

Dahlia:

Hi, I'm Dahlia Lithwick, legal correspondent, author and host of Slate's Amicus podcast, the show about the rule of law, the law, and the Supreme Court justices who interpret it for the rest of us.

I've been watching the high court for over two decades and I bring all that experience and knowledge to examining the US justice system and democracy. Each episode, I am joined by guests with deep knowledge of the law and policy who helped me and you navigate our constitutional landscape. Slate's Amicus podcast, subscribe now wherever you listen.

Jill:

Welcome back to #SistersInLaw with Barb McQuade, or is that Barbie McQuade? Kimberly Atkins Stohr and me, Jill Wine-Banks. Joyce is not with us this week, but she'll be back next week and we miss her until she gets back.

Today, we're going to be discussing January 6th news. That means we're talking about indictments for the interference with the peaceful transfer of power, including Trump's target letter, Michigan's fake electors indictment, RICO in Georgia, a trial date in Mar-a-Lago case. Plus, we'll talk about the GOP state AGs sending a letter threatening corporations if they don't drop DEI policies, because of the Supreme Court's affirmative action ruling.

We'll also update you on losses Trump suffered in two of the many other cases pending against him. One is about the district attorney's criminal case based on hush money payments he made to Stormy Daniels. And the other is news of victories for Eugene Carroll in both her cases against Trump. And as always, we look forward to answering your questions at the end of the show. And remember, go to politicon.com/merch to buy our shirts, totes, and other goodies just in time for summer. I'm wearing the t-shirt today. We'd love to see you wearing one too.

And before we get to the serious topics we're going to talk about, I have to ask you all about Gretchen Whitmer's tweet about Barbie and the major opening of the new Barbie movie. Did you both have Barbie dolls? I'm too old to have had one. I have a Hillary Clinton nutcracker. That sort of looks like a doll. I'll have to post a picture of that one. But tell me about your Barbie dolls.

Kim:

I did have Barbies and I want to be, this podcast is not sponsored by the Barbie movie, but everybody knows Barbie and it is an American cultural icon. I did have Barbie dolls, when I was young and back then when I was a little girl in the 1970s, there was also a Kristy Doll, which was the black Barbie that I had.

But my favorite one, my favorite one of all my Barbie dolls is that there was actually a Cher Barbie esque doll. And she was a little bit taller than all of the other ones because she didn't quite fit in my Malibu Barbie Corvette. So she had to kind of sit in the backseat sideways, which I thought made her look so cool. But she was my favorite one. I always watched the Sunny and Cher Show with my mom. So I definitely was a Barbie household. What about you, Barb? Barbie's in your household?

Barb:

Yeah. Barbie's in my household. But tell us about the Governor Whitmer tweet because I didn't see it.

Kim:

Well, so there was a Governor Whitmer Barbie in a series of tweets showing Barbie Governor Whitmer doing all of her hard work for the people of the state of Michigan. And I just thought that was such a clever way of showing Barbie in... We had all these, Barbie had a lot of professions, but a lot of them, especially in the beginning were a little, they were a little sexist, let's be honest. But this was her being powerful, running a state, supporting indictments against people who fomented an insurrection. Just being badass. So I loved it.

Jill:

Yeah. It sounds more like the message of Taylor Swift than Barbie.

Barb:

Yeah, no, that's great. Well Barbie is an empowering figure. There was Barbie president, Barbie astronaut, Barbie has had many important jobs in the Barbie world that existed well before the real world. So don't be dissin' Barbie.

With Barbie, my name is Barbara, of course, Barb, I have been called Barbie most of my life. There'd be a lot of the clever kids in elementary school. "Hey Barbie doll, where's Ken? Haha!" That was the big joke. It wasn't terribly offensive, so you don't have to feel too sorry for me. But I did read just this week that the name Barbara reached its peak of names in 1964, which is perhaps possibly my year of birth. And so growing up, I've actually known a lot of Barbs or Barbaras or Barbies. And some people even call me Babs, but they don't usually get away with it. But-

Kim:

I was going to say, not to your face.

Barb:

... But I once played on a high school softball team and in softball there are four outfielders and we had an all Barb outfield. So that just tells you the popularity of the name at a certain age. And it was very challenging when there was a fly ball and people were yelling for Barb to catch the ball because we had four of us. So quick shout out to Barb Van Arsky, Barb Cullen and Barb Hampton. Hope you're still out there, Barb-ing away.

Jill:

That is great. So I never was called Barbie. I never even had a nickname because if your name's Jill, people think it is a nickname. So I missed out on that. But Kim, I did have a black dowel. It wasn't a Barbie, it was a little rubber dowel that I named Sandy and who I loved enormously. She was actually my favorite doll of all.

Kim:

Jill, it's important to me not only to keep my hands and home clean, but also to help the planet, and I love using Blueland. I know you use it too. Don't you love it?

Jill:

I do. It is really wonderful and it makes me feel so virtuous because did you know that we're already eating and drinking roughly a credit card's worth of plastic a week? Yep. It's true. And it's scary.

The products that we're using every day are ultimately contaminating our water supply, generating hundreds of microplastics that we and endangered species end up ingesting. So Blueland set out to do something about it. They are eliminating the need for single-use plastics in the products we use for everyday use.

Barb:

Yeah. I know sometimes it can feel overwhelming. How can I alone solve problems with the environment? But we can all do our little part and it feels good to do your little part. Blueland is on a mission to eliminate single-use plastic by reinventing cleaning essentials to be better for you and the planet.

Their idea is simple. They offer endlessly refillable cleaning products with a beautiful cohesive design that looks great on your counter. Just fill your bottles with water, drop in the tablets and wait for them to dissolve. You'll never ever have to grab bulky cleaning supplies at your grocery store again. Refills start at just \$2 and 25 cents. You can even set up a subscription or buy in bulk for additional savings.

