

Jill:

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Welcome back to #SistersInLaw with Joyce Vance, Barb McQuade, Kimberly Atkins Stohr, and me, Jill Wine-Banks. Today we'll be updating you on all the January 6th developments, Trump's threat to sue CNN for saying his claims of voter fraud were baseless, even though of course they are, Alito's speech in Rome about Dobbs and religion, and as always, we look forward to answering your questions at the end of the show.

Before we get to the show though, I want to talk about one of my favorite things, Chicago hotdogs. We just made it into The New York Times. They said we were extraordinary. They had pictures of what a real Chicago hotdog looks like. Despite the fact Kim and Barb are from Detroit and tell me that theirs are good, I'm all for Chicago. But I want to hear about Detroit hotdogs, and then I'll tell you why the Chicago ones are better.

Kim:

Well, in Detroit, they're called Coney, first of all, and they are amazing. Unlike in Chicago where they put all kinds of vegetables and pickles and whatnot on them, there is an amazing Coney sauce, which is like a runny kind of chili on top of the Detroit dogs, plus fresh onion. Here's a point. I do not like raw onions ever except on a Detroit Coney, and they're perfect. They're perfect.

Barb:

And mustard, you've got to have a little bit of mustard, Kim.

Kim:

Yes, and a little stream of mustard, one squirt of mustard across the top, and it's really, really delightful. I love them.

Jill:

Well, we get celery salt. We get tomatoes. We get pickles. We get a hot pepper, too. And we get relish, bright green, beautiful relish and raw onions.

Kim:

What is [inaudible 00:02:24]?

Jill:

Never get-

Kim:

That's not a hot dog.

Jill:

Yes, it is. Hot dogs have to be Vienna hot dogs, which are made here in Chicago. Vienna hot dogs are by far the best. If you had a Vienna hot dog with your chili sauce, I think I would like that too-

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Kim:

I think I probably would too.

Jill:

... but it has to be a Vienna hot dog.

Kim:

Maybe that's where we can find compromise. What do you think, Joyce? Do you have an opinion in this?

Joyce:

I'm listening to y'all, and I'm just sort of in a state of shock, not really believing some of the tortured hot dogs I'm hearing. I will tell y'all, I like hot dogs, but not often. I have to be in the mood for one. But when I was pregnant with my first kid, I always really struggled with morning sickness in pregnancy, but with my first kid every morning predictably at 10:30 in the morning, I wanted to eat two hot dogs. It was just a weird pregnancy thing. The guy whose office was next door to me, bless his heart, Will Somerville, if you're listening, we used to run down to Gus's. Sometimes he would go without me. Two Gus's hot dogs, mustard, onions, a really good kosher dog, a really great fresh bun hit the spot. You guys, if you come down here, I'll take you to Gus's or to Sneaky Pete's, the other Birmingham legend for hot dogs.

Jill:

As part of our live shows, we're going to have to have a hot dog competition-

Kim:

I love it.

Jill:

... and taste the hot dogs in Chicago. I would say we have to go to Herm's Palace or Fluky's for that. Then we'll go to Detroit and have a Coney dog. Then we'll go to Birmingham and have whatever you call your hot dogs. What are they called?

Joyce:

Gus's.

Jill:

Gus's.

Joyce:

We just call them hot dogs. Hot dogs, it works for us. We don't put no stinking celery salt on our dogs here.

Kim:

I will-

Jill:

Do you put ketchup on? That's a no-no in Chicago.

Joyce:

No, absolutely not. No ketchup.

Jill:

What about-

Kim:

There we agree.

Jill:

No ketchup.

Kim:

There's no ketchup any of these dogs.

Joyce:

No ketchup at all.

Barb:

Can I tell you something else I bet we'll all agree on? I was recently in Seattle where they have something called the Seattle dog. The key ingredient in the Seattle dog is cream cheese.

Kim:

Ooh.

Barb:

I think I might make a note of that.

Joyce:

That's [inaudible 00:04:34].

Kim:

We love you Seattle-

Joyce:

That's a hard pass.

Kim:

... but, no, you're doing it wrong.

Jill:

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Well, I'm willing to give it a try, but I'm going to say that at the end, we're going to have a runoff between Detroit and Chicago.

Barb:

I'll try them all. Any city we go to, bring us your hotdogs. We'll try them all, and we will-

Kim:

Particularly our Detroit listeners, let us know, tweet us to let us know if we should go to Lafayette, American, or National.

Barb:

I'm an American fan, Kim. I know you're Lafayette.

Kim:

I like Lafayette.

Barb:

I like American because the physical restaurant is shaped like the bows of boats, one of those cool street corner-

Kim:

It is.

Barb:

... triangles.

Joyce:

I'm really getting excited.

Barb:

I like sit in the bow of the boat.

Joyce:

I want to [inaudible 00:05:16] all the hot dogs.

Kim:

It really is. [inaudible 00:05:16] is awesome.

Jill:

Chicagoans, I want to hear from you, too, about your favorite place. Then I will try them all before we get the SistersInLaw to Chicago.

Kim:

Barb, I've been stressed out this week. What do you do to calm down?

Barb:

Well, you know how it goes, Kim. Your day is filled with all those to-dos: laundry, email, errands, cooking dinn... hmm, placing your takeout order for dinner. When is there time to focus on what you need? With Calm, you can prioritize your most important to-do, which is taking time for yourself each day.

Joyce:

We're partnering with Calm, the number one mental wellness app to give you the tools that improve the way you feel. It's not quite as good as ordering takeout, but maybe it'll convince you that it's okay to do that. Reduce stress and anxiety through guided meditations, improve focus with curated music tracks, rest and recharge with Calm's imaginative sleep stories for children and for adults.

Barb:

There's even new daily movement sessions designed to relax your body and uplift your mind. If you go to calm.com/sisters, you'll get a special offer of 40% off a Calm premium subscription. New content is added every week. More than 100 million people around the world use Calm to take care of their mind. Calm is ready to help you stress less, sleep more, and live a happier, healthier life.

