

Barb:

Welcome back to #SistersInLaw with Jill Wine-Banks, Kimberly Atkins Stohr, and me, Barb McQuade. Joyce Vance is away this week, but we look forward to her return next week. Today we'll be discussing the appointment of a special counsel to investigate the January 6th attack and the documents found at Mar-a-Lago. We'll also be discussing Nancy Pelosi's leadership legacy and the latest legal developments in the abortion wars. And as always, we look forward to answering your questions at the end of the show.

And on December 3rd, as you know, we will publish our 100th full episode. To celebrate this anniversary, we want to hear from you, our listeners, and invite you to answer this question. Through our first 100 episodes, what's the most important thing you've learned from the #SistersInLaw podcast? It could be, for example, my obsession with pockets, but I hope it's something more substantive about the law. Please share your biggest learnings or takeaways with us on Twitter and Instagram using #SistersInLaw100. That's #SistersInLaw100. Well, we've got Thanksgiving coming up later this week. Do you all have interesting plans? What are you going to do for Thanksgiving? Kim, how about you?

Kim:

Well, we generally go to my actual sister-in-laws, my sister-in-law by marriage.

Barb:

Wait, what?

Jill:

Wait a second.

Barb:

You have other sisters? What?

Jill:

I don't want to hear that. Oh, no.

Kim:

We actually test-

Jill:

You go to a relative. It's okay.

Kim:

We go to a relative.

Jill:

You can say relatives.

Barb:

Yeah, relative. Thank you.

Jill:

You just can't say, "Sisters-in-law."

Kim:

We have Thanksgiving dinner traditionally at the home of the sister of my husband.

Jill:

Yes.

Barb:

Thank you. Much better.

Jill:

Much better.

Kim:

And so that's what we plan to do this year. And as always, I will be bringing my famous, which is actually my mom's famous, sweet potato pie. So I'm excited to go. What are you guys doing?

Barb:

Doesn't that sound good? How about you, Jill?

Jill:

So I have a group of friends that we call The Quints because there are five of us. We formed during COVID to have weekly political conversations, and it's an amazing group of really smart, unbelievable women, almost the caliber of my sisters-in-law. I am going to one of them, to her house for dinner. And my only job is to bring two jello molds, because jello molds are my family favorite for every holiday, for every occasion. And I'm going to make a lime jello mold with pears and cream cheese that's fabulous and a cranberry mold, because that's another way of having cranberries. And so I'm really looking forward to using my jello cookbook, which I've had since, well, probably the '70s, and making this. And you know what? I'm going to share those recipes in our show notes.

Barb:

Well, that sounds delicious. We are doing what we traditionally do, which is to go to Buffalo. I always joke that we go there this time of year for the weather, but this year they're getting something like five feet of snow this weekend. In fact, I'm hopeful that by the time we drive, the snow will just be a beautiful thing to look at and not a road hazard. But the snow is going to be so bad in Buffalo this weekend that they've moved the Bills game to Detroit at Ford Field because travel will be so hazardous in Buffalo. So, that's pretty interesting.

Jill:

Well, I hope you drive carefully.

Barb:

Yeah. Well, we aren't leaving until later, so hopefully the weather will have improved by then. And then of course, on Thanksgiving Day, the Bills, who are very good this year, are playing the Lions at Ford Field in Detroit. So I will be tuned in. I will be wearing my Lions jersey, and I expect not a whole lot of success for the Detroit Lions faithful, but hope for the best, and I'll console myself in pie if it doesn't turn out the way I want it to. Jill, I've been wondering what are you doing to combat all of the waste that we are generating and ruining our planet with?

Jill:

Man, I'm really on top of that. I am an avid recycler, and I also always look for ways that I can eliminate something that has to be recycled. That means, of course, using canvas bags instead of the plastic that gets thrown away. But in addition, I've started using products that help me to do that, and particularly in the holiday season, which creates even more waste than usual. Each year, Americans throw away 25% more trash from Thanksgiving to New Year's, but Blueland, which is what I've been using, is the perfect way to get all your holiday shopping done without the guilty feeling over the waste that typically comes with it. We know you'll love their products as much as we do. I've been using them for quite a while now and they really get the job done. And I think, Kim, you're using it too, aren't you?

Kim:

I am. We have Blueland hand soap at every sink and faucet in our house, and we really love it. Blueland is on a mission to eliminate single-use plastic by reinventing cleaning essentials to be better for you and the planet. And this holiday season, Blueland is having its best sale of the year so you can save and shop sustainably for your friends, family, and even yourself. The idea is simple. Grab one of the beautiful Forever Bottles, fill it with warm water, drop in the tablet and get cleaning. Refills start at just \$2.25, and you don't have to buy a new plastic bottle every time you run out. You can even set up a subscription so you never run out of the products you love most. And save even more when you buy in bulk.

Jill:

And it is wonderful. As you said, the hand soap is terrific. And instead of paying to ship water, which is what's in most hand soaps you buy, you get just a tablet. And so you're not paying for shipping all that water. But it also includes things like cleaning sprays, toilet cleaner, which is one of my favorite products, great aroma from that, laundry tablets. All the Blueland products are made with ingredients you can feel good about. They use only Clean Essentials, and you can get the Clean Essentials kit, which has everything you need to get started in signature scents such as Iris Agave, Fresh Lemon and Eucalyptus Mint. Plus, for a limited time, Blueland is offering a hand soap in a festive upgrade with a beautiful chocolate box inspired gift set with cozy scents like Evergreen, Winterberry and Peppermint.

Kim:

Don't give it away.

Jill:

My favorite, though, stays the lemon. Yeah, I like the lemon, though. It's such a good-

Kim:

The chocolate sounds intriguing, and this may turn up in people's stockings. Don't give it away. Don't give it away. So to take advantage of their best sale of the year, go to blueland.com/sisters. You won't want to miss this, blueland.com/sisters. That's blueland.com/sisters. And you can also find the link in our show notes.

Barb:

Well, let's turn to our topics. We actually just got some breaking news just before we began recording today, and that news is that Attorney General Merrick Garland has announced that he is appointing a special counsel to investigate, now, he didn't use the words Donald Trump, but it was almost as if he was saying anything but those words, to investigate anyone who might be responsible for interfering with the transfer of power in the 2020 presidential election and the storage, in passive voice, the storage of documents found at Mar-a-Lago. There will be a special counsel, a lawyer named Jack Smith who is going to investigate that. So I thought that was interesting. Jill, I know you've got some experience with this from your Watergate days. What was your reaction to it? And maybe you could also include a little bit of background about when a special counsel is required under the current regulations.

Jill:

Sure. Well, first of all, I will leave out the expletives that would otherwise precede my comments so that we don't have to have a blue check mark or whatever it is that would limit listeners to this podcast. I think it's the wrong decision. I think Jack Smith sounds like a pretty incredible choice. He is currently a war crimes prosecutor, and if you Google him, you will find a picture of him wearing what I assume is The Hague's uniform for prosecutors. And it's a picture of him prosecuting the former president of Kosovo. And so obviously he now has some experience prosecuting former presidents, but I think that it demeans the Department of Justice to appoint a special prosecutor. I do not think there is a conflict of interest at this point. I get that there could be a perception of a conflict of interest, but if we don't trust the Department of Justice to act on the law and the facts, then I think we're in real trouble with the Department of Justice.

And I don't think there's anything about the policy that has been expanded. The real rules about not prosecuting a candidate are when they're an actual candidate in the 60 days prior to the election. This is two years before the election, and it's a candidate for the primaries. It's not even someone who's actually a candidate for the presidency and who may never get that nomination. So I think it's wrong. A special counsel is appointed when there is an actual conflict of interest or exceptional circumstances. And while I think it can be, and obviously Merrick Garland acting, I'm sure, in good faith determined that there were extraordinary circumstances which were the fact that the former president announced that he was going to run a third time for the presidency, which he clearly did for two reasons.

One is to preempt Ron DeSantis from keeping the momentum going for his nomination. And secondly was because he clearly thought it would stop his being prosecuted. And now he's gotten that to happen. Well, it isn't stopping him from being prosecuted, it's stopping the Department of Justice. It will create a delay because the new person doesn't know any of the things that the department has already gathered. And he will have to appoint a team. Whether it's the same team, and if it's the same team, then he's just being put in charge of the same team, will people actually think, people who support Donald Trump, or Donald Trump think that he's fair? Absolutely not. So other than wasting time and money, I'm not sure that we gain anything by this appointment.

Barb:

How about you, Kim, what was your reaction to the news?

Kim:

Yeah, I was surprised by it. I mean, I, up until now, thought that a special counsel was not necessary in this case, because, as Jill rightly points out, the grounds for appointing a special counsel are, one, either a conflict of interest, which is not the case in this case, or two, whether under the circumstances it would be in the public interest to appoint an outside special counsel. And I assume, I don't know Merrick Garland, I was not part of this deliberation, but I assume that is the justification for this because Donald Trump is a former president, because he is now running for president again. And this is a very public investigation. That was the justification for doing so just to erase any specter of funny business about the Department of Justice that they have somebody independent in there.

I don't think that there's any harm in doing it. I don't think necessarily that this is a problem. And especially the way Merrick Garland worded this, he seemed to make it clear that the work that has already been done will go on, and this is just someone stepping in, he didn't say this, but it sounded like he would likely use the same staff and build on the work that's already been done. So it didn't sound to me like this will cause much delay, at least I hope it doesn't, or that there is any much downside here. But I think he's trying to just cross his Ts and dot his Is and do everything. I think he knows that nobody who believes Donald Trump is going to be swayed by this, but I think that this is something that he's doing out of an abundance of caution.

Jill:

So something you just said, Kim, does bring me back to my Watergate days when Archie Cox, who was the special prosecutor, was fired. And of course, at that time there was an actual conflict of interest because the attorney general would have been investigating the president who appointed him. So, that's very different kind of conflict. But we actually didn't lose any time because the whole staff was kept on, and we just went about our business with a new boss who let us continue without any impediment from him while he caught up. And so I guess what you said makes me feel a little better about the loss of time, but I still see a insult to my beloved Department of Justice, which I believe was capable of doing an independent investigation in these circumstances. And so I hate to see the department treated that way. And Barb, what are you thinking?

Barb:

Yeah, it's interesting you raised that point, Jill. I made that same point. I just wrote a piece yesterday for Time Magazine laying out all the reasons I thought they did not need to appoint a special counsel. I thought it was a bad idea.

Jill:

And it was a great article.

Kim:

Not legally fair. Yeah.

Jill:

Great piece.

Barb:

Thank you. Yeah. Now obsolete, but it lasted for a day. Obviously, Merrick Garland took it very seriously. But I did raise that point, Jill, which is if the Justice Department is as it claims to be, and I believe it to be fair, unbiased, nonpartisan, then why do you need an independent counsel, a special counsel at all? Right? And doesn't it play into those suspicions of others that if you work at the Justice Department, you're appointed by the president, well, you can't be fair? So when it starts to get a little political, you need a special counsel. There's no special counsel in all the other cases that get prosecuted by the Justice Department. So I do agree with you that it does kind of hint, it buys into that idea that the Justice Department is just part of the political machinery.

I do agree with Kim, though. Listening to Merrick Garland today, one of the points he made was, number one, he did not base this on the fact that there was a conflict of interest so much as what you said, Jill, that second prong about when there's an extraordinary circumstance. And I suppose it is an extraordinary circumstance when you're investigating a former president who is a candidate for president and is likely to be running against your boss. I suppose one could say that is an extraordinary circumstance. And the subject matter itself, a president mishandling classified information, allegedly, apparently, possibly, and an effort to interfere with the peaceful transition of presidential power. I mean, all of that really is quite extraordinary.

And so is it necessary? Probably not. And so the thing I worried about was delay, but I did hear him use the word quickly more than once. And it sounds like unlike the Mueller investigation when he had to start from scratch and hire a team, the team that Donald Trump referred to as "18 angry Democrats," instead of that, there's already a team in place. It sounds like, I mean, Jack Smith is just going to come in and be the new boss. Maybe he hires one top deputy, someone whose counsel he really trusts to kick around ideas, but it sounds like he's just going to come in and oversee the action that's already being done. So I imagine that if a prosecutor or an FBI agent has an interview set for Monday morning at 9:00 AM, that interview is still going to go.

I imagine they didn't call him up this morning and say, "Hey, Jack Smith, do you want to be the special counsel?" I'm sure they've been working on this for a bit of time. They've probably got an office set up for him, a place for him to go. And I think the hope is probably to continue the investigation without breaking stride. Well, meanwhile, we saw some progress on some of the investigations themselves. Kim, the Supreme Court rejected a challenge to a subpoena that was issued by the January 6th committee. Can you please tell us what happened there? I thought this was pretty interesting.

Kim:

Yeah. So Kelli Ward, who is the chairwoman of the Arizona Republican Party, asked the Supreme Court to intervene to block a subpoena that was issued to her by the January 6th committee about her phone records. And the Supreme Court declined to do so. Justices Thomas and Alito dissented from that decision. They would have intervened and blocked it. But the other seven, well, up to seven other justices, we don't know exactly who voted otherwise, but they turned that down. And this is pretty much consistent with what we've seen from other folks trying to ask the Supreme Court and appellate courts to intervene and prevent the January 6th committee from obtaining important documents that are crucial to their investigation. And certainly whatever role Kelli Ward played in trying to prevent the certification of votes from Arizona on that day is central to this investigation. And this seems pretty much in line with what the Supreme Court and other courts have been doing.

Jill:

It does.

Barb:

Yeah. Go ahead, Jill.

Jill:

I was just going to add that it was one of those cases where I went, "Oh," scratch my head, "what in the world is the argument for doing this?" And the argument really was that she claimed that it was a violation of her First Amendment political association rights. And I would say that in the same way that executive privilege has an exception for crime fraud, that when your political association is conspiring to overturn the election and to put in place fake electors, that there's just no argument like that. And I think that's what the Supreme Court was saying.

Kim:

I think that's exactly right. There's no executive privilege that covers that. There is no speech and debate clause privilege that protects that, and-

Jill:

And no First Amendment.

Kim:

... there is no First Amendment privilege either.

Barb:

Yeah. But of course it did probably get her what she really wanted, which was delay because now that the midterms have gone to the Republicans, I imagine that the January 6th committee is going to disband sometime in the next few months. Jill, what does that do to the subpoena that was served on Donald Trump? He refused to comply with the subpoena he received from the January 6th committee. He actually filed a lawsuit to challenge the power of Congress to subpoena a former president. In light of the timing and the outcome of the midterms, what do you think is likely to happen there?

Jill:

So first, let me say that he didn't thumb his nose at them. He did file a lawsuit, which may prevent him from being held in contempt of Congress for having just ignored them. But it is clear that his lawsuit was based on, "Let's just delay this long enough to see what happens with the election." And he did get what he wanted. Now the question is, could the Senate start the investigation instead of the House? And the answer is, of course they could. It was the Senate that investigated Watergate. It was a special committee appointed to do that investigation under Senator Sam Ervin, a Democrat, but it was definitely the Senate.

And so maybe that could be turned over to the Senate and they could continue the investigation. But for sure, the Republicans who have made clear that their goals for their management of the House are to investigate Hunter Biden and President Biden and Merrick Garland, and it doesn't matter whether there are facts on which to base that to properly predicate the investigation, as we have learned the language for the Russian investigation, it could be a successful ploy now that the time has run out.

Barb:

Well, I guess we'll have to wait and see. And it makes that Justice Department investigation all the more important because between DOJ and Georgia, Fani Willis, they're really the only game that's left.

Jill:

Hey, Barb, I just heard about something called Upside. Do you know what that is? And can you tell me how it can help you?

Barb:

I do. It can help you save a lot of money, Jill, during this holiday season. Like all of us, I'm sure many of our listeners know that this is the perfect time to save in any way you can. And with the Upside app, you can get cash back on all your purchases. The sisters and I have been reaping the rewards on everything from dinners out to trips to the store, and even when we hit the road to visit family and friends. The Upside app is easy to use. You can join us in using the rewards to keep your budget in check and push back against rising prices. For me, that means more trips to restaurants plus extra money down for holiday gifts.

Kim:

Rising prices mean we need to cut back on ordering out or online purchases. There's nothing fun about financial discipline. I know that, for sure. But that's why we started using Upside. Upside is an incredible app for anyone who buys gas, groceries or dines out, just about everyone. And with Upside, we don't have to cut back because you can get cash back. That means more savings for investments, simple pleasures, holiday gifts for loved ones, whatever you need it for. You need to get it.

Barb:

To get started, download the free Upside app. Use our promo code sisters and get \$5 or more cash back on your first purchase of \$10 or more. Next, claim an offer for whatever you're buying on Upside. Check in at the business, pay as usual with a credit card or debit card, and get paid. In comparison to credit card rewards or loyalty programs, you can earn three times more cash back with Upside. Upside users are earning more than a million dollars every week. That's probably why they have a 4.8 star rating on the App Store.

Kim:

Download the free Upside app and use promo code sisters to get \$5 or more cash back on your first purchase of \$10 or more. That's \$5 or more cash back on your first purchase of \$10 or more using the promo code sisters. You can also look for the link in our show notes.

Jill:

So let's continue on the subject of the fallout of the midterm elections. Aside from what it might do to the January 6th committee's investigation, one of the big fallouts was that Nancy Pelosi stepped down as Speaker of the House and said she would not run for election to the leadership, and Steny Hoyer did the same thing. So, Barb, let's talk about the extraordinary record of Nancy Pelosi, who has served for almost two decades as a leader in the House, and has been said by the President Biden that she will go down in history as one of the most extraordinary leaders ever. Can we talk about some of the things that she did and why she may have resigned, whether it was really what she said, time for new

leadership, or whether it's because she would've been minority leader, not speaker, or the violence against her husband. But let's first talk about her record.

Barb:

Yeah. I want to pay her tribute before we talk about speculating as to her reasons. And of course, she said it's time for a new generation of leaders. She's 82 years old, and she's had this job for a while. She's been in Congress 35 years. And she's staying in Congress. She is just stepping down from the leader role. But I think we really have to acknowledge what she has done not only as a member of Congress but as the first woman to be the Speaker of the House. Really extraordinary pioneer. Certainly has paved the way for other women to come after her. When you're first, you also don't want to be last. And I think she has been such a strong leader.

It's so important when you have leadership authority that you use it. Some people aspire to positions because they want to be the position. Instead, you need to use the position. You need to serve in that role. And she certainly has. She was really instrumental to the passing of the Affordable Care Act, marshaling the votes and getting people. Sometimes I think it has to be sweet like honey, and other times it has to be muscle and twisting arms. And she got that job done. There's some very memorable things like when she clapped back at Donald Trump at the State of the Union, the time that she and Chuck Schumer went to the White House to deal with budget issues and got Trump to back down and actually persuaded him, using the sweetener, walked out of the White House where she put on the iconic sunglasses and the orange coat as she strode out after successfully negotiating with him. And then the other situation where there's a famous photo where she stood up and pointed at him in the room from across the table where she wasn't going to take his nonsense.

So she's been a strong leader and she has really allowed a lot of achievement. And then there have been some times where I thought she went too far. There's the famous moment when she tore up his speech, which I did not like. I know some people thought that was a show of strength. I thought that no matter what you think of Donald Trump, tearing up the speech, it was a weird State of the Union. It was an awful State of the Union. But I thought that she degraded the office by tearing it up. I'm sure you may have different thoughts on that.

Kim:

I liked the clap, though. I like the clap.

Barb:

Yeah, I liked the clap, but I didn't love the tearing of the State of the Union. I thought that went too far. But she has been the punching bag for the Republicans. She has been their boogeyman. Nothing makes some members of the far right crazier than the idea that there is a strong woman who is leading the Democratic caucus. And so I think we'll miss that. I think she has been a strong leader. And so I just thank her for her service in the face of a lot of adversity and vitriol.

Jill:

I think she has been an amazing role model and leader. Elegantly classy, smart, brave. I thought her behavior on January 6th in that last hearing that the January 6th committee showed, the video of her really taking charge, not being afraid but being in charge, was one of the most powerful things I've ever seen. And I think all of us want to say thank you, Nancy Pelosi, for your service as speaker and for your

remaining in the House as a representative of San Francisco. You've done a great job and you've been a great role model.

But let's talk about more of the fallout from the midterms. And one of those is that Kari Lake, after a long election count, has lost, but she hasn't conceded. Instead, she went to Mar-a-Lago. And it's also important to know that it wasn't just her that lost, it was all the election deniers in swing states. They all lost. And most of them, though, conceded. So, Kim, is concession now a trend? Does that mean that Donald Trump doesn't have the power anymore that he had to make sure that no one ever conceded?

Kim:

Yeah. So I will start by saying I hope so, but I want to go back first and I want to make two points about Nancy Pelosi. One of the things as a reporter on Capitol Hill that a Republican said to me once that I'll never forget, it was, "Nancy Pelosi is as good as Mitch McConnell thinks he is."

Barb:

Oh, I love it.

Jill:

Oh, wow. Great.

Kim:

And I think that that is really good. That being said, Nancy Pelosi has been probably one of the most effective politicians that Washington has ever seen. That being said, and two things can be true at the same time, I do agree that leadership change is important, that generational change is important. This isn't about ageism. This is about entrenchment. And I do think between that one of the biggest issues that Democrats have in particular is this issue of entrenchment. There has been this idea that Democrats, you wait in line and you wait your turn and then you get this thing, you get this leadership role, and you keep it as long as you're alive. And then all the people in line behind you have to wait to get that thing.

I think that that is detrimental to the effectiveness of Democrats, and I also think it's detrimental to democracy too. So to the extent that this is true, this is why she's doing this and not just stepping down because she's no longer in the majority. I think that that's important, I think voices throughout... Democrats are not like Republicans. They're much less monolithic than Republicans, right? Especially now. And I think it's really important that all the different voices have a seat at the table. And that only happens when you allow room at the top for those voices to be heard. So I think that this is a good thing for the party and democracy.

All right. So back to Kari Lake and concession. I hope so. I was so heartened about the concessions that were made on and immediately after election night that Mastriano and Dr. Oz, all these people who we didn't know would concede, wouldn't deny the results of the election, who said on the campaign trail would not commit to accepting the results did, and that's truly important for democracy. That's truly important for the people who believe in them, who follow them to have faith in democracy.

Honestly, and I understand, I understand the difference between this past election in 2016 in Georgia, but I was also glad that Stacey Abrams conceded. I understand why she didn't in 2016, but I still think it was crucially important that she did too, because that can be used as a talking point. I think people need to believe that results of the election are the results of the election, that it's the people speaking and

that that voice is respected. And I was so, so grateful that they did. Is this a permanent trend? I hope so. I don't know. I never know what people are going to do in the elections ahead, but I do hope so.

Jill:

So, Barb, Kim made a very good point about how the perception is that the election is the election, but is there actually any legal impact from conceding or not conceding?

Barb:

There's really not. It's a tradition that the person who loses the election acknowledges that fact so that the public can have closure and go on. I think it's also really important that the person who loses the election submits to the authority of the other person, recognizes that they now have this position. "You are my president," "You are my governor," "You are my senator," whatever it is. If you are a good American, you fight hard for your victory, and if you lose, you respect that because it's the will of the voters. When you don't concede, you are really trying to put your own ego above the will of the people in a democracy. There is nothing less democratic than that. So there's no real legal recourse. Sometimes, as we saw with Donald Trump, it invited a lot of lawsuits and other kinds of things. But if there's no evidence, then there's just no basis for someone to refuse to concede other than their own smallness.

Jill:

Let's talk, Kim, about the GOP has now won the House as of Wednesday, it became clear, and they have sort of said what you can expect from the Republican House. And there's also a question of who's going to be the Speaker of the House. Can you talk about that?

Kim:

Yeah, I don't think there's a question of who's going to be the Speaker of the House. I think that Kevin McCarthy's going to be Speaker of the House. I think there's some intrigue. There's a little bit of opposition within. I think it's just a matter of what Kevin McCarthy is going to promise the people that are still holding out to support him. And I'm wondering why people like Marjorie Taylor Greene, for example, are already backing him, and I'm wondering what she was promised. I think she was promised a ticket out of Siberia, that she got kicked off of her committees.

Barb:

Oh, yeah. I forgot about that.

Kim:

She might get, who knows, it might even be something in leadership or chairmanship. I don't know what he promised her, but she is full-throatedly behind them. So, who knows what that is. I think it's a matter of getting other people who are still voicing some opposition what they want too, which could be frightening. But I think, yes, I think that there will be some return to the Benghazi style investigations. But I think here's what we know about Kevin McCarthy. He is certainly power hungry, which accounts for his abject complete loyalty to Donald Trump, except for that one minute after January 6th where he showed some backbone and then backed completely off of it when he thought, "Oh, I want to be speaker, though, and I can't do this if I'm completely going against him."

I think he's smart enough to know that a Benghazi times a thousand approach, especially after these elections where voters particularly said, "You know what? We don't like these conspiracy theories. We

don't like this anti-democracy stuff. We don't like this election denialism," that that would be a mistake. I think he will try to do everything he can to block Joe Biden's agenda. I think he will do everything he can to try to placate Donald Trump. But I think if he goes too far, that would be a mistake. It will backfire on him and it will backfire on the party, based on what we saw in the midterms.

Barb:

And, Kim, can you just remind our listeners what you mean by Marjorie Taylor Greene wants to come out of Siberia?

Kim:

Yeah. So she was stripped of her committee assignments based on comments that she made after the January 6th attack, essentially supporting it and supporting violent rhetoric against Democrats. It was really reprehensible and she should have been stripped of those committee assignments, but I bet she comes back.

Jill:

All right. Now let's look at the Senate, which has now come down to a runoff in Georgia. It could end up being 50-50 or 51-49. And some people are saying, "Well, 50-50, that's fine. The Democrats control because the vice president casts the deciding vote in a tie." But I think there's more to it than that. And so, Barb, can you talk about the 50-50 Senate and the committee assignments since we've been talking about Marjorie Taylor Greene's committee assignments in the House?

Barb:

Yeah. So 51-49 is much better for Democrats or Republicans than 50-50. So there is control of the Senate now, but if it's only 50-50, that means that both parties get an equal number on every committee. And so it requires the committee to engage in a lot of compromise, and very difficult for the committee to have leadership and take positions on things. Democrats don't get to control. There's like a two-headed monster sharing scenario as opposed to having a majority of the committees where you get to control the agenda. So I think that runoff on December 6th matters very much to the Democrats because taking that one additional seat is the difference between sharing power and controlling the Senate.

Jill:

Yeah. I think it's much more important than people realize, and I'm hoping that the Georgia voters will realize the importance of this. It is really a big deal. To get out of committee, to get a proposal out of committee requires a special discharge petition if there's a tie vote in the committee and it doesn't come forward with a committee recommendation. That's a big deal. And-

Kim:

And can I say something indelicate? For the last two years, every time Senator Patrick Leahy, he gets a cold, everybody kind of grasps there.

Barb:

Yeah. Good point.

Kim:

You know what I'm saying? Now it'll be-

Barb:

Yeah, the heir and the spare.

Kim:

... the same every time Bernie Sanders doesn't feel well, people are going to freak out that it could mean the change in control of the Senate. So, that additional seat will stop that.

Jill:

So it's the holiday time, and I am stressed out, but I love to take a break and cook my HelloFresh meals. They are delicious. They're easy. The ingredients come straight to my door, and every week I look forward to them. What about you, Kim?

Kim:

I really do, too, because when you're thinking about what you're going to do for Thanksgiving, or Christmas, or Hanukkah, or anything else, you can't forget the other meals in between. And HelloFresh makes it really easy to know just what you're going to prepare for yourself and your family. And with HelloFresh, you get farm fresh, pre-portioned ingredients and seasonal recipes delivered right to your doorstep. So skip trips to the grocery store and count on HelloFresh to make home cooking easy, fun, and affordable. That's why it's America's number one meal kit.

Barb:

With the holidays just around the corner, HelloFresh makes the busy time of year easier than ever with chef crafted recipes and pre-portioned ingredients delivered right to you. That means you can cut down on hours of meal planning and prepping when you've set aside time for your loved ones. So whether you're hosting a holiday party or just stocking up on snacks, you'll find everything you need at HelloFresh Market. From quick breakfast to charcuterie boards and desserts, it's never been easier to prep for a party or fill your pantry.

Kim:

I love a charcuterie board, Barb. I really do. HelloFresh even works with your schedule. Their plans are flexible and you can change your meal preferences, update your delivery day and change your address with just a few taps on the HelloFresh app. Imagine getting fresh quality produce from the farm to your door in less than a week, allowing you to enjoy the incredible flavors of the winter season right from your home.

Barb:

Go to hellofresh.com/sister65 and use code sister65 for 65% off plus free shipping. Remember, go to hellofresh.com/sister65 and use code sister65 for 65% off, plus free shipping. You can also look for the link to HelloFresh, America's number one meal kit, in our show notes.

Kim:

So this week also brought a lot of news about state level abortion laws. In Georgia, a judge struck down a law banning abortion after about six weeks. And in Kentucky, the state Supreme Court heard arguments in a challenge to that state's near total ban on abortion. So, Jill, let's start in Georgia. What did the court rule there?

Jill:

In Georgia, the court had two issues before it, one of which was that the law that Georgia had passed had been passed in 2019. And that was before Dobbs. And the court said it was therefore void ab initio, which means that it never really was a valid law because it was so clearly in violation of existing Supreme Court precedent.

And he then decided not to go on to the second question, which was a right of privacy that exists in the Georgia Constitution, and which the argument made by the plaintiffs was that the Georgia Constitution protects the right of privacy and therefore the right to have these decisions made by the person who needs an abortion and that person's doctor. And he didn't decide that. He put it off. And there's a sentence in there that sort of says, "Well, the legislature could pass this law again and then we could talk about it." So he was saying that the legislation was invalid because it was passed before Dobbs eliminated the right of abortion at the federal level, but opened the opportunity for Georgia to have their legislature pass this law again now that it is no longer a federal right.

Kim:

Yeah, I thought that was really interesting. And, Barb, the judge in this case, Judge Robert McBurney, who we've spoken about before, he's the same judge who informed Rudy Giuliani when it came to traveling to Georgia when Rudy Giuliani said his doctor had said he-

Barb:

Oh, I didn't realize that was the same judge.

Kim:

Yes. When Rudy Giuliani said he couldn't travel to Georgia by plane because of medical reasons, Judge McBurney informed him that he could take a bus or an Uber or any other method of transportation to get there. We talked about that before. But he had a footnote in which he really picked apart the state's contention that there was "never a constitutional right to abortion." I found it interesting. What did he say? And what did you think of it?

Barb:

Yeah. We always tell students, "You got to read the footnotes because there's a lot of information there." A lot of people skip the footnotes. They think it must be unimportant if it's in a footnote. But in this footnote, Judge McBurney really takes umbrage at this idea that there never has been a right to an abortion. He says, actually, sentence, "Except there was." That's a full sentence, which I love. Next sentence. "For 50 years." And he said, "We know it because this very same Supreme Court told us so." Repeatedly."

And so what they say is, until Dobbs came in, he says, just because the court purely had the numbers, this actually was the law of the land for 50 years. And so when the legislature acted contrary to the precedent of Roe, it was violating the law. And so it is a very strong pushback of that idea that somehow there was just trying to erase history, that there was never a right to abortion under constitutional law.

Well, yeah, there was for 50 years because the law is what the court says it is. That's what Marbury versus Madison stands for. So good footnote. I applaud the footnote.

Kim:

Yeah, I like a good footnote. I'm always a fan of that. I have been since law school. So, Barb-

Barb:

Footnote better than end note, don't you think?

Kim:

Yes, yes, absolutely.

Barb:

End note, you got to flip pages.

Kim:

I know. So, Barb, I want to stick with you as we go to Kentucky, and there were some oral arguments in the challenge there to that state's abortion ban, which is a much more strict one, the strictest in the nation. It's nearly a complete ban. What clues did we get from those arguments about how the Supreme Court there might rule?

Barb:

Oh, we got some very good clues. Of the three judge panel, two of them were women who clearly care about women's rights. And so I think it did not go well for the litigants here in the case. Kentucky has passed a near total ban on abortion, no exceptions for rape or incest. Not really even an exception for the life of the mother unless a doctor makes a finding. And so during the oral argument, the attorney general for the state, I guess we call it a Commonwealth of Kentucky, made an argument that, "There's no historical evidence that the state constitution, which was adopted in 1891, includes any right to abortion."

And then Justice Lisabeth Hughes says, "1890, isn't that a time when women had no right to vote or own property? Why on earth are we even talking about what happened in 1890 when we are here to decide what should happen in 2022? And in fact," she said, "shouldn't we instead be looking to the more recent history of just last week during the midterm elections when the voters of Kentucky said that they did not want to enshrine in their constitution a ban on abortion?" And so that's very important.

The other woman justice is a former nurse who also really pointed out how difficult it is to make decisions when it comes to life and death decisions. Does it have to be a hundred percent death? And the idea that the mother does not have a role in that decision-making. She even gave a hypothetical. "So if there's a man bleeding out in the ER and he has all the self-determination in the world to just tell his doctor what to do and not to do, and yet for a woman who is there, if she happens to be in a state of pregnancy, she doesn't get to make those same decisions. Is that what you're saying to me, Mr. Attorney General?" So I think they got a lot of hostility in response to those arguments, which may bode well for those who oppose this statute in Kentucky.

Kim:

And I thought that was so important because I say so frequently with these abortion bans, it's literally putting lawmakers who you voted in to make laws not because of their medical experience in the position of making life and death decisions in some of the most exigent circumstances. It's essentially what it is, and I love that there was somebody who actually had some medical experience.

Barb:

I know. Isn't that great? "Excuse me, I've actually been a nurse. Let me tell you how difficult it is to make these life and death decisions."

Kim:

That was really fabulous. So, Jill, given that voters in the midterms in Kentucky just rejected a ballot question declaring that there is no right to an abortion under that state's constitution, how do you think this might play in this particular challenge and how that might go?

Jill:

So as Barb pointed out, it did come up in the arguments, and it's a tricky question. First of all, I want to point out that the Kentucky proposal on the ballot was written much like the Mueller investigation, sort of in double talk. Instead of saying, "We want to enshrine it," it was, "We want to ban it," but they didn't say it outright as what it was. And I thought it was strangely worded. But the voters did resoundingly reject it nonetheless. And it did come up. And there is a question as to whether a court should take into account public opinion as to the right and wrong of it. When they're interpreting laws and constitution, they have to really stick to what did the legislature mean? What did the constitutional framers mean? But it does seem like it is going to have some influence that this law is a bad law and that it should not be upheld.

Kim:

So, Barb, I have really been enjoying particularly the bacon from Moink. Have you heard about Moink?

Barb:

I have, although the bacon is still in my freezer. I haven't tried it yet.

Kim:

What?

Barb:

I've tried many of the others. Yeah.

Kim:

You got to get that bacon out and use it.

Barb:

All right.

Kim:

It's probably the best bacon I've eaten in a while.

Barb:

Well, Kim, with Moink you can support small family farmers, reduce your environmental imprint, all while enjoying the highest quality meat on earth. When you join the Moink movement, you can know that their animals are raised humanely, their employees are paid a living wage, and the quality is way better than anything you'll find in stores.

Jill:

Boy, that is for sure. I was so impressed with the box of product that I got, which included fish and chicken. Moink delivers grass fed and grass finished beef and lamb, pastured pork and chicken and sustainable wild caught Alaskan salmon straight to your door. The Moink farmers farm like our grandparents did, and as a result, Moink meat tastes incredible. The family farm does it better. And the Moink difference is one you can really taste. Unlike the supermarket, Moink gives you total control over the quality and source of your food. You choose the meat delivered in every box, everything from ribeyes to chicken breasts, pork chops to salmon filets, and much more. Plus, you can cancel any time. It has been a real delight, and I feel really good about supporting rural America.

Barb:

Shark Tank host Kevin O'Leary called Moink's bacon the best bacon he's ever tasted. And Ring doorbell founder Jamie Siminoff jumped at the chance to invest in Moink.

Kim:

We are guaranteed that you'll say, "Oink, oink. I'm so happy I got Moinked."

Barb:

You'll love it the way we do. It's the perfect option for a family meal or dinner party.

Jill:

Keep American farming going by signing up at moinkbox.com/sisters right now. And listeners of the show can get free filet mignon in every or order for a year. That's one year, the best filet mignon you'll ever taste, but for a limited time. It's spelled M-O-I-N-K [box.com/sisters](https://moinkbox.com/sisters). That's moinkbox.com/sisters. Or look for the link in our show notes. You'll really love it.

Kim:

The only thing we have left are the steaks. In fact, I made a big batch of bolognese sauce with that sausage that we're actually defrosting.

Jill:

Wow.

Barb:

Oh, that sounds good.

Jill:

I haven't used the sausage yet. That's a great idea.

Kim:

Yeah. We're defrosting some of that.

Barb:

Yeah. That is a good way.

Jill:

But we did use the steak, and the steak quality was by far-

Kim:

I'm sure it's amazing. You just don't-

Jill:

... the best I've ever tasted. It was really good.

Kim:

I had to be-

Jill:

Give it away before it goes bad.

Kim:

... creative with the bolognese because it was the breakfast sausage and we're like, "We're not going to use that." But we defrosted some of it tonight because I made a huge batch. And so that's a good idea for that.

Jill:

Oh, good.

Barb:

Yeah, that sounds great for winter.

Kim:

Yeah.

Barb:

Well, now we come to the part of the show that really is our favorite, listener questions. We get so many, and we spend a lot of time deciding which ones to answer because there's so many good ones. 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

where we'll answer as many of your questions as we can. So our first question comes to us today from Rhonda who asks, "What branch of government is responsible for either expanding the US Supreme Court or setting term limits of the justices?" Kim, you're our Supreme Court reporter. What do you think about that?

Kim:

Yes. So the answer to that question is both the legislative and executive branches because it would require a law to be passed to change it. The Constitution is silent on things like term limits and the number of justices. And we know that the number of justices has changed over the years. The reason we have nine justices currently is because at the time that was set, there were nine circuits, and each justice is assigned a circuit when it comes to emergency petitions. And so they thought that that was a good number.

Right now, there are 13 circuits, just FYI. So that in itself would be a good justification for changing the number, but it would have to be done by an act of Congress and that act would have to be signed by the president. So those are the two branches that would be in charge of that. The political will to do that is absolutely zero because the problem is now the Supreme Court is being recognized as the political body that it is, and so it would require a bipartisan effort. And I think that would be really tough to do in any particular administration because it would give that president the power to appoint the extra justices.

Barb:

All right. Well, our next question comes to us from Mike who asks, "Does the power of pardon apply at all stages of a prosecution, during grand jury procedures, after indictment, during a trial, after a verdict?" Jill, you were around when there was a famous pardon issue during the Watergate era. What do you think is the answer there?

Jill:

The answer is it can happen at any time. It can even happen before a grand jury starts investigating. And that's what happened in the case of President Ford, who took over when President Nixon resigned. He pardoned him for any crimes that he might have committed. There was no indictment pending. There was no investigation. Although he had been named an unindicted co-conspirator, he had not been indicted. And so it can happen at any time. It does have political consequences. I believe that one of the reasons that President Ford was not elected when he ran for election in his own right was because people were angry that he had pardoned Richard Nixon.

I also want to point out, of course I'm talking about federal pardons, but there are state pardons. And everybody's going, "Well, we just have to make sure that Donald Trump gets indicted by a state." Well, Georgia looks like it could be the next or the first to bring charges against him, but Governor Kemp could pardon him, and people are forgetting about that. And so he could pardon him before he's even indicted. Although, I'm saying that without knowing the rules in Georgia. If it was federal rules, it could happen before. And so even if it waits till after indictment, there might be political consequences against Governor Kemp, but he could do it.

Barb:

All right. And our final question comes to us from Gloria who asks, "With the 100th episode coming up, can you share how you all came together to make this podcast?" That's a fun question. Well, I think I'll start and you guys chime in with anything I overlook or get wrong. We all kind of got to know each other

as legal contributors on MSNBC. We all currently and have for several years worked as legal analysts on MSNBC. I actually knew Joyce for a long time. We served as US attorneys together, and I've known her since we started that. So I consider her a close friend and have known her for a long time, but I got to know each of you...

Kim I got to know a little bit because she served as the moderator on an event where I was speaking, and I thought she was great. And so when you meet somebody and you think they're great, you tend to pay attention to them going forward. So I watched her appearances on MSNBC and always thought she was very sharp. And then of course, Jill is a legend in the legal community, especially among women and especially women of my age who grew up and were inspired to be lawyers by watching the Watergate hearings and everything Watergate. So our benevolent overlords at Politicon pitched us this idea of SistersInLaw to us, and we were smart enough to say yes, and we've loved it ever since. You guys have-

Kim:

And the name came from MSNBC viewers, actually, who appreciated the women who were giving legal commentary and came up with the #SistersInLaw.

Jill:

And I just have to say, I had met Joyce in person in the green room in New York at NBC, and then I met Barb, not through NBC but through Politicon, who is of course our wonderful producer of this show. It used to have a wonderful in person event of speakers, and I got to meet Barb there. But I did not meet Kim until I was in Washington... what was it? ... about a year ago, and we finally got to meet. But I already really felt like I knew her from talking every week. And for all of you who I'm sure realize that there's a lot of outtakes when we record this and we talk a lot in between, we really have all gotten to be good friends, people that I respect and trust and look for their advice on and want to ask questions of all the time. So it's been a wonderful experience for us.

Barb:

Thank you for listening to #SistersInLaw with Jill Wine-Banks, Kimberly Atkins Stohr, me, Barb McQuade, and Joyce Vance will be back with us next week. Remember, share your biggest learnings or takeaways from the show with us on Twitter and Instagram for our upcoming 100th full episode using #SistersInLaw100. That's #SistersInLaw100. We can't wait to hear from you. 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, hoodie and other goodies. And please support this week's sponsors BlueLand, Upside, HelloFresh and Moink. 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.

Why don't we pause for a moment? Is it Jack Smith? Is he hiring? Jill just got a call while we're talking. I wonder if it was Jack Smith, as he's listened to Jill on this podcast and heard about all of her extraordinary experiences and wants her to be that top trusted deputy.

Kim:

He said, "I want the Watergate girl."

This transcript was exported on Nov 28, 2022 - view latest version [here](#).

Barb:

Was that who it was, Jill?

Jill:

Yep.

Barb:

Was it Jack Smith?

Jill:

You got it. You got it. No.