pay.

Joyce Vance:

So Barb, the conflict of interest analysis is really an issue for bar associations. It's a matter for lawyer discipline in the first part, but can situations like this ever have criminal implications?

Barb McQuade:

Well, they can if the lawyer is being used as a conduit to try to intimidate a witness into lying or failing to reveal certain facts that could be damaging to the person who's paying the fees. So imagine a scenario where let's say hypothetically, oh, I don't know someone say, Donald Trump is paying the legal fees for someone like, say, I don't know, Cassidy Hutchinson. And the lawyer is coaching and saying things like, "We don't need to talk about that. You might be asked about certain areas. Just say, I don't recall." When in fact she does recall, and she does have some damaging things. And so if the lawyer is attempting to serve the interest of the person paying by obstructing the truth, that could amount to a crime, and there's a federal statute that makes all manner of witness tampering a crime, it's a form of obstruction of justice.

It's considered a very serious crime, is punishable by up to 20 years in prison. These are the kinds of crimes that Giuliani has often referred to as mere process crimes as if they don't really count. But I think prosecutors and judges view these process crimes as very serious crimes because they cause the whole system to grind to a halt. The whole system relies on people telling the truth. And so if you tamper with witnesses or if you lie to investigators or you lie under oath in court to a jury, you are committing a very serious crime against the criminal justice system. So yes, it could cross that line. I don't think we've seen anything to indicate it has yet, but it is curious that Cassidy Hutchinson suddenly remembered things that she didn't remember back when she was being represented by a lawyer who was closely affiliated with Trump world.

Joyce Vance:

It can be easier to prosecute the cover up than the underlying crime. That's an experience that I've had. It's going to be a wonderful irony if some of these people end up being prosecuted over the coverup when they otherwise might have been able to walk away.

Jill Wine-Banks:

Isn't that the lesson of Watergate? Hey Kim, I need some advice. It's been a bad few weeks in the news, the Supreme Court, the January 6th revelations, what are you doing to stay calm and collected and get your brain going in a good way?

Kimberly Atkins Stohr:

Well, Jill, it's interesting that you say calm because for me, meditation is crucially important, especially when really trying things are going on in the world. And I would highly suggest that for you too, using calm, whether you're crushing your goals, or you need a little boost, calm can help. With calm, you can jumpstart or continue your meditation practice and find peace of mind today. That's why we're partnering with Calm, the number one mental wellness app to give you the tools that improve the way you feel.

Joyce Vance:

I've practiced yoga for a long time, but I've always had a distant relationship with meditation. I've tried it, I've wanted to meditate. It was Calm that finally helped me develop a meditation practice, which I'm really enjoying. You can reduce stress and anxiety through guided meditations, improve focus with curated music tracks and rest and recharge for Calm's imaginative sleep stories for children and adults. There's even new daily movement sessions designed to relax your body and uplift your mind.

Kimberly Atkins Stohr:

If you go to calm.com/sisters, you'll get a special offer of 40% off a Calm premium subscription and new content is added every week. Join over 100 million other people around the world using Calm to take care of their minds. Calm is ready to help you stress less, sleep more and live happier, healthier life, and it's worked for us. It certainly has worked for me.

Joyce Vance:

It won't fix the Supreme Court, but it'll help you develop the energy you need for all of us to do the work that's ahead of us. So for listeners of the show, Calm is offering an exclusive offer of 40% off a Calm

premium subscription @calm.com slash sisters. So go to C-A-L-M.com/sisters for 40% off unlimited access to Calm's entire library. That's calm.com/sisters or look for the link in our show notes.

Jill Wine-Banks:

You've sold me.

Joyce Vance:

I'm telling you, I've been using calm so much. Barb said this one time, she was like, "Am I breathing right?" And that was always my problem when I meditated, it's like, "Well, maybe the air is not going into my nose the way it should." It would just fill me with anxiety,

Jill Wine-Banks:

But I took breathing lessons. I actually took breathing and it absolutely helped. And I can't tell you how much I wasn't breathing right.

Joyce Vance:

I need to do that.

Jill Wine-Banks:

I had a great meditation. It turned out to be meditation. It was intended to just help me get more air in, but it actually is meditative if you just focus on your breathing. But-

Barb McQuade:

Yeah.

Kimberly Atkins Stohr:

The connection between mind and body is really quite direct, and breath work is one of the best ways to get right to that.

Jill Wine-Banks:

Well, it's time for my favorite part of the show where we answer listener questions. 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, keep an eye on our Twitter feeds throughout the week. We sometimes answer questions there and we get to as many of your questions as we possibly can. This week we had so many good ones. It was really hard to pick. But I'm going to start with one from Lois. And I think we all want to weigh in on this, but let me start with you, Kim. Lois asked when each of you are invited to appear on the cable news shows, what kind of content preparation is discussed with the producers and interviewers? Do you have the questions in advance or just a general topic focus? Are you informed of any clips that set the questions?

Kimberly Atkins Stohr:

Oh, this is a great question. The answer is, it depends. And also things can always change, right? There are some shows that we'll get a call or an email that says, "Hey, do you want to come on and discuss this column that you wrote?" And I'll say, "Sure." And that's pretty much it. Then you have other shows that

are very, very detailed. We get this big, I almost said dossier, but I don't want to use that word because it's tainted just this big packet of relevant news stories, topics, relevant news stories.

Nicolle Wallace, I don't know if I'm talking out of turn saying that she definitely gives that, you totally see, yeah, she's a former Calm's chief at the White House because she makes sure that you have topic by topic what the latest news is. But what often happens particularly on her show is that the news changes, and an example of that is I was all prepped one day to talk about infrastructure week when the president went on air and said there were very good people on both sides in Charlottesville. So I did not talk about infrastructure week. That happens frequently where the news will break and we have to be light on our feet.

Joyce Vance:

Yeah. I think that's fair. More often than not. I go into a show having very little idea what we're going to talk about other than that they want to talk about whatever today's news is. And that used to be great when the news was limited. But honestly the news cycle has accelerated to the point where you just really don't know. The wonderful thing and what I think the blessing of that is, is that it forces you to stay in your lane. I try to be really careful about not talking about subjects that I don't feel like I have expertise in because obviously if people are listening to us, what they're seeking is the benefit of our expertise. They're perfectly capable of forming their own opinions.

And so something that I've really appreciated is that you're talking about statutes you know about, or the types of cases you know about, Jill's body of knowledge about Watergate is phenomenal. And I saw you last night on Lawrence, Jill drawing on that knowledge to explain events that were going on. So I'm never put off by a show that just says, we'll talk about whatever's going on when you hit.

Kimberly Atkins Stohr:

Yeah.

Jill Wine-Banks:

Yeah. I'd say it's maybe 50/50 as to whether you get a topic only they'll say we're talking about January 6th or whether they will provide you with details of particular articles that they want you to be familiar with. And I even had one recently where they sent me the actual introduction in advance saying, this is what the host is going to say. But a lot of times it is either nothing but a topic, it's whatever they feel like talking about. And sometimes as you say, you'll be on air and the news will change and you'll suddenly be asked something completely different. One time when I was actually in studio in New York and an indictment came down and they basically printed it, handed it. And I ended up staying on for almost three hours talking about what I was reading at the time. So you never know. And that's part of what's exciting about it. It means you have to stay completely alert and tuned into the news at all times.

Kimberly Atkins Stohr:

Yeah. Once I even left a hit and I was walking outside the studio and a producer ran down and got me because something else had happened and they wanted me to come back.

Jill Wine-Banks:

Wow. Okay. So let's move on to a question from anonymous in Flint, Michigan. And Barb, since you're from Michigan, we're going to ask you to look at this. And anonymous says I saw Ghislaine Maxwell got 20 years and R. Kelly got 30 for sex trafficking. Is Trevor Noah correct that it's because women earn two

thirds of what a man earns or is there a legal justification for the difference? And does this sentence or do these sentences, I guess give justice to the victims?

Barb McQuade:

I think the difference for the two sentences is not what Trevor Noah said. I think that although the charge is the same label, sex trafficking, when judges sentence defendants, they look at a number of different factors. And so in many ways it's really apples and oranges. They look at sentencing guidelines as a place to start. And then they also look at all kinds of things like the person, all the characteristics of the offense, the age of the victims, and there are a number of different aggravating and mitigating factors. And then once they calculate that correct guideline range, then they listen to the argument of the parties to decide whether they should go above or below that. So I think my takeaway is just, these are both very serious sentences for very serious crimes.

Jill Wine-Banks:

Great answer, Barb. And Joyce, let me ask you a question that Tracy sent in. And it's about Thomas's concurring opinion in Dobbs. Is it normal common practice to use written opinions to tee up reconsideration of other rulings as he did on contraception, same sex marriage and same sex sexual relationships?

Joyce Vance:

Yeah. You often see this sort of behavior in a concurrence or a dissent. It's a call in response. Thomas is signaling to the conservative faithful that the time has come to use the success in Dobbs to challenge these other rights. And it's a very interesting counterpoint to Brett Kavanaugh's concurrence where he says, "Absolutely not, no other rights are at stake here, don't even try." So I can't say that this is unusual. There is a very pointed conflict between the two concurrences. I think that there's no doubt that we'll see lawsuits challenging everything from contraception to same sex marriage. My state's attorney general in Alabama has now suggested that Dobbs is precedent that supports anti-trans legislation. Sky is the limit when it comes to eroding Americans' privacy interests.

Jill Wine-Banks:

Thank you for listening to #SistersInLaw with Barb McQuade, Kimberly Atkins Stohr, Joyce Vance and me, Jill Wine-Banks. You can send in your questions by email to sistersinlaw@politicon.com or tweet them for next week's show using #SistersInLaw. Go to politicon.com/merch to buy our pale blue tee or other goodies. And please support this week's sponsors, HelloFresh, Grove, Bambee and Calm. You can find their links in the show notes. Please support them as they really help make this show happen. To keep up with us every week, follow #SistersInLaw on Apple Podcasts or wherever you listen. And please give us a five star review. It really helps others to find the show. See you next week with another episode, #SistersInLaw.

Joyce Vance:

Did you guys see the close captioning while Cassidy Hutchinson was testifying and the total mishmash that it made of Pat Cipollone's name at one point it was Pat Abaloney and then I think it became Patsy Baloney. It was so funny. I was fixed on that while I was watching the hearing.

Jill Wine-Banks:

This transcript was exported on Jul 02, 2022 - view latest version [here](#).

I have to say, I didn't notice it during the hearing, but I saw your tweet about Patsy Baloney, and I laughed so hard and these days I could use a good laugh. So thank you, Joyce, for pointing out that error.

Joyce Vance:

I can't take any credit. There were people who had done screen captures, but it really was a much needed laugh.

Barb McQuade:

That's great. I'm going to go have joys in my vans.