Joyce:

For listeners of the show, Calm is offering an exclusive offer of 40% off a Calm premium subscription at calm.com/sisters. Go to C-A-L-M.com/sisters for 40% off unlimited access to Calm's entire library. That's calm.com/sisters. Look for the link in our show notes.

Barb:

Well, the Department of Justice criminal investigation into the January 6th attack appears to be heating up. We saw reports this week that a number of people are cooperating and that DOJ is gearing up for a legal showdown over privilege. Kim, first let me ask you about some of the new witnesses that reports say DOJ is talking to and why those particular people matter.

Kim:

I found this really interesting, and it really seems to put me on the bones of that Washington Post report this week that the DOJ is specifically focusing on both this phony elector scheme that Trump was a part of as well as what happened at the Capitol on January 6th itself in trying to stop the certification. The two most interesting people who have talked to the DOJ to the grand jury so far, to me, are Marc Short and Greg Jacob. They are close aides of former Vice President Mike Pence, and, notably, they were in the room during a January 4th meeting in the Oval Office where Donald Trump allegedly was pressuring Pence to get on board this scheme to refuse to certify the election results on January 6th based on this whole cockamamie scheme with phony electors.

Barb:

Cockamamie, that's a legal term, right?

Kim:

That is. That is a very technical term. We know after that Pence went and called conservative and esteemed retired judge, Mike Luttig, and said, "Is this something I could do?" and Luttig said, "Absolutely not." We saw Luttig testify before the January 6th Committee. So I think that those two are very important witnesses since they were in the room where it happened, with apologies to Hamilton.

There's also someone named Ken Klukowski, who was hired at the DOJ in December of 2020, so after the election, after Donald Trump knew that he lost. He was a drafter of those letters from Jeffrey Clark to state legislatures trying to get them to get on this false elector scheme, too. During the January 6th hearing, Liz Cheney really highlighted him as an important witness in that. He's also talking to the DOJ, so that's important. There's also, of course, Cassidy Hutchinson, who gave a riveting testimony before the January 6th Committee. She has talked to DOJ investigators, too, as has Ali Alexander, who, if you recall, was one of the planners of the Stop the Steal rally. So this really shows, to me, that the DOJ investigation is certainly in a high gear and getting closer and closer to Trump.

Barb:

Those are all really interesting steps. So all those haters out there who said, "Merrick Garland, do your job," just shut up. He's been doing it. They've been working on it for months. They got communications records months ago, and we're learning all about that. Joyce, let me ask you, you wrote an interesting piece this week for MSNBC Daily about some ideas you had for who else DOJ should question. Can you tell us about that?

Joyce:

I love the points Kim made because there are all of these really valuable witnesses out there that DOJ needs to talk to, and it's almost overwhelming. I think at this point the clock is ticking. You don't just indict and magically go to trial. There's a lot of time involved between indictment and trial. Then if there's a conviction, there's an appeal that follows. My sort of nightmare, I think, scenario is there's a conviction against Trump, and then Trump wins again, and the Trump Justice Department declines to defend that conviction on appeal. So you got to get down to business. The question is, how do you do it efficiently?

It seems to me that one possible path for DOJ to take... We have to remember that DOJ investigates conduct. It investigates crime. It doesn't target individuals. So one logical path here is to say, okay, we've got multiple conspiracies. We know that we've got this whole situation with perpetuation of the Big Lie. We've got the fake electors push. We've got the January 6th insurrection itself. The common thread between all of those conspiracies is the bad lawyers who managed to surround Trump at the end of the administration, so people like Giuliani, who had been there forever, but the queen of the kraken, Sidney Powell, Jeff Clark at DOJ, John Eastman, and even some of these folks whose names maybe aren't quite as familiar, but Boris Epshteyn, who seem to be in constant communication with Trump and some of the other lawyers, people like Jenna Ellis, involved in pursuing the Big Lie. Some of these folks, these bad lawyers may have criminal exposure of their own, so working cases on them and then flipping them, turning them into cooperators could be a very efficient way for DOJ to move up the chain.

Of course, there are White House lawyers in the mix too. We all watched this very painful Pat Cipollone videotaped testimony where he would be asked a question and the question would say, "Hey, Pat. Can you tell us from Trump's response whether or not he knew he'd lost the election?" Cipollone would turn and look to his lawyer and the lawyer would just give him that death glare, like, "No, you can't answer, Pat," and he would plead privilege. It's time for DOJ to send him a grand jury subpoena, litigate, resolve the privilege issues. I think executive privilege can be overcome there. It's not absolute, and it falls in the face of a great need to obtain information. If that's not applicable here, it's not

applicable anywhere. So I think DOJ can get the lawyers' testimony and then use that to resolve the issue of how far up does criminal culpability for these events go.

Barb:

Well, let me ask Jill about that executive privilege that you raised there. Jill knows a thing or two about executive privilege having worked through Watergate. Jill, do you expect these White House insiders, not just the lawyers but others, to assert executive privilege? Do you think they'll be successful in using it to avoid testifying either at grand jury or a trial?

Jill:

I not only expect, I've already seen them doing it, so, yes, privilege will be asserted, and, no, I do not expect them to be successful. I think Joyce said exactly the truth, which is that the privilege is not absolute. It falls when there is a great need for it. Criminal investigations are one of the things that the Supreme Court has identified in the Watergate case as being something that will make the privilege fall.

Here you have even more complicated things. Number one, to the extent that we're talking about executive privilege, it's the current incumbent, the president, Joe Biden, who can assert it, and he has declined to do that in recognition of the importance to the American public of the information that is being sought. There has never been a recognition that a former president could assert it. But even if a former president could, there's the crime-fraud exception, which means that if the conversation is not about policies, is not about politics, is not about the job of the president, but about committing crimes, there is no privilege that attaches to that conversation and that if it did, under *US v. Nixon*, it would fall to the Department of Justice.

Something people don't remember is that the Impeachment Committee and the Senate investigating committee, the Select Committee, did not get the tapes. We got the tapes because it fell to a criminal investigation. I also want to point out in timing, everybody's, "Oh, it'll take too long. It'll take too long." We indicted on March 1st after having obtained, without going to the Supreme Court, the first batch of tapes where we had subpoenaed nine and ended up with six plus one with a 18 and a half minute gap. We indicted on March 1st. On April 14th, we subpoenaed 64 tapes for trial because we had more information to identify tapes that would fall outside executive privilege, outside of attorney-client privilege and within the crime-fraud exception. On July 24th, I think the Supreme Court decided that case. So we had gone all the way up through the courts to the Supreme Court. Two weeks later, less than two weeks later, Richard Nixon resigned based on the tapes that we obtained from that Supreme Court decision. So that's less than three months. It isn't that long a time.

The Department of Justice can and should be challenging any claims of privilege immediately. It should be a easy and quick decision unless the Supreme Court wants to be known as the most political, which it already is, but even more political than it already is known, and it should decide very quickly that *US v. Nixon* means they get the tapes and that that's the end of that or it gets the testimony or the documents.

Barb:

Kim, I want to ask you a question as a reporter about some of the things we're learning. I think the only reason we know that Pence's aides, Marc Short and Greg Jacob, were testifying in the grand jury is because the courthouse was full of reporters last week waiting for the verdict in the Bannon trial. That's how they found out. They saw them coming and going. Back when I was prosecuting cases, and I know Joyce has shared that the same was true with her, it used to make us crazy that reporters would hang

out around the grand jury room. They'd be all lurking, like, "Oh, hey. Just walking down the hallway." "What are you doing here? We know what you're doing here." So we would go to all kinds of ends of the Earth to try to sneak witnesses in so that we could keep them out of the public eye. What's your view about what the ethics of that? I don't know. Just what are your thoughts on those efforts?

Kim:

Well, listen, courthouses are public places. As journalists, if you report on what you see, then I think that that's on the table. As long as they're not using any sort of subterfuge or breaking any laws, that's certainly a way. Listen, I've spent a lot of time as a reporter staking out people on their streets, in buildings knowing where the secret entrances and exits are trying to track down elected officials and figure out other information. So in that case, I think that's always been how it's done. I'm sure it frustrates prosecutors. It frustrated you.

Barb:

Well, it does.

Kim:

If you would just tell us what you're doing, then we wouldn't have to do that, but y'all don't do that. So this is what we must do.

Barb:

All right, fair enough. We've been talking about the DOJ investigation. How about the January 6th Committee's investigation? They're in a little bit of a hiatus right now from the public show, but no doubt they're still working behind the scenes, getting things ready for these promised hearings in September. Joyce, who are some of the witnesses that the committee is talking to and why you think they're important for upcoming hearings?

Joyce:

It's really a flood not a trickle at this point. Everybody who's anybody wants to testify in front of the January 6th Committee and not get left out at this point. As a prosecutor, you could always sort of sense that minute in an investigation where the momentum turned. It looks like that's what's happening here, and everybody is beating a path to the committee's doorstep.

Something that's really interesting, Barb, has been this reporting that Mick Mulvaney, who, of course, was the White House chief of staff before Mark Meadows but who left before January 6th and was off as a special envoy in Ireland, that he has now testified and that Mike Pompeo is scheduled, is in conversations to testify. What most of the reporting centers around is the fact that these witnesses and other members of the cabinet who have already testified, like Labor Secretary Scalia and others, could talk about whether members of the cabinet formally considered using the 25th Amendment to remove Trump from office after January 6th. I think the committee would like to have that testimony to present to the country to complete this picture of a president who did nothing for 187 minutes, and then how his own people, his own administration reacted to that, not just the employees who he had in the White House, but also the political appointees in the cabinet.

I'm focused on this for an additional reason. Y'all know that I have a bugaboo about this. I'm very interested in what happened at the Department of Defense. Because after the election, as with the DOJ employee that Kim talked about earlier, after Trump loses, he stacks the deck over at DOD. He fires

the secretary and brings on board Chris Miller as the new acting secretary of Defense. There are other high-level appointees who come into play, including Kash Patel, a Trump loyalist who Miller brings in as his chief of staff. It's been reported that Secretary Pompeo had conversations with General Milley expressing concern that Trump might try to wrongly use the military to prevent the transfer of power. I'm hoping that someone, whether it's the committee or the Justice Department, is focusing on that. It continues to be an unanswered question.

I always remember that piece in the Washington Post on January 3rd where every living secretary of Defense wrote jointly to declare that the election was over, that Trump had lost, and they warned against the use of the military to interfere with the transfer of power. They didn't write that piece just for kicks. We need to know what was going on there. I hope calling these witnesses before the committee signifies that we're going to find out.

Barb:

I think that could be very interesting, especially when you've got Mike Flynn there in the lair talking about seizing voting machines and using the military. So I think that is really interesting.

Jill:

Barb, I want to add that in the show notes I think I will ask that we put the link to the Chris Miller interview on iGen Politics because everybody should know who the secretary of Defense was at that time. Now, I understand he has testified that he was never asked to call out the Guard or to dispatch troops, which is probably true, but we also asked him about what his conduct was on that day about his responsibilities. It's a quite interesting interview of Chris Miller.

Joyce:

Jill, is he the one that walked out on you?

Jill:

Well, he almost did. He sort of went berserk. We've had that twice now. We had Liz Smith going crazy with joy at being on the New York Times Bestseller List. He was just so incensed, but he calmed down and he stayed. He talked to us. So it was interesting. Of course, his almost walking off is quite interesting in itself because this was the secretary of Defense. Having worked in the Pentagon, I know the issues that are involved. You don't want someone who, when asked a question by an 18-year-old, Victor Shi, is ready to walk off... I'm sorry. If you can't handle an 18-year-old's questions, you can't be the secretary of Defense.

Barb:

You can't handle the truth.

Jill:

Great movie, great.

Barb:

In the September hearings, Jill, I might be looking for a little clip from iGen Politics. That might be some pretty good stuff.

Jill:

I'm going to send it to them, yes.

Joyce:

Good idea.

Barb:

Well, let me finish this topic by just asking about these missing text messages. Last time we talked about the missing Secret Service text messages. This time it's DHS leadership, the former acting secretary, Chad Wolf, and his deputy, Ken Cuccinelli. Now their text messages are missing. Lest we forget, at one of the January 6th hearings, we learned that Cuccinelli was kind of in the midst of all of this. They showed an email where he was suggesting that Ken Klukowski, that late-to-the-game Justice Department employee, briefed Pence along with Eastman about the fake electors. So Cuccinelli is kind of in the mix, and now his messages are missing. Interesting. We already have the missing Secret Service messages. We have the missing White House call records and daily activity logs. Jill, is this going to be another case like Watergate where the cover up becomes part of the crime?

Jill:

Yes is the short answer. First of all, I think Joyce tweeted that she's seeing a pattern here, and we certainly are seeing a pattern. This is more than just a coverup because the Federal Records Act requires that you keep these documents. It is incomprehensible and unacceptable and illegal. That these things were deleted as part of a reset of telephones? No. You save the messages first because that's what the law requires. It's not a coincidence that all of these things are missing.

In case our audience doesn't realize it, it is very important evidence to have even the daily call records, to have the daily diary, the president's daily diary of all his movements. It was an essential tool for Watergate to figure out who we needed to even talk to, because one way who to talk to is who talked to the president. So, yes, I would say the coverup may be worse than... Well, no, in this case, the crime is worse than the coverup, sorry. Yeah, yeah, nothing could be worse than this crime. But it is another crime. Even the Federal Records Act is a violation.

By the way, there is one section in the Federal Records Act, the penalty for which violating it is you can no longer serve in any office. You are barred from office just as you would be under the Insurrection 2383 criminal law. So for me, I have always believed that preventing Donald Trump from having an opportunity to do more damage to our democracy is keeping him from ever running for office again and that that's more important than sending him to jail. Frankly, even if he's convicted as a former president, I cannot imagine him being put in a jail. The security would be horrendous and impossible. So he's probably not going to jail. He might be in home confinement. If all these civil lawsuits are successful, his home may not be Mar-a-Lago. He could lose everything with all of the police officers who are suing for their damages and death, plus many other lawsuits. So it's important to think about having a law that the penalty for which is barring him from office.

Barb:

Joyce, tell us about Athena Club.

Joyce:

Well, Barb, you have to accept that it's magic, and the magic starts with the Athena Club razor blades. They're surrounded by a water-activated serum with shea butter and hyaluronic acid so you get a silky smooth shave that actually leaves skin soft and hydrated, not strip dry. Even you, Barb, will want to talk about shaving when you're using Athena Club blades. The blades are even spaced out to let hair and shaving cream pass through easily so you don't have to take a ton of passes over your skin to remove hair. Fewer passes means less irritation to your skin, cutting down on razor burn and ingrown hairs. The razor kit is only \$9.00, and there's free shipping. It comes with two blade cartridges, a magnetic hook for shower storage, and your choice of handle colors. I've got a blue one, and I like it a lot. There are a lot of colors to choose from, from chic black and white to neon and pastel.

Jill:

Joyce, I never hardly ever disagree with you, but there is no way that Barb is going to ever be comfortable talking about shaving, sorry. But for our listeners, you'll never have to worry about dull blades because you'll get refills sent on your schedule. Just choose how often you need fresh blades and Athena Club will send them automatically with free shipping so you always have the best blades for the best shave. I would suggest getting their Cloud Shave Foam, too. It's insanely thick and actually stays on while you shave so you don't have to constantly reapply. Plus, it leaves your skin nourished and moisturized. It is truly amazing, and it smells good.

Joyce:

Why deal with razor burn and wasteful disposable razors when you could be getting the best shave of your life with the Athena Club Razor Kit. Get 20% off your first order at athenaclub.com with promo code "sisters." That's A-T-H-E-N-A-C-L-U-B.com with promo code "sisters" for 20% off, or look for the link in our show notes.

Kim:

Donald Trump is using a familiar tactic in his ongoing refusal to accept the results of the 2020 election. He's threatening a lawsuit. This time his target is CNN. His lawyers sent the network a notice of intent to sue for defamation for calling his baseless election fraud claims baseless. The lawyers claim Trump's big lie isn't a big lie because he, quote, "Subjectively believes that the results of the 2020 presidential election turned on fraudulent voting activity in several key states," end quote. LOL. Jill, tell us, is this a legitimate beef, or is Trump just using his threat to belittle the media like he likes to do?

Jill:

No. He's using his threat to subjugate his followers, to make them believe that there's something going on, because I don't think that CNN is in the slightest bit frightened by this ridiculous lawsuit. I think your description of it as calling his baseless election fraud claims baseless kind of says it all. I mean, truth is still a defense, and his claims were baseless. The January 6th Committee presented ample evidence that he knew that they were baseless, that there was no fraud that would affect the outcome of the election. So, no, there can be no lawsuit here because what they said is true. Frankly, I think CNN is going like, "Okay, bring it on. We can't wait to defend this one." I would like to be on the defense of that case because it will be so juicy to prove that he is a liar, and he's threatening to sue anyone who calls him a liar. So Donald Trump, go ahead. I'm ready. Sue me. You are a liar.

Joyce:

Discovery is going to be lit, right?

Kim:

Right, right. We really should link this notice of intent in the show notes because it's literally just hundreds of pages of him... or over a hundred pages of being mad-

Jill:

282 pages.

Kim:

Oh, it's 200, right. I knew it was... You can tell I didn't read the whole thing... of just being angry at being called a liar. Like, "How dare you call me a liar?" It's like, "Well?" "How dare you call it the Big Lie?"

Jill:

Whoever said a subjective belief is... I could subjectively be delusional, but I can't say those things.

Barb:

It's the Costanza defense. We've talked about this before, George Costanza, "If you believe it's not a lie."

Kim:

Right.

Jill:

But if you believe it, then you can't be president again because you are not competent to be president.

Barb:

William Barr said delusional.

Kim:

Well, Joyce, the defamation standard set out in *New York Times v. Sullivan* was, in part, to stop powerful public figures and public officials from bullying the press into not covering them robustly. But the Supreme Court has been dropping some hints that it might be interested in changing that standard. Help us understand that.

Joyce:

This is exactly the right question to ask to pop this case into focus because traditionally it has been really hard for public figures like Trump to win defamation cases. The reason is the legal standard. They have to prove that the person that they claim defamed them acted with what's called actual malice. We've talked about that before on the podcast. It means that the statements were made with actual knowledge that they were false or with reckless disregard for their falsity.

The rule comes from a case called *New York Times v. Sullivan*. It's an Alabama case like all the good defamation and libel cases. It's been around for a long time. But increasingly we have a Supreme Court that's maybe not as respectful of precedent as other courts have been. Still, I don't think that this particular precedent is in imminent danger. Both Justice Thomas and Justice Gorsuch have suggested that the court should reconsider the *New York Times v. Sullivan* rule. But at this point they haven't had enough votes to get the court to take a case on certiorari. The question we have to flag, though, is

whether they might get the votes, whether this could become the case. They'd need at least two more votes to get the court to hear the case. They'd need five votes to reverse the rule in *New York Times v. Sullivan*.

I'll share something interesting. Trump's lawyer in this case is a guy named Jim Trusty who used to work at the Justice Department, a very respected prosecutor. Barb, I don't know if you ever worked with Trusty. Yeah, good people, worked on the criminal side of the house mostly. But the fact that he's decided to pick up this case suggests that there are folks who believe it may have some viability. I hope not. I bet we'll be talking about it more, hopefully, because Jill is right and the discovery phase of the case is just hilariously funny.

Kim:

That is really interesting to me because, first of all, I don't think that this is the test case because I think even if Trump were not a public official, that he would lose this case. But I worry that there might be another case that the Supreme Court would take up because there has been this animus. In this case, you have Clarence Thomas saying he wants to revisit the standard. Well, it was only a couple years ago that Brett Kavanaugh said, "Hey, by the way, I don't think that *Heller* is being interpreted correctly," the case that gave an individual a right to possess a handgun, and you knew that there was at least one person on the court who wanted to see that extended beyond the home. A couple years later, lo and behold, this is where we are. So this does worry me. Barb, is there any way to protect this standard and bolster First Amendment protections while we wait for the Supreme Court or to get ahead of the Supreme Court before they toss out the *Sullivan* standard?

Barb:

The Supreme Court and the Constitution are only one place where we get legal protections. Two professors wrote a really interesting piece about this in the Lawfare blog, which is a great blog about legal issues. Their names are Jeff Kosseff and Matthew Schafer. They talked about how states could actually take some effort and Congress could make some effort to protect that actual malice standard.

First, let me just explain for our listeners who aren't lawyers. The Constitution really just works as a backstop. It tells people which rights cannot be abridged, or can only be restricted if they meet certain very high legal standards. So the right to free speech requires, currently, this actual malice standard that Joyce was just describing, that is that the publisher knew that the statement was false or acted with reckless disregard as to whether it was false. But if there's some concern that constitutional standard could be eroded, just in the same way we saw *Roe v. Wade*, the protection for rights to abortion erased, then legislation can actually protect it because legislation can never violate a provision of the Constitution, but it can always provide more protection than the Constitution as long as it doesn't violate some other provision of the Constitution. That's what we're seeing in the abortion wars, too, is states taking up these protections.

One thing we could see is state legislatures could enact laws that require actual malice before someone can bring and prevail on a defamation case. That would be done on a state-by-state basis within state legislatures. State Supreme Courts could also decide cases in their own cases that their own state Constitution requires the actual malice standard. Now, all the state Constitutions are different. Some do, and some don't protect free speech. But they could decide that they want to use the... Maybe some already do. They could apply that within their states. The Supreme Court cannot disturb that because state Supreme Courts get the final say on interpreting their own state Constitutions.

Then finally there could even be a role for Congress at the federal level. Even though most of these defamation cases are brought in state courts under state law, sometimes they end up getting filed in federal court or removed to federal court from state court when they are accompanied by federal claims in the same lawsuit. If there's a mix, they could be brought together in federal court. So Congress could pass a procedural federal statute that says, "If you want to succeed in a defamation claim in federal court, you have to meet this actual malice standard." So there are a lot of avenues. They require some tricky politics, and you could also end up with a patchwork of different standards across the country, much as we are seeing in the abortion context. If there's one thing you can predict with this Supreme Court and a decision like this, it would be chaos, the same kind of chaos we're seeing right now in the reproductive rights arena.

Kim:

Well, let's hope that our lawmakers are listening and paying attention to this.

Joyce:

Jill, now that I'm back from vacation and heading into the fall, I'm really trying to focus on good nutrition. Do you have any tips?

Jill:

I certainly do. I like to make smoothies during the day, and I have been using something called Ora Organic. It's got products that are called So Lean & So Clean. It's a clean, plant-based protein powder made from organic ingredients. The brand is Ora. This protein powder is great after a workout, or if, like me, you love making protein-packed smoothies and snacks, Ora is a one-stop shop for clean, plant-based nutrition that works. I find protein really helps me. It lasts longer in terms of energy for me. What about you, Kim?

Kim:

Yeah, I love it. I have a smoothie every morning with fruit and yogurt and healthy ingredients and a scoop of the So Clean. It really is a great way to start the day. It has the cleanest ingredients, which means Ora is vegan with nothing artificial, all from whole food ingredients, sourced from USDA organic certified farms. Ora is high in protein with 21 grams of protein per serving and low carb with between one and four grams of carbs depending on the flavor you choose.

Jill:

Unlike many companies, Ora Organic has a strict commitment to produce only plant-based, cruelty-free products. They believe plants do it better for your health and the planet. You have nothing to lose. Try Ora's products now. If you're not happy for any reason within 60 days, get a full refund, no questions asked.

Kim:

Get 30% off your first subscription when you text "sisters," S-I-S-T-E-R-S to 64000. Text "sisters" to 64000 and get 30% off your first subscription. That's text "sisters" to 64000 or 64000. Message and data rates apply. Terms available at [oraorganic/terms](https://oraorganic.com/terms), or look for the link in our show notes.

Joyce:

Justice Alito went to Rome this month for what was billed as a Religious Liberty Summit hosted by Notre Dame University. It was widely attended by conservative American law professors, and Justice Alito gave the closing keynote address. I'm not sure why a bunch of American conservatives had to go to Italy for this. It sounds like a little bit of a boondoggle to me. In fact, the justice noted that he took his wife along and that the view from their hotel window was of the Forum, so it sounds like a nice little summer vacation trip. But maybe he felt like he had to go offsite to make the kind of comments he had in mind. Let's listen to some of them.

Justice Alito:

Over the last few weeks since I had the honor this term of writing, I think, the only Supreme Court decision in the history of that institution that has been lambasted by a whole string of foreign leaders who felt perfectly fine commenting on American law. One of these was former Prime Minister Boris Johnson, but he paid the price.

Joyce:

Barb, what do you think about these comments? Are they appropriate for a Supreme Court justice?

Barb:

Well, I am in the camp that Supreme Court justices and judges should speak only through their opinions. I know that it is common for Supreme Court justices to spend their summers kind of going on tour. There are lots of groups that will buy tickets and show up and listen to what they have to say. But it really, I think, undermines the reputation of the court as an independent and apolitical branch of government when they come in and say these things. Some justices are out there and they talk about how the court works. I think there are a lot of things you can talk about that can bolster public trust in the courts, "Here's how we do our work. Here's how we receive cases," that sort of thing. That understanding, I think, is fine. But when you start talking about issues like religious freedom, as Justice Alito did here, I think it's very dangerous.

Then also if you want to be a standup comedian, that's fine, but you should not also be a justice on the Supreme Court. He mocked and ridiculed foreign leaders who criticized the Dobbs opinion. "No, thanks. We'll listen to what Americans have to say." He made fun of Boris Johnson about how he paid the price, suggesting that his resignation was somehow related to his criticism of Dobbs. I don't think so. Justin Trudeau, Prince Harry, really mocking, "How dare they criticize my opinion." I thought that that was really inappropriate. When you say this sort of thing, you're going to alienate a large portion of our country, and it harms the reputation of the court.

I think if you want to be a writer or speaker or comedian or whatever, go for it, but maybe serving at the same time as judge or justice is not the job for you. I don't think they get paid a fee for showing up for these speaking engagements. They just get their expenses paid. But when your expenses are a trip to Rome with a view of the Forum, that frees up a lot of other dollars to pay for other things. So I think they are getting compensated for this in a way that I just think is kind of a bad look.

Kim:

Also if you're going to be a comedian, be funny.

Joyce:

Ooh, burn. Barb, I think you're dead on the money. I always remember that my father-in-law, who was just an 11th Circuit judge not a Supreme Court justice, was always super careful when he weighed these kinds of opportunities. Ultimately, if he traveled, it was almost always either for government business or on his own nickel because he would always say that he was worried about how it might look to people if a judge lets somebody else pay for his travel. That seems like a really good standard to me for judges to use.

This speech that Justice Alito gave, it lasted about 40 minutes. We listened to it so that y'all don't have to. It was largely focused on what Alito characterized as American progress in obtaining and guaranteeing religious freedom. He talked about how fragile that right was referencing early Christians who were martyred in Rome, but he also talked about some more modern examples. It included, for instance, Jews and Hindus. Alito said that the biggest challenge that people who believe in religious freedom face is that there are an increasing number of unbelievers, and he said it's hard to convince them to protect religious freedom. He expressed a lot of concern about what he called a growing hostility to religion, and he attributed that to people with quote, "a new agenda." Jill, does this assessment square with what the First Amendment is actually designed to protect?

Jill:

No, it does not. Even his definition of religious freedom doesn't coincide with what I think the First Amendment means. The Constitution prohibits the establishment of religion, and I think what he's urging is the establishment of religion. He's framing it in terms of freedom of religion, but, by his definition, he's denying me my freedom of religion and imposing his religious views on me. That's what the court has... That's, in my view, what they did in Dobbs. I think it's really important that you pay attention to what he's saying and what the recent decisions of the court have been. Recent court rulings suggest, for instance, that you can protect the cake baker at the expense of the gay couple. You can protect those who want to go to church during a pandemic without regard for people they may infect.

I think his whole speech... I mean, listening is painful to even clips of it because it ignores, to me, the provisions and the history of the Constitution, the history of our religious freedom both in Europe and in America. To me, it shows that he is the one with an agenda, and it is to impose the Catholic religion on me and to deny me my religious freedom. I think there's a lot to be discussed here. I certainly agree with Barb that this is not the right forum for him to be expressing it. It's one thing for him to write it in an opinion. It's another thing for him to be, well, gallivanting to Rome with a beautiful view and talking to people who are going to then proselytize. It's almost as if he's an evangelical, religious person now. So, no, I think it's not what the First Amendment means.

Joyce:

Kim, did you have something to add?

Kim:

I was just, let the church say "Amen."

Joyce:

I was watching you. But it is true. It goes back to what Barb said. What's disturbing here is it's one thing for him to write a legal opinion. It's another thing to hear his personal views and to hear in those personal views and agenda. I thought parts of this speech were really interesting. He sort of rehearsed the European tradition of taking steps to guarantee religious freedom. He talked about efforts that were

made in our own country. I thought that that religious discussion through history was very interesting. But there seemed to be very little doubt that he had a more precise religious agenda.

Kim, there was one line in this speech that really struck me. I suspect it struck you as well. Justice Alito said, "Religious liberty is under attack because it is dangerous to those who want to hold complete power." I thought, "Yes, amen. He understands." But he seemed to mean that in a very different sense than the way that I would mean it. Do you think he said the quiet part out loud here?

Kim:

Yeah. He was speaking very loudly with a megaphone. The concerning part of this is that this isn't the first time that Justice Alito has made comments like this. It's gobsmacking that he's on a world tour doing it now. He frequently speaks before groups like the Federalist Society and has been talking for years just lamenting this attack, as he sees it, on religious freedom and the ability to exercise the right of religious expression in America.

Point one, that's absolutely dumbfounding because if you look at this US Supreme Court, not just during this very conservative era with the 6-3 court, but even before that, religious expression claims always won, always won. Perhaps the only right that has greater protection now than the right of religious expression is the Second Amendment right to have guns. The Supreme Court always has very strongly protected the right to religion. So just the premise of this, that it's under attack, is just plainly false, and other courts have protected it, too. That's plainly false.

What he is talking about with this "new agenda," put that in air quotes, this new agenda being a threat to religious freedom is what he has lamented for a long time. It's basically the ability of people who say, based on their religion, and we're usually talking about white, conservative, evangelical Christian folks in that sphere, we're not talking about all religions, but for people in those religions who want to say, "Well, I think that marriage should be between a man and a woman," that if they speak this out loud and there is any consequence to that or they don't get their way, that constitutes religious discrimination, which is a) ridiculous.

And b) what it does is it relegates a host of other rights to second-class status under the very well-protected right to religious expression and does it in a way that I do not believe that the Framers intended. They didn't intend to keep the government completely separate from religion, but it certainly intended to keep from the kind of government sanctioned religion that existed in England and one of the reasons that they broke away.

That's not what Alito is talking about here. He was talking about how fragile this right is. To me, when you were talking about that, I jotted down a few rights, constitutional rights I think actually are in a fragile state. One is the right of liberty, which is stated in the Constitution. The other is a lot of civil rights that would fall to the wayside if Alito's view carries its way. Certainly the right to marriage is extremely fragile, certainly under this view, and just about every equality right that exists. Because in this country, the history of this country is that those rights, the protection of those rights are very, very new. They're very fresh. But discrimination in the name of religion against all of those things goes back to the [inaudible 00:52:57]. My fear is that that's what Alito wants to bring back.

I am a religious person. I am a Christian. I want the ability to be able to practice my religion as I see fit, and I think that is a very important constitutional right. But I think that all these other rights, too, need to get just as equal protection. Then it's the job of judges to figure out how we protect all those rights at the same time so that everyone respects each other's rights. You don't have to agree with it, you don't have to subscribe to it, but you need to respect it. That's not what Alito seems to want here.

Barb:

I just want to say something, too. The point Kim's making is such a good one. As a Christian, I'm a Christian too, I want to be an ally on this because I think so often people think that it's all about the substance. It's all about process, isn't it, and it's all about the rights, like the coach who prays at the 50 yard line. I'm a practicing Christian, but I just don't think we should be imposing the substance of our religion on everybody else. The right to reproductive choice, prayer in school, all of these things are so important to our founding tradition of religious freedom that when you impose one religion on others, it is just completely antithetical to that. So as a Christian ally, I want to stand with all others who have different religious faith or no religious faith, which is also protected under our Constitution.

Jill:

But even within the Christian faith, there are many different social views. I think his intent is to impose his particular Catholic views on all religions. He is failing in the First Amendment itself in not balancing the Establishment Clause with the Freedom Clause. We have to avoid establishing a state religion, but we also have to balance that with the religious freedom of every American to worship in the way they want to, or to be an atheist or an agnostic. That is part of why we are America. That's part of why we were founded. If you don't balance those out, that is really getting at... Remember, this is the First Amendment, which means it's one that was really on everybody's minds immediately. He is ignoring that balancing.

Joyce:

That was something that really disturbed me in this speech. Although he was careful to include religions that weren't Christian, like Jews, in his list of people who had been oppressed, he never, never spoke about the discrimination that Muslims experience. In fact, they were the bad guys in a couple of his stories, and I found that to be very disturbing.

Beyond that, Barb makes a good point that I think we should close this one with, which is the rights of people who do not have a religious faith. This was driven home to me... I had the honor during the Obama administration of hosting one of the six religious round tables that they held nationwide. Vinita Gupta, who was then the head of the Civil Rights Division, came down. We did this jointly. Although our focus was on religious discrimination and discrimination in the workplace, we had the great good fortune to have some folks who represented communities of non-believers sitting at the table.

They made a powerful point that had always stayed with me because our conversation was centered on things like, "How do Jews react when you're at work and somebody wants to pray over the lunch meal in Jesus's name? It's very uncomfortable. What should you do?" These folks made the point that they represented the 20% of Americans who do not have religious faith and do not believe in God. They talked about how oppressive the overwhelming Judeo-Christian ethic was for people who don't believe, whose rights are and should be protected by the First Amendment. So I think we can all be more sensitive here. None of us should take the kind of views that Justice Alito took because that doesn't express the First Amendment. We're going to have a lot of work to do in this area as a country.

Jill:

Kim, I bet you have lots of need for new bedroom furniture with your stepchildren coming back from college and stuff. Have you looked at Thuma?

Kim:

I have been looking at Thuma, and I've been really impressed with what I've seen, because our bedroom, too, could use a refresh. We now spend so much time in our homes. We think a lot more about being comfortable in our homes. If your bedroom could use a refresh too, now is the perfect time to elevate the most important room in your home with Thuma. Thuma practices an intentional "less is more design" philosophy for the bedroom. With clean lines, subtle curves, and lifestyle enhancing details, Thuma proves that simplicity is the truest form of sophistication.

Barb:

Made for how you live, The Bed by Thuma is back with a lifetime warranty. It ships right to your door in three easy-to-maneuver boxes, which is key if you've ever tried to move a large piece of furniture that doesn't fit through a doorway. Believe me, I know. Three easy-to-maneuver boxes sounds like a brilliant idea. It takes about five-ish minutes to assemble with no tools required. You can easily build it yourself. Along with The Bed, Thuma offers other bedroom essentials to elevate bedtime. The nightstand, the side table, and the tray are perfect compliments to The Bed. Thuma works with One Tree Planted to plant one tree for every bed and nightstand sold, and all of their essentials are GREENGUARD Gold certified.

Kim:

Create that feeling of checking into your favorite boutique hotel suite but right in your own home with The Bed by Thuma. Now go to thuma.co/sisters to receive a \$25 credit toward your purchase of The Bed, plus free shipping in the continental US. Go to thuma.co/sisters. That's T-H-U-M-A.co/sisters for a \$25 credit, or look for the link in our show notes.

Barb:

All this talk about The Bed makes me want to take The Nap.

