

Kim:

Welcome back to #SistersInLaw with Jill Wine-Banks, Joyce Vance, Barb McQuade, and me, Kimberly Atkins Stohr. Today we will be talking about Peter Navarro's conviction for contempt of Congress, one of the first lawsuits claiming Donald Trump is disqualified to be on the ballot under the 14th Amendment, and a couple of rulings over Texas' inhumane border barrier.

And as always, we look forward to answering your questions at the end of the show. And remember to go to politicon.com/merch to buy your shirts, totes, and other goodies for the perfect gift, if you're already shopping for the holidays, or for yourself. As the temperatures start to turn cooler, you can get your hoodie and be ready to go.

Now, before we get into these very important topics, I wanted to ask you guys something. I needed a little help over the weekend. I normally am very conversational with strangers. I like to chat with people, especially if I'm traveling and I meet people or if I'm in an Uber, I chat with the driver.

But this weekend I found myself in a situation where I was in an Uber with 45 minutes with a driver, who turned the polite chit-chat at the beginning of the ride into this long regaling of his problems to me. He talked about this terrible divorce he went through, how awful his ex-wife was, this grueling custody dispute. He gave me all kinds of details about the things his current girlfriend doesn't like about him. All of these things.

Joyce:

And that's just hard.

Kim:

I'm sitting in the backseat and I just wanted to check my emails and mind my business and I didn't know what to say. I didn't want to be rude and say, "Would you mind if we're just quiet now?" But I also just really didn't. I wanted him to stop and the ride was so long.

So you guys are my wise sages. Please give me some wisdom about what to do in a situation like that in the future that'll save me.

Joyce:

I wish I could, Kim, but I'm you. I would've sat there for the whole 45 minutes and let him talk. And I'll tell you, this goes back to something that I learned as a young federal prosecutor. Barb, I bet you did this too.

We had what was called a duty week where you handled everybody who walked in the streets-

Barb:

Yeah, with duty week.

Joyce:

... and you would get people who walked in with some really interesting complaints that the Justice Department could not resolve for them, including people who thought that they were being bugged by space aliens or controlled by the government.

And what I learned to do was just to let people talk on the theory that I might be the only contact that they would ever have with the federal government and that my patients could keep them from going

ballistic and shooting up a post office or something like that. And I guess that's carried over. It's like if I'm in that situation, I will let someone go on painfully. So I'm all ears for what Jill and Barb have to say.

Jill:

So I'm not so nice. But before I answer Kim's question, I just want to say at DOJ, we used to also have duty and people would come in, my dentist put in a recording device in my mouth and I'm being monitored all the time. And one of my colleagues made a chain of paperclips and said, "You just-"

Joyce:

We did the same thing.

Kim:

Did you really?

Jill:

"... put it on your belt and it'll ground you, you'll be safe." So that was one way of helping people.

Joyce:

Well, I just have to say this because my favorite prosecutor in my office, a former FBI agent named Anthony Joseph, whose wife listens to our podcast and I think his son's, mom does too.

But Anthony taught me to unfold a paperclip and to keep it in my pocket on my duty week. And if someone came in and they would, you would say, "Look, I'm not supposed to tell you this, so don't give me up, but if you'll keep this in your pocket, you won't have problems anymore." And you would never hear from those people again. It was brilliant.

Jill:

It was brilliant. But anyway, to answer Kim's question, I'm not as nice as you are. I will let people go on for a little while, partly because I find it interesting and because it might be helpful.

But at some point if I have work to do, I will say, "Could you mind turning off the radio, which is frequently blaring music I don't like and I'm so sorry, but I have to get some work done before I get to my house." And people are usually pretty responsive to that. I say it nicely and say, "This was very interesting hearing from you, but I have to do this before I get to where I'm going."

Joyce:

That's a good idea.

Barb:

I'm trying to go farther in the other direction. I am often the one who, I get on a plane and I just put on the headphones and get working and try to tune out. And I've read this book called The Good Life, that talks about how when we spend some time with strangers, even those who may not want to engage with strangers, all feel better afterwards after you do.

But I feel for you, Kim, because at some point it can be a bit much, and I don't know what the right call is when you're captive like that. If you're in a taxi or an Uber, there is nowhere to go. So Jill's advice is pretty good.

But I actually raised this with a couple of friends today about how do you extricate yourself from a conversation and in an office setting, they had a couple of good ideas. One, said people instinctively mirror physical behavior, and she said she's find if she stands up, the other person stands up and then they start to walk away. It just sort of physically triggers like, "Well, I guess we're done here." Which I thought was amazing. I might have to try that.

Joyce:

I love that.

Barb:

Isn't that good?

Joyce:

Yeah.

Barb:

And then the other one had this, which I thought was brilliant. She said, "This always works, especially if the other person is male. You say, 'I'm sorry, I have to go to the ladies' room.'" So the men freak out and run away. So that's not bad.