Kim:

From cleaning sprays to hand soap, toilet bowl cleaner and laundry tablets. All Blueland products are made with clean ingredients you can feel good about. Right now, try Blueland's new limited edition hand soap kit with scents inspired by the national parks and our shared goal of leaving no trace featuring Joshua Tree, Zion, Sequoia and Glacier Scents. I really, really love the glacier scent. It's really clean and beautiful.

So join us in using the best cleaning products out there, because Blueland has a special offer for listeners. Right now, get 15% off your first order by going to blueland.com/sisters. You won't want to miss this. blueland.com/sisters for 15% off. That's blueland.com/sisters to get 15% off. And you can also find that link in our show notes.

Barb:

Well, Donald Trump announced on Truth Social this week that he has received a target letter. Jill, let's start by talking about what a target letter is and whether it means, drum roll please, that an indictment is coming.

Jill:

So let's start with the definition of a target. A target is someone that the prosecutor or the grand jury thinks it has substantial evidence that links that person to the commission of a crime, and a target letter goes out when the prosecutor is very close to an indictment and making a final decision. It usually offers an opportunity for that person to come in and tell the grand jury his or her side of the story.

And Donald Trump did announce that he had gotten a target letter, including three separate crimes were identified as far as reporting goes, saying that he was the target of this investigation about January 6th or as it is now being called the interference with a peaceful transfer of power. But it doesn't necessarily mean that he will be indicted.

In fact, and not getting a letter doesn't mean you won't be indicted. It is not mandatory. There's no law that says you have to send a target letter before indicting someone. And a lot of times prosecutors don't do that because we don't want the subject to know that they're under investigation. They might flee, they might try to interfere with witnesses. So there's a lot of reasons not to tell the target that they are a target.

But in this case we know that he got one or at least his, it's been confirmed by many sources that he has gotten one. But it does not mean it's inevitable, although it's highly likely. And I don't know of any cases where someone has gotten a letter and talked their way out of getting indicted or not been indicted for any other reason.

Barb:

Yeah. I think Joyce mentioned back when Trump cut the Mar-a-Lago target letter that she was aware of one situation where somebody came in and talked their way out of it. But same as you, Jill, usually when somebody sees a target letter, it means you're on a path toward indictment. Most targets decline the invitation to come in because they don't want the information that they give to be used against them.

And I would think in a case like this, it seems likely that it means they're pretty close to the end, because Trump is the kind of witness if you were to accept the invitation, you'd want to put last after you are as educated as you can be about the case by talking to all the other witnesses and reading all the other documents. So it definitely to me portends that we're getting close to the end. So I thought that was interesting.

Jill:

Absolutely.

Barb:

Well, let's talk about the charges that are included. According to reporting, Kim, the target letter lists three statutes that the grand jury is focused on and it leaves to us speculate what the theory of each of these charges might be.

One of them is conspiracy to defraud the United States. That's Title 18 United States Code Section 371. What does that mean? How do you think that statute would be applied to the facts in this case?

Kim:

Yeah. So as I understand it, that is a general conspiracy statute and you frequently see this statute cited in a charge when you have a case that involves a lot of people who collectively acted, not just in fomenting an insurrection or trying to stop the peaceful transition of power, but in a lot of circumstances.

So my understanding and the prosecutors can correct me if I'm wrong, is this was the most anticipated charge. This is the one that most people guessed would be coming because Trump acted and a lot of other people acted in concert in a number of ways, both in the efforts, for example, to pressure state officials, not to certify election result or not to find votes, for example, or not to certify election results or to encourage people, even perhaps to go to the Capitol on January 6th. It's sort of an umbrella statute that's used for conspiracy.

Barb:

And this would make sense to me that it would allow them to get in A to Z, everything that they did even before the election, through the election leading up to January 6th and beyond. So that one makes some sense to me.

Jill, the second statute that's been cited is Title 18, United States Code Section 1512. And some reporting, have you seen this has said that the charge is witness tampering? But that's just the name of

the statute and so I think they may be confused by the language because the statute actually includes a lot more than that. It has a whole bunch of different types of obstruction. What's your theory about how that statute might be used in this case?

Jill:

Well, you are right on all counts. It is generally titled 18 U.S.C 1512. Tampering with a witness, victim or an informant. But it includes a section C, and section C is where I think the case is going to go, which is somebody who obstructs or impedes an official proceeding or attempts to do so. And that is obviously a very clear part of what happened here, where the mob went and tried to stop the counting of the electoral votes. So that would be interfering with an official proceeding. And there are many other parts. The fake electors scheme fits into that because they were trying to get fake electors to claim that they were the real electors, and that would also interfere with the proceedings. So that was all part of it. The pressure on Pence would be part of it as well. So I'm guessing that it's going to be subsection C that we are looking at and not the tampering with a witness.

Barb:

Yeah. I tend to agree with you, unless maybe there's something we don't know about, but that makes sense to me. It's been used against many of the other defendants, January 6th defendants. So that one makes a lot of sense to me.

So those two really come as not much of a surprise to me. I think there's been a lot of talk about those, but there's a third one that kind of blows me away. Kim, this third statute is deprivation of rights in violation of Title 18 United States Code Section 241, which makes it a crime to deprive someone of their civil rights. What do you make of that one?

Kim:

Yeah. So the language of the statute criminalizes conspiring to injure, threaten or intimidate a person in the United States in the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the United States, or because of his or her having exercised such right.

Now, this law was one of many that was passed during the Reconstruction era and it is meant to secure the civil rights particularly of those who had been disenfranchised of those rights or who had had never been yet enfranchised with those rights, specifically Black people in America. And so what I gather from this, is the theory of the case is that by trying to, quote, "find" some votes in places like Georgia and elsewhere or trying to subvert the vote in the states that the people who are trying to do that did, that was depriving those voters of something that they have the right both under the constitution and under federal law to do, which is vote in a presidential election. I think that this is a great charge. I think it's an important one if it comes to pass.

I wrote a column, I don't know, sometime last year. I'll drop the link in the show notes. Basically, making the case that Reconstruction era statutes like this should have been referred by the January 6th committee frankly, because they're so in line with what happened, and particularly because they come from the Reconstruction era and they have everything to do with race.

Look at the cities where the challenges to the vote in 2020 were taking place. It was Detroit, it was Atlanta, it was Milwaukee, it was Philadelphia. It was places that had very, very large Black votes. And those are the places where the election was lost for Donald Trump. And it's no coincidence that those were the places that were being challenged. And I thought, especially given that and also just the imagery that we saw on January 6th at the Capitol, confederate flags and all kinds of white supremacist

insignia, that this is precisely the sort of thing that the Ku Klux Klan Act was meant to guard against the kind of vigilantism that was meant to discourage and to intimidate Black and brown folks from taking part as full citizens and the right to vote.

That seemed plain to me, that seemed to be a good basis for this. And it sort of seems like something similar is happening here, or at least I hope it is because I think for posterity that's an important point to make.

Barb:

Yeah. In fact, Kim, I remember that column distinctly. I thought it was really eye-opening. I think you wrote it at the conclusion of the January 6th investigation, sort of pointing out that, "This was all about race people." And what's kind of deafening silence about the recognition of that in their report. And in fact, I've cited it in my book because I think-

Kim:

Oh, well, thank you.

Barb:

... it raises such an interesting point that so much of this mega movement is about racial identity and threats to racial identity, and it is what motivates people to try to win at any cost. Super interesting. I think one other thing about this, tell me if you disagree with me, but one thing that has struck me about this particular statute that might be really brilliant, is unlike the other two statutes where I think they're going to have to prove that Trump actually knew he had lost the election, right?

For the conspiracy to defraud the United States, you have to show that he was acting with a fraudulent intent, which means he knew he had lost the election. I think for the 1512, they need to show that he had a corrupt intent, meaning that he knew he had lost the election. But I think for this one, you can prove it even if he believed he won, because what he was doing was subverting the voting process. And so even if he thinks, "Well, I was going to win anyway." That doesn't matter. You are trying to deprive people of the rightful vote.

Like in Georgia when he says, "I want 11,780 votes." He doesn't care how they get there, he just believes he's entitled to them. So you should kind of fix it, "Do a make-up call ref. To rig the outcome in my favor to sort of correct the injustice or something." But that's not how it works. You can't do it that way. And so I wonder if one theory behind adding this statute was an effort to, even if a jury is not persuaded that Trump knew he lost though, I think they can win on that using a theory of willful blindness and all the people who told him he lost, including his own consultants. If a jury somehow think, "Gosh, I just, I don't know. The government has the burden of proof here." I think this is when they can win without even proving that he knew he lost.

Jill:

I agree with you, Barb, completely. But I think there's no question that they can prove that he knew or that he was willfully ignorant, that he had all the evidence he needed to make a reasonable choice and that he couldn't possibly have concluded that he won the election.

Barb:

Yeah. Well, let me ask each of you, I've got one quick question for each of you that's slightly adjacent to this topic.

Jill, let me start with you that there is some reporting that Fulton County District Attorney, Fani Willis, is getting close to an indictment and is actually preparing RICO charges against Trump. This would be the Georgia State RICO statute. Can you explain just generally what RICO is?

Jill:

Sure. RICO is Racketeer Influenced Corrupt Organization. And it was a law at the federal level that passed just as I was becoming a prosecutor and was intended to go after organized crime, but has since been successfully used and states have passed similar laws as Georgia has, and they have used it well beyond organized crime.

It is an broader in Georgia than it is at the federal level because it charges can be based on an attempt to do another crime as opposed to a completed crime. And this is, it says it's unlawful for any person to conspire or endeavor to violate any of the provisions of law that they work together to do and to conspire in order to commit an overt act.

So they have to do something in furtherance, so the conspiracy, it's not enough to just have an agreement that you're going to do something. You have to take some action. And I would say in this case, they have plenty. I mean, in Georgia you have the phone call. There is an overt act in the attempt to take down the election.

So I would say that they have a very strong case in Georgia and it has harsher penalties than just an ordinary crime. So it's a good one to be using. And Fani Willis has a history of successfully using RICO charges.

Barb:

Yeah. Yeah, I like it. I think it encompasses a large scope, so you can get in all kinds of other activity that is related to the heart of the case. And then in Michigan, Kim, your home state this week, Attorney General Dana Nessel filed charges against the 16 fake electors with forgery, election fraud and some related charges. Why do you suppose she has filed state charges and will that in any way impact the federal charges that Jack Smith is investigating?

Kim:

Well, I think that it was fantastic, first of all that they did this and I hope other states where there were phony electors follow suit. So the charges are all felonies and come with a 14-year prison sentences and it, they are counts of conspiracy to commit forgery.

Forgery and something called uttering and publishing, which I honestly, the first time I heard that term, and a lot of people don't understand what it is, was when I was actually a bank teller in college. It was even before law school. And what that means is, people know what forgery means. It means creating a fake document, but uttering and publishing is actually trying to use it.

So if you have a fake dollar bill, if you make a fake dollar bill, that in itself is a felony. But if you try to take it to a bank and deposit it, that's uttering and publishing, that's an additional felony. And what they're allegedly charging is that these electors when they gathered together in the basement of the Republican Party headquarters in Michigan, and they called themselves duly elected and qualified electors and then submitted the documentation of that to the US Senate and National Archives each along the way, they were committing state felonies, multiple state felonies. So I think that this is great. I think that this is important, and I think every state where this happened should do this.

How it will affect Jack Smith? I'm not sure that it will, other than perhaps if he had not looked into this as a basis of charges, maybe that could light a fire under him. But it seems from the reporting that we've

seen that he's already on this, that he's already looking at the phony elector scheme. So this seems to me like a parallel path, but you guys again, are the prosecutors. I want to hear your views.

Jill:

I would say it only affects how they schedule trials because the witnesses would be the same witnesses in federal and state cases, and they can't be in both trials at the same time. So they would have to just coordinate the trial date, but there's no reason why you cannot have a violation of state law that also violates federal law and both could be tried.

Barb:

Yeah. I think the same, and I think, Dana Nessel had said previously that when she learned about this apparent violation of the law, she shared it with the Justice Department and asked them to investigate, and then she got tired of waiting. So she said she, earlier this year, she was just going to pick up the investigation herself and look into it, and file these charges and said that they lied in a very official formal document, that's very important about election law and the rights of the voters of Michigan. So kudos to her for filing this charge.

I think the defense will be that they did not intend to defraud anybody. It was just sort of conditional or provisional in some way. But she's got evidence that she has cited about them saying, "You must keep this secret." That there was at one point an effort to sneak into the State House and spend the night there so that they could be in the place where they're supposed to be to cast the vote. So I think there's enough sort of consciousness of guilt, evidence of intent here to go forward. So I'll be really interested to watch this case play out.

Kim:

You know what, Barb? I know how much you love to cook. But let me tell you, I made a really great dinner. In fact, Greg and I both cooked it together. It was scallops and bacon in a creamy sauce over spaghetti. And guess what? It was so easy because it was from HelloFresh. I know you like HelloFresh.

Barb:

Yeah, I do. And it is a little bit of a joke in the family that I don't love to cook. When my children were young, every time the doorbell rang, my then three-year old would say, "Foods here!" Because we use delivery services so much. But I have found that 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.

HelloFresh, gets that you want options when it comes to what to make for dinner, not just the same old thing all the time. So that's why they offer 40 recipes to choose from every single week, so you'll never get bored and can always find something new to try and love.

Jill:

I just want to know, Barb, how you get your husband to help you cook. That's what I want to know. Or Kim, I guess you're the one who's getting your husband to do it. Lucky you. But even without him cooking, it is fun to cook HelloFresh.

And did you know that HelloFresh offers more than just delicious dinners? It's now easier than ever to skip the extra grocery store run by adding snacks, sides and more to your weekly order. Simply shop

HelloFresh Market and take your pick from a curated selection of over 100 items. I love their salads, desserts, and breakfast.

Kim:

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 flavors of the season right from home.

So go to hellofresh.com/sisters50 and use the code Sisters50 for 50% off plus free shipping. Again, go to hellofresh.com/sisters50 and use the code Sisters50 for 50% off plus free shipping. Everyone can also look for the link to HelloFresh, America's number one meal kit in our show notes.

So I have been wanting to get both of your reactions to Republican state attorneys general, sending what I would call a threatening letter to Fortune 100 companies, warning them that if they don't drop their diversity, equity and inclusion workplace policies, they may face legal action.

Barb, a lot of companies adopted these policies after George Floyd was killed in 2020 as a way to be more responsive to racial inequities in all forms. But these attorneys general cite Title VII, which we've talked about many times on this podcast, and it protects women, people of color and LGBTQ folks in the workplace. Well, that's the context that we usually discuss it, but it seems here these AGs are flipping the script and suggesting white men need to be protected in corporate America. What do you think about this analysis, Barb?

Barb:

Yeah, I think that they are putting a little too much stock in the recent affirmative action cases, the cases out of Harvard and the University of North Carolina. The context there is a little bit different. Those were Title VI and the 14th Amendment that they were looking at there, it related to higher education and not corporate America.

And also, even though, I know the headline is that the Supreme Court has overturned affirmative action, I would say a better way to phrase it was they gutted it because they still recognize, and this is a really important point, I think, that it is okay to draw racial lines as long as you have a compelling reason and your program is narrowly tailored to achieve that reason.

And so I think that, even though those programs are struck down, Chief Justice Roberts said, "You can still talk about how your race impacted your character or your experiences or your viewpoint. You just can't say, everybody who shares this racial description can be admitted on that basis." And so I think that, number one, until courts rule that this applies to corporate America, I would expect them to continue to do what's good for business, which is to promote diversity, equity, and inclusion. They wouldn't do it if it weren't good for business. Customers want to know that they are doing business with corporations that care about values like diversity, equity, and inclusion.

So I think they're going to continue to do that. There's nothing that would require them to stop. This is not a precedent that is in any way binding or applicable to corporate America. I think they'd have to make a separate challenge under Title VII. Maybe they can make out the case, but unless and until they do, if I were advising a corporation, I would just keep on keeping on.

Kim:

So Jill, as we mentioned, they cite the affirmative action decision by the Supreme Court. Do you think that reasoning extends to corporate workplaces? And if so, do you think this is just the tip of the iceberg? Do you think that there will be challenges to other things too?

Jill:

Well, I'm going to give you inconsistent answers because no, I don't think it applies to corporate America. And I would go further than what Barbara said, which is to say, there is even in their striking down affirmative action in the way they did, they said it's okay in the Pentagon because it's really important to have a diverse workforce so that the leaders look like the workforce.

Well, excuse me, but that's a workplace. It is. And so I think that they're saying right there that corporate America can continue to do what it thinks is best. And we know for sure that corporations that have diverse workforces have more profit than others. It's proven time and time again. So corporations are going to want to keep doing that and have an obligation, I think, to keep doing that. And there is nothing in the decision which is limited to higher education and to schools that get federal money.

Now, if they do bring a case and it goes to the Supreme Court, everything I've said could be thrown out because the Supreme Court is unpredictable and goes further than it ever should or could or that we would've ever predicted. They have thrown out precedent time and time again. And so who knows what they would do with that case? I don't know. But it does seem to me that the Pentagon exception may speak to a workplace being exempt from the affirmative action ruling.

Kim:

That's a really good point, that they totally carved out the Pentagon in a way, and they didn't really explain why. They just kind of did.

Barb:

Well, that's really important, Kim. That's great.

Jill:

Yeah.

Kim:

But they did, and that's an important thing to point out. And to your point about profitable, not only has it shown, and I wrote a column that cited some of these statistics, and I'll put it in the show notes, but it is more profitable when companies have more diverse workplaces and boards. And when you have more women and people of color in C-suites, those companies have been shown to be more profitable and more innovative.

But Title VII is meant to guard against discrimination. So what it's meant to do is if there is a barrier put in place in front of somebody because of their gender or because of their sexual orientation or because of their race, it's meant to bar using that barrier. There is no barrier. Show me the barrier to white men in corporate America. Let's be for real.

They make up 30% of the US population and they run everything. And they have a majority of board seats, not just in Fortune 100 companies, but through actually the Fortune 100, do better on diversity than Fortune 500, the 400 under them overall in corporate America. It is run by white men, who is being discriminated against. This is just such nonsense.

Anyway, Barb, Democratic attorneys general sent their own letter in response to the letter that the GOP officials, I should also note that the GOP officials, I think it was 17 of them, I think 15 were white men, whereas the Democratic attorneys general were multiracial, multiethnic. Anyway, wait, let me just stop. But I was on a press call with some of the Democratic attorneys general and I asked what action they could take in response to this. And essentially what they said is, "Well, you know what? We're going to encourage these corporations to keep on keeping on with their DEI policies and don't be bullied by the Republicans." And I sort of thought, "Okay, that was not the most satisfying answer." Barb, is there more that they could do in this case?

Barb:

Yeah. I don't know that there is actually Kim, because I think that if they were to try to bring some sort of lawsuit against the challenge and be very proactive and aggressive to say, "You're interfering with our business, we have a right to do this." I think the worry is sometimes, you think about this strategically, you don't want to make bad law. And so if you set your entity on a course toward the US Supreme Court, as Jill has mentioned, they've been a little bit unpredictable. And to the extent they are predictable, they strongly disfavor racial preferences of any kind, even though I would argue that diversity that is based on a compelling interest that is narrowly tailored would be permissible.

So I think what they'd probably rather do is if any of these companies, target is one that has been mentioned and others do find themselves as a defendant in a lawsuit, what these attorneys general could do would be to either file a statement of interest, get involved and file their own brief or lead a group of amici, friends of the court and file an amicus brief and talk about the value of diversity in the workplace.

I know when we had the Grutter vs. Bollinger case involving affirmative action at the University of Michigan Law School a decade or so ago, a large number of large corporations filed amicus briefs like General Motors and others, who talked about the value of diversity in their workplace, that it added to the value of their products to have diverse perspectives around the table talking about what the product ought to look like and how to market it and how to sell it, and all of those things. And so I think helping play defense here is probably the better strategy than going on the offensive.

Kim:

Yeah. Jill, what do you think? I mean, you said you already worry about what the SCOTUS might do if a challenge like this ultimately reaches it. What do you think?

Jill:

I think, there is very little, unfortunately that the attorneys general can do other than what Barbara has said. And I think, the statistics are so compelling in terms of how much help it is to the profitability of a company to have a diverse workforce. Barb mentioned in terms of a lot of things, but even in terms of who you market to, the population buying products is a very diverse population. And if you have a diverse workforce, they will not only develop products for that.

I've worked in two corporations that are very much dependent on marketing things that people will buy. And in order to know what people will buy, you have to know those people. And so I think, it is very helpful to have the diverse workforce and therefore there is a compelling interest for it. In the same way that, as I said, the Pentagon was viewed as, "Yeah, it's okay for them to do DEI because they really have to have a diverse workforce." Well so do other corporations.

So I think that maybe, although I worry with the Supreme Court and I worry about what other possible ways that attorneys general who want to could bring cases to expand the affirmative action recent decision, I think that in the workplace they're going to be safe and that corporations can continue to do what they are doing to help create diversity, equity, and inclusion in their workplaces.

Kim:

I hope you're right, Jill, because according to an estimate by the World Economic Forum, racial inequity in the labor market costs the US economy \$51 trillion in the last 30 years. Racism costs everybody.

And listen, I have been, I've had the experience not only of being the only black face in a classroom many times in my higher education experience, I've also been the only black face in a workroom or on a team or something else. And I know what that feels like. It happens to a lot of people. It's a great burden on those folks and good on these companies for trying to ensure that their workplaces are inclusive and supportive of everyone in it and welcoming because that's a big deal and it's important.

Jill:

All my friends know how much I love my garden. It is one of the joys of my life, and Lomi has helped me make it even better. We all know it's too easy to leave full trash bins at home when we are away. And so what does that have to do with gardening?

Well, I can tell you how, because Lomi is the perfect way to keep our places clean, that also makes a difference for the environment. Lomi transforms garbage into gold at the push of a button. If you didn't already know, Lomi is a countertop electric composter that turns food scraps to dirt in under four hours. It's amazing how fast it goes and how quiet it is. You're going to love it as much as I do.

Barb:

It even makes cooking at home even more enjoyable and in alignment with our values. That's because with Lomi, you can turn waste into nutrient rich dirt to feed your plants, lawn or garden, which means it's not going to landfills or producing methane gas. So we get to help with the environment and make our lives easier.

Now, all our food scraps, plant clippings, and even those leftovers you forget in the back of the fridge can go back to the ecosystem. Even better, anyone who uses Lomi can grow more nutritious food right in their own backyard.

Kim:

Yeah. We literally have been putting the dirt from Lomi right back in the backyard, and the flowers have been looking great, despite the fact that we haven't gotten a lot of rain this summer. It's been quite hot, but it's still doing great. And it feels so great knowing there's no food rotting in your garbage and smelling up the kitchen. Thanks to Lomi, I only have to take out the trash once a week and it's hassle-free, mess free. It's a great experience.

Imagine having no more leaky bags. I hate leaky bags. There's no smell when it runs and it's really quiet, making it the perfect compliment to a tidy and classy looking kitchen. And if you're planning a lot of summer dinner parties, you really want to have Lomi as your companion.

Jill:

Yeah. It's really good because you also are helping the environment. And you mentioned the heat, Kim, and it has been hot all over this country and all over Europe. So whether you want to start making a positive environmental impact or just grow a beautiful garden, Lomi is perfect for you.

Head to lomi.com/sil and use the promo code SIL to get \$50 off your Lomi. That's \$50 off when you head to lomi.com/sil and use promo code SIL at checkout. Thank you Lomi for sponsoring this episode. Everyone can also find the link. You know where, in our show notes.

In addition to the criminal cases we expect to be filed imminently, whatever that means in DC and Georgia. There are multiple other cases pending against Trump and Trump Org and there were new developments in three of them this week. Two are civil cases, one by Eugene Carroll that we'll discuss, and one from Michael Cohen against Trump Org. That is reportedly being settled today in lieu of starting a trial next week.

These are two out of the over 4,000 civil cases involving Trump just between the 80s and his election in 2016. And it doesn't count more of the cases that were filed since he became president, including the New York attorney generals. But today I want to talk about developments in two of the cases.

One is the Eugene Carroll case first, and I'm going to turn to you Kim, because she won \$5 million in her defamation case against Trump for remarks he made after losing the presidency or after he was not the president, after he was out of office. And she's had several victories since the verdict in that case. And so I want to talk about that.

So you're our civil litigation expert. So I want to start by asking you to sort of just remind our jury that there are two cases, and although the one that was tried is actually the second, it's case number one in many people's mind. So just talk about what the two cases are and how this week she defeated Trump in his quest for a retrial of the case that has already been tried and for reducing the verdict in that case.

Barb:

Can I just interject that Jill just said, "Tell our jury what all that means?"

Jill:

Oh, tell our jury?

Barb:

Yeah. When you're an old trial lawyer, old habits die hard.

Jill:

Oh, god.

Kim:

So you get a bunch of lawyers together and we get used to reminding the jury. Jill said, remind the jury, remind our listeners. But in a way, you all are our jury, right? You render a decision about what all this is been.

So just a reminder that the verdict in favor of Eugene Carroll was actually the second defamation case that she filed because the first one had been put on hold for some time, while there was a determination to be made about whether Donald Trump could be a defendant in a case if he was potentially acting within the scope of his job as president of the United States. We'll get put a pin in that. We'll come back to that later.

So she filed a second defamation case based on comments that he made after leaving office so that defense could not be offered by him. And that led to that \$5 million verdict. So a couple of victories for her. The first one was Donald Trump was seeking to throw out that award, saying that he did not actually rape her. The jury found that he did not rape her. So he wanted a new trial because the verdict was excessive \$5 million for what? Essentially was just sexual abuse. Which just made me angry and said, "That's the sort of charge that you would file against someone who say..." And these are the words of Donald Trump's filings, "Groped a breast or something. It's not like rape."

First of all, groping a breast is battery. It is battery. And if it's done in a threatening way, it's also assault. It is traumatizing. It's a horrific crime. So stating that as if that's no big whoop is so offensive, and I think it would more than support a \$5 million award-

Jill:

He goes around doing that every day. What's the big deal? What is that frowned upon?

Kim:

What? I mean, my goodness.

Jill:

Yeah. I can't even do that anymore.

Kim:

What an argument to make? That is so offensive.

Barb:

You walk in a room and you shake hands with the guys you fondle of breath, "Hey, it's nice to meet you."

Kim:

Oh my god, it's so offensive, so spot, Judge Kaplan made a point that A, that wasn't even alleged in this case. So that's inappropriate, inapt description. What was alleged was something much awful was that Donald Trump taking his hand and penetrating her. I'm sorry, this is a children's show, but that's what it is. And under any general parlance, somebody would understand that to mean rape. It is a very serious accusation and it could more than support that kind of jury award. So he loses on that.

Also, he loses in that, the current Justice Department has reverse course from the Bill Barr Justice Department and said it would no longer defend Donald Trump and claim that he was acting within the scope of his employment in that first civil trial and that Donald Trump is on his own. So it was a very good week for Eugene Carroll.

Jill:

It was great because that ruling by the Department of Justice also means that he is not immune to the suit because the Department of Justice, if it's substituted as the defendant, cannot be sued for defamation. But Donald Trump can be. So it really was a big verdict for her. And of course we know that he does more than grope breasts. He says, "I grab." And it is a family show, so I'm not going to say the word, but everybody listening knows-

Kim:

And he admitted to it.

Jill:

... the word. He definitely did. And just to make it clear, the judge was very clear in saying, "Yes, in common parlance, this is rape. It is only by the fluke of the specific language of New York's rape law that requires the penetration not be by a finger to be considered rape." And this was a big issue when I was on a committee looking at sexual assault in the military and was assigned to the committee to redraft the rules of the military code of justice and to define what rape was.

And at first I was so uncomfortable using the words that you have to use, but luckily was on the committee with a former New York state prosecutor who did only sex crimes and who was very comfortable with the words. So I became comfortable, but we won't use them here.

But okay, so second, Kim, and this is to go a little more in depth, if we go back to her original case, the one where he was the president and defamed her, as you said, the department reversed its previous agreement to represent Trump and make him not immune. What did Department of Justice say about why they reached that decision? Because the Trump AG, we can understand why they said they would represent him, but it's been a long time since Biden has been president and Merrick Garland has been the attorney general and they continued with it. What changed their minds?

Kim:

Well, I don't know why it took so long. I would've thought that they could have come out with this letter much earlier. But essentially what they did is do an analysis of the respond, yet superior standard, and we've talked about this before, it's basically when an employer steps into the place of an employee, in this case it would be the United States stepping in the place as the president of the United States. And as you noted they would be, the United States would be immune from such a suit.

But it said, "In this case that doctrine of respond yet superior does not apply because the facts in this case does not," And now, I'm reading from the letter, "support a determination that he was acting within the scope of his employment when he denied sexually assaulting Ms. Carroll and made other statements regarding Ms. Carroll that she challenged in this action."

Basically, it is not a duty of the president of the United States to say what he said. He was not acting in any official capacity, he was not representing the country when he did that. He was doing that as an individual and therefore there's no place for the DOJ in this action.

Jill:

Right. And I think they also said that it was partly because he had done it twice after he was president. And so that just showed that it wasn't part of his job to do. He continued doing it.

But So Barb, let's turn to another interesting aspect of the verdict that she got, in that it impacts her second case to go to trial, which is really the first case and that's the one for his defamation while he was still president that Kim was discussing. And that is something that I love saying, res judicata or claim preclusion. Can you explain how this will impact the trial that is going to go forward now?

Barb:

Yeah. Res judicata means things decided. It is also the goofy pun that is used anytime groups of lawyers do running competitions.

Kim:

Yes.

Barb:

The race judicata.

Jill:

Have you ever run into res judicata? I've run in res judicata.

Kim:

Yes, I've run already.

Jill:

Everybody thinks they're so clever. We're going to call it res judicata, get this.

Barb:

It's one of those concepts you learn about in first year civil procedures. Everyone walks around thinking they're so funny. But I think res judicata and claim preclusion means that in a prior trial, some other court has already ruled on this thing. And so there's no need to re-litigate it. The parties can just come in and say that's been decided. So that would be a whole claim.

There is a second subset of that, which I think is probably the one that applies here called collateral estoppel, and that is issue preclusion. So it's not the whole claim that's been litigated before, but it is an issue that has been decided. And in this instance it is the sexual assault. So if when this case goes to trial again, I think Eugene Carroll can say, "We don't need this jury to decide whether there was a sexual assault at the Borgsdorf Goodman dressing room in 1990. Whatever it was. That's been decided. What we'll look at instead are the other elements of defamation." That is the statements here which are different from the first trial. These are some of the ones issued on the White House letterhead and on the grounds by the helicopter and all that.

Was it published? Was it false? Was Trump at least negligent or I guess it's actual malice in this case? Did he know it was false? And did he say so with actual malice? And did those statements damage your reputation? So they'll have to prove up all the other stuff. But I think as to the issue of whether there was or wasn't a sexual assault, I think we're done.

And then I think even the word rape as Kim and Jill you just discussed, based on Judge Kaplan's finding, that in common parlance this was a rape, I think that they can say this issue is precluded from further litigation. The jury can simply be instructed that this rape occurred.

Jill:

Perfect. And let's move to a different case. And that's the DA's felony charges against Trump. There was another loss for him in that case. And so maybe just briefly remind our listeners, I got it this time, what that case is about and what happened in court this week that was good for the prosecution.

Barb:

This is two indictments ago, so it seems like such a long time ago. It's hard for people to remember. This is the Alvin Bragg indictment, charging Donald Trump with falsifying business records for the payments he made to Michael Cohen to then be used as hush money for Stormy Daniels on the eve of the election. So that case was filed in state court and Donald Trump was endeavoring to have it moved to federal court. And there may be some strategic advantages there, federal court draws from a larger geographic area, so perhaps he thought he could get a more favorable jury to include suburban New Yorkers as opposed to just people living in Manhattan. But the idea that this could be removed to federal court is based on the law, that says when you sue or charge a federal official based on conduct committed in the scope of their employment, then that case belongs in federal court.

And so that was the argument that the Trump team was making. And the court decided, "No, this related purely to Donald Trump's personal affairs. This was not any part of his duty as president to make these hush money payments." I think he wrote some of the checks while he was in the White House, but they were very much about protecting his personal reputation and protecting his campaign, not in any way serving the country in his role as president. And so for that reason, this motion was denied and trial will proceed in state court where it was filed.

Kim:

Jill, every time I see you, you always look immaculate right down to your fingernails. Tell me your secret.

Jill:

My secret is that it's great to be able to give yourself the perfect home manicure with Olive and June. They have everything you need for a salon quality manicure in one box, and you can customize it with your choice of six polishes, and their colors are fabulous.

I love how their polish doesn't chip and lasts seven days or more. And when it comes down to it, you're getting a great savings because it breaks down to just \$2 a manicure. So not only do you get salon worthy nails at home with Olive and June, you'll immediately notice the difference you get when you craft your perfect nails with their Mani system.

Kim:

That means no appointments, no traveling to find a suitable salon, and it saves you money while putting your nails on your schedule. Your friends, family, spouses and podcast co-hosts will be amazed. I wouldn't think of using anything else before going on air. Plus they have amazing looking press on that go on really quickly and they look so real and last so long and have any size you can imagine, you know you're going to get the perfect fit.

Barb:

Well this podcast co-host is amazed looking at your nails, Kim.

Kim:

Thank you.

Barb:

With Olive and June, you can get a non-damaging manicure in less than 10 minutes that go on much better than gel. They're even an allure, best of beauty winner. And with their quick dry, you have to wait

only a minute and can feel confident knowing they'll last for five days or more with only one or two coats.

So visit oliveandjune.com/sil for 20% off your first Mani system. That's O-L-I-V-E-A-N-D-J-U-N-E.com/sil for 20% off your first Mani system. You can also find the link in our show notes.

Jill:

Well, it's time for our favorite part of the show and that is to answer your questions. We had some really good ones this week and we will answer the three that we have time for.

If you have a question for us for next week, please email us at sistersinlaw@politicon.com or Thread or tweet using #SistersInLaw. If we don't get to your question during the show, keep an eye on our Thread feeds throughout the week because we oftentimes answer your questions there.

The first question is for you, Barb, and it's from Ellen in Goleta, California. "Why has Steve Bannon remained free for so long after his appeal of his contempt conviction?"

Barb:

That is a great question, Ellen from Goleta, California, because I think it's an outrage that he is out. Ordinarily, when someone is convicted of a crime and has been sentenced, they start serving their term even while their appeal is pending. There's a federal statute on this that says, except upon another finding, the defendant who is awaiting appeal shall be detained, shall be. But they give an exception if the judge finds first by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of the community.

Okay, maybe I'll give you that one. But, and the judge also has to find this, that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal an order for a new trial, a sentence that does not include prison or a reduced sentence.

I don't see how they find any of those things. I mean, I suppose they'll say maybe he raises some issues regarding executive privilege that are worth talking about. But remember his conduct, the stuff he was tested, subpoenaed to testify after he had left the White House. And so I don't see how the judge could have found that there was a substantial question of law or fact likely to result in a reversal or an order for a new trial. So, gosh, to me, it just seems like people getting special treatment.

Jill:

It also seems to me you're being too generous in thinking. Okay, I'll give you, he's probably not a flight risk, but that he's not a danger to the community? I don't think so. I think he is a danger to the community.

Anyway, the next question is for you Kim, from Sharon. "If a jury finds Trump not guilty or cannot agree to a verdict, can a judge either overturn or make a verdict of his own?"

Kim:

That's a great question, Sharon. So in the event of either a not guilty verdict, a unanimous verdict for not guilty, or a jury hanging, which means unable to agree on a verdict, a judge can't substitute his or her judgment of guilt in the place of the jury.

But if there is a case where a jury finds a defendant guilty, and a judge finds as a matter of law, the evidence presented could not possibly support a verdict, a judge does have the power to go the other

way and direct a verdict of not guilty. But it can't go the other way. A judge cannot take it upon himself or herself to convict someone where a jury did not.

Jill:

And our last question, and all of these, by the way, are from Threads where all of us are now also active at most of, I think the same names that we have on other social media sites. And this one comes from Lisa. She asks whether former President Trump is trying to prolong his trial dates down the road and closer to his hearing date, "Could he fire his current consul and hire a new team? Would he then gain more time so his new consul gets clearance and in that they need in order to defend him?"

And the answer is he can try that, but unless he has a good reason for firing his consul, the judge isn't going to let the consul withdraw. And I think in this case it would be an obvious ploy for delay without any reason for firing his consul. So his consul are pretty much in this for the duration, and he's not going to get away with that, in my opinion.

Thank you for listening to #SistersInLaw with Kimberly Atkins Stohr, Barbara McQuade, and me, Jill Wine-Banks. Don't worry, Joyce will be back next week. And remember, you can send in your questions by email to sistersinlaw@politicon.com or tweet them or thread them for next week's show using #SistersInLaw.

Please support this week's sponsors BlueLand, HelloFresh, Lomi, and Olive and June. You can find their links in the show notes and please support them as they really help make this show happen. And go to politicon.com/merch to buy our shirts, totes, and other goodies. To keep up with us every week, follow #SistersInLaw on Apple Podcasts or wherever you listen, and please give us a 5-star review. It really helps others to find the show. See you next week with another episode, #SistersInLaw.

Kim:

So it's not a Barbie, it's about the size of an American girls doll, but a friend of mine who has since passed away years ago, saw a doll online and said that it looked like me, so I bought it and I put it in a dress that I designed. So this is-

Jill:

Oh my gosh!

Barb:

Oh my God.

Jill:

That's creepy!

Barb:

It's you. Oh my God.

Kim:

Little Kim, little Kim.

Jill:

This transcript was exported on Jul 22, 2023 - view latest version [here](#).

Little Kim.

Kim:

It's little Kim. It's little Kim.

Jill:

Little Kim.

Barb:

Oh my God, that's fantastic. Oh my God. I'm going to have to get up and get the doll I-

Jill:

It kind of looks like you.

Barb:

Hold on.

Kim:

Yeah.

Jill:

It's kind of, it's a little eerie, frankly.

Kim:

It does. Yeah. Yeah. When my hair's curly.

Barb:

I love it. The little Kim doll.

Kim:

Little Kim doll.

Barb:

Excellent.

Kim:

Oh, Ruth.

Barb:

Leave it to Jill. She's got an RBG doll.

Jill:

That's the doll that I have sitting facing me when I record. She inspires me all the time.

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Kim:

I love it.

Barb:

Yeah. I have an RBG action figure that I have in my office. Same.

Jill:

And I really do have a Hillary Clinton nutcracker.