Jill:

Now it's time for one of our favorite parts of the show, which is listener questions. We always learn a lot from reading your questions. If you haven't sent one in and want to, you can send them to us at sistersinlaw@politicon.com or tweet using #SistersInLaw. Then if we don't get to your question during the show, keep an eye on our Twitter feeds throughout the week because we sometimes answer other questions that have been asked in that way. Today we had a lot of really good questions. Let me go to you, Joyce, with the first one from Ed. He wants to know, "What does it mean that a judge ordered the disqualification of the district attorney in Fulton County, Fani Willis, from handling the case against one of the fake electors because she had had a fundraising party for his opponent?"

Joyce:

Judge McBurney in Georgia has now disqualified Willis from proceeding against Senator Jones who's running for lieutenant governor in Georgia. The judge says she can ask other witnesses about Jones, she can gather information, but she can't bring charges against him. That doesn't mean he gets a pass though. It's now up to the Prosecuting Attorney's Council of Georgia. This is a nonpartisan group of Georgia district attorneys that essentially works as sort of a prosecution services function for district attorneys in Georgia. The head of that group now gets to appoint a new district attorney to replace Willis.

That's not without a little bit of peril for this case. Presumably someone will be appointed who will have the best interests of the case in moving forward. But we know that elected district attorneys can sometimes be susceptible to political influence. That's precisely the reason that Willis has been disqualified from proceeding against Jones because of the appearance of political impropriety there. So you could imagine someone who was appointed to handle the case involving Jones who was perhaps hostile to prosecution of these folks could do things that might impede the remainder of her investigation. It's pretty fraught. We'll need to keep a good eye on it to see who's appointed and how this plays out. But it injects even more risk into a case that already was a very difficult endeavor for Willis to investigate and prosecute.

Jill:

Well, we will definitely keep our eyes on that one. Let's go to the next question. Barb, I'm going to ask the question to you from Kristy. Her question was about being under oath and pleading the Fifth. "Is there a legal tool that can be used to compel a witness to answer a question when he, I'm thinking Mike Flynn," she says, "pleads the Fifth when answering could not possibly self-incriminate himself?"

Barb:

Yes, a couple of things. One is if the answer cannot possibly incriminate the person, you cannot assert a Fifth Amendment right. Fifth Amendment requires a well-grounded fear of prosecution. For example, if they said, "State your name. What day of the week is it?" you cannot assert the Fifth Amendment there. So prosecutors could take the person to court and compel them to answer certain questions, and a judge would decide that on a question-by-question basis.

Now, I will say, if there's really any possibility, any realistic possibility that a statement could be incriminating, I think courts have a very wide berth to witnesses who might be testifying to something that is incriminating. But prosecutors have a tool there as well, which is to grant use immunity. It doesn't mean that the person cannot be prosecuted. That would be transactional immunity, very rarely given. I think the only person I can think of as an example who got transactional immunity was Monica Lewinsky when she was asked to testify about Bill Clinton in the grand jury. I think it's because her lawyers pushed really hard for it, and the prosecution decided they didn't want to prosecute her anyway but they wanted her testimony. Most often, what is done is something called use immunity, which just says, "We won't use your statements against you in a criminal prosecution, but we want to hear what you have to say about other people." So that is sort of a trump card, if you will, when somebody exercises their Fifth Amendment right.

Jill:

Let me just add to that even use immunity can be tricky. I can say during Watergate there were witnesses who had use immunity. Then it's really hard to find a crime that they committed that doesn't implicate what they said. So it isn't without peril. Let's go now to our third and final question for today. It comes from Nancy, and it's for Kim. "How come when the Supreme Court chief justice position becomes available it doesn't go to the most senior of existing justices? I know there must be a rule for this," she says. Of course there is, and you're going to tell us.

Kim:

There is a rule. The rule is found in Article II of the Constitution, Section 2, Clause 2, which is the Appointments Clause. It provides that the process for filling the chief justice position when it is vacant on the Supreme Court is exactly the same as filling all of the other vacancies on the court. It's up to the

president to nominate and the Senate to advise and consent. Of course, a president can nominate somebody who is already on the court to be chief justice if the president so chooses. But then, of course, that would mean there would be an additional confirmation process to go through. It's a really powerful power because the chief justice isn't just another justice on the court. This person usually, it's questionable about whether that's happening right now, has an important role of being a leader on that court. If a president has that very, very special opportunity to appoint a chief justice, he or she would want that person to have a lasting impact on the court. The last president to get that chance was George W. Bush.

Jill:

Thank you for listening to #SistersInLaw with Joyce Vance, Barb McQuade, Kimberly Atkins Stohr, 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 T, our hoodie, and other goodies. Please support this week's sponsors: Calm, Athena Club, Ora Organic, Thuma, and HelloFresh. You can find their links in the show notes. Please support them as they really do help make this show happen. To keep up with us every week, follow #SistersInLaw on Apple Podcasts or wherever you listen. Please give us a five-star review because that's how other people can find us. See you next week with another episode #SistersInLaw.

Barb:

Are you guys nappers?

Kim:

Mm-hmm.

Joyce:

No.

Barb:

I'm a distinct not napper.

Kim:

I am. I believe in naps. Naps are good. Naps helped me have 14 jobs. That's the one thing that has suffered in my new married life is that just because I'd have lot less opportunity to take naps now, and I'm suffering for it.

Barb:

Thomas Edison was a big napper, and the Pope is a big napper. They say that's how they get through these really incredibly busy days or the best ideas.

Kim:

The key is less than 15 minute, like a 10, 12-minute. If you try to do it for an hour, then you're more tired afterwards. But that 10, 12-minute power nap, ah, so great.

Jill:

This transcript was exported on Jul 30, 2022 - view latest version [here](#).

If you count falling asleep during a television show a nap, then I nap a lot.

Joyce:

My husband built himself a whole screen porch just so he could nap. He built this really wonderful porch with a view of the trees with a big comfortable couch, and he just goes out there and naps.

Barb:

Well, let's hope nobody's listening to this and falling asleep. Naps are for quiet time not for SistersInLaw.