I will confess that at a prior workplace, I won't say where, and I won't say who. There was somebody who was chronically chatty, lovely person, but didn't know when it was time to stop and people needed to get back to work.

So we all had a pact among the rest of us that if you ever saw this person sort of camped out in the chair in your office, you owed that person and you had to save them. And the save was they would call you on the phone and you'd pick up and they'd say, "You owe me." You say, "Oh, yeah, yeah, I can come down to your office. Yeah, I'll be right there. Sorry, I got to go."

Kim:

That's what I used to do on dates.

Barb:

To do the save. "Oh yes, I'll be there."

Kim:

After a minute you look on a date and you knew it was going nowhere. And I'll look at my phone, it's like, "Oh gosh, my friend just told me that she has to rush my dog to the hospital." It's sort of like that being the, although I always made it up.

Jill:

My secretary always did that for me. She would call. If someone came in who's overstayed their welcome, she would know and she would call. And I got out of a lot of lengthy discussions that were unnecessary that day.

Kim:

Oh, that's great.

Barb:

And may I say, although that is dishonest and it is useful, I try to be honest in all of my endeavors. I think there are times when it's just more kind to do that.

Kim:

It is. Rather than [inaudible 00:07:37].

Barb:

Then to say, "Stop that, I don't want to talk to you anymore." To have a kind face-saving way out.

Joyce:

And I think all of those strategies are good to know.

Kim:

I think that too. Okay, so next time I'm going to text one y'all to call me when I'm in an Uber and to-

Jill:

Smart move.

Kim:

... say, "This is my boss. I got to go, sorry."

Barb:

I'm going to call you and then talk loudly and say, "Kim, why did you call me and tell me the Uber driver is driving you crazy?"

Jill:

Remember, kindness. I know you wouldn't do that.

Kim:

Joyce, when I see you, you always look great right down to your nails. What's your secret?

Joyce:

Kim, this is why I love you. My secret is really good, supportive friends and Olive and June. 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.

I love how the polish doesn't chip and last seven days or more, and I really like being able to have six wildly different colors because they have a great selection. When you come down to it, you're getting great savings because this breaks down to just about \$2 a manicure.

Jill:

I don't know about you, Joyce, but I have trouble picking the colors because there are so many that are really attractive. There's a blue and a pink that are probably my two favorites.

One is called, Yes Please. Great color. And with Olive and June, not only do you get salon worthy nails. At home with them, you'll immediately notice the difference you get when you craft your perfect nails with their Mani system.

That means no appointments, no traveling to find a suitable salon and saves you money while putting your nails on your schedule. Your friends, family, spouses and coworkers will all be amazed. I wouldn't think of using anything else before going on air.

Kim:

Plus they have amazing looking press ons that go on quickly, look real and last a really long time. And the press ons come in every size you can imagine. So you know you're going to get the perfect fit. Or use Olive and June's great polishes and get a non-damaging Mani in less than 10 minutes. That goes on much better than any gel.

They're an Allure Best of Beauty winner. And with their quick dry polishes, you'll only have to wait a minute and you can feel confident knowing your mani will last for five or more days. Mine always lasts longer, and you only need one or two coats.

Barb:

So if you want to have great looking nails like Joyce and Jill and Kim, you can 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.

Well, Peter Navarro, who was Donald Trump's former trade representative, was convicted this week for contempt of Congress for refusing to appear to testify before the House select committee last summer. He had spoken openly in the media about Trump's plan to overturn the election and a strategy he referred to as the Green Bay Sweep. The trial took about two days.

Kim, was this verdict a surprise for you?

Kim:

Yeah. It really was not surprising to me because the case for obstruction of Congress is pretty straightforward. It really turns on one crucial key question, which is whether Navarro willfully defied lawmakers? And in this case, I think it was pretty clear that he did. He was issued a subpoena to appear before the Congressional committee and also to provide documents, and he refused to do that.

Now, he of course, claimed an executive privilege, but the judge ruled that he didn't even put forward evidence that would support this claim. He didn't even put forward evidence saying that Donald Trump told him not to cooperate. So, no, that it took two days was not a surprise. And the outcome wasn't a surprise at all either.

Barb:

Yeah. I think they said they called three witnesses. I was surprised that they needed three. I thought one. And they were staffers on the house committee. I'm sure the questions were kind of like this. "Did you serve a subpoena on Peter Navarro?" "Yes, we did." "Did he give him a date to show up?" "Yes, he did." "Did he show up?" "No, he didn't." "Thank you. Case closed." Isn't that it? That's three witnesses. Why do you need three witnesses?

Well, Kim mentioned this idea of executive privilege, which seemed to be his defense here, at least in his mind, when he was refusing to appear.

Joyce, afterwards, Peter Navarro said he will prevail on appeal on the basis of executive privilege, but as Kim said before the trial, the judge ruled that Navarro could not use executive privilege as a defense before the jury. Navarro was once Trump's trade representative. Why is it that executive privilege was not available to him as a defense in this case?

Joyce:

Yeah. So there are a lot of reasons. I mean, this defense was always going to fail, but the most important one is that Trump never asserted executive privilege and it's the president's privilege to assert and Trump, for whatever reason, didn't hear.

Navarro actually tried to argue that because Trump had asserted privilege for some earlier very specific work he had done, where he was summoned to testify, that somehow tagged up and protected him from testifying here. And the judge just said, "No dice. Not going to work. Trump had to assert it specifically for this situation and he didn't." But here's the kicker.

Even if Trump had asserted executive privilege, Navarro would've still had to show up and answer each question individually and say, "I can answer my name. I can't answer X question because I'm invoking executive privilege." He didn't do it. This was the easiest case ever for a judge to say, "Sorry, you cannot argue this in front of the jury."

Barb:

Yeah. I saw that his lawyers argued that in closing argument, something like, "The government never even said where he was on the date." In question. And the reply was, "It doesn't matter where he was. The only thing that matters is where he wasn't." He wasn't in contempt of Congress to testify. I thought that was great.

Well, Jill, let me ask you about kind of what happens next. So Navarro joined Steve Bannon now as having been convicted at trial for refusing to obey a subpoena, that was issued by the January 6th select committee.

Bannon remains free. He got sentenced to, I think it was four months, but the judge said he didn't have to report to prison while his case was on appeal, which is highly unusual. And now, Navarro's sentencing has been set for a date in January. Do you think Navarro will get to remain free too, while his case is on appeal?

Jill:

It's a great question and I don't think he will for a couple of reasons. First of all, Bannon who got four months and a \$6,500 fine for two counts testimony and documents, did invoke executive privilege even though he wasn't actually at the time even an employee.

But the judge said that he had raised some serious legal issues and might prevail on appeal. And so there are three steps to winning on a motion not to be put in jail pending appeal. And one of them is that you have a substantial chance of prevailing on appeal.

I think in Navarro's case, there is no chance that he will prevail. The judge was very clear on the fact that there was no evidence that would show that executive privilege had been invoked by Donald Trump, and as Joyce pointed out, he just didn't even show up. So even if there had been, he'd still be guilty for

not showing up. So I think the chances of him winning on appeal eliminate the chance of his being not incarcerated during his appeal.

Barb:

Yeah. And I am never a fan of this idea of Trump judges, Obama judges, all that sort of stuff, but I thought this ruling in the Bannon case, allowing him to stay out while appeal is pending was really outrageous. It's a real outlier.

I mean, normally you go to prison and you handle your appeal. If you win, then you get out, but you go and serve. And the judge in that case is a Trump appointee, Rudy Nichols or Mick Nichols, I guess is his name. I don't like to cast dispersions that way, but I think that decision's just wrong.

Now, I guess the idea is, if you're serving a four-month sentence, it'll probably be over by the time your appeal is heard, and so you can't undo that, but that's what happens to most defendants.

Joyce:

Yeah, I mean that's not a factor. I think you're right, Barb.

Jill:

And you've raised an interesting point about how long it's taken. It's been on appeal for about a year, and so of course his sentence would've been over. I think he meets the qualifications, he posted bond, so he's not going to flee.

The other part I'm not so sure about. You have to show that you are not a danger to the community. And I would say that Bannon is definitely a danger to the community with his false statements on his podcast and things.

So I don't know if he would've prevailed on that one. But the judge really made his ruling there saying, "You've raised significant legal questions." I just don't think anyone's going to say that Navarro raised significant legal questions.

Barb:

Yeah. Well, it'll be interesting to see if he gets treated the same way or differently.

Kim, remember back when the January 6th committee was hearing testimony, they also referred two other witnesses to DOJ for prosecution, for contempt, for refusing to come testify.

Former chief of staff, Mark Meadows and his deputy Dan Scavino, the committee wanted them prosecuted for contempt for failing to show up, and DOJ declined to charge them. Why do you suppose they were treated differently from Navarro and Bannon?

Kim:

Yeah. That's an interesting question. I mean, I don't know. DOJ didn't tell me, but if I had to guess.

Barb:

That never stops us from speculating. Come on.

Kim:

A couple things come to mind. First and foremost, we have to remember that historically there have been other times when Congress has referred, made criminal referrals to the DOJ and the vast majority of the time the DOJ ignores them, right? The DOJ doesn't have to take up a criminal prosecution referral from Congress if it doesn't want to. So it's not terribly unusual that they did not bring charges in this case.

Also, as we've talked about many times, bringing a criminal case is very fact specific to the individual. So what I think more than likely happened is that prosecutors took a look, took a look at this case, took a look at what was there, and for whatever reason decided they were not certain they could get a conviction, if they brought that claim, and so they decided not to.

Also, there's option number three, which we don't know, but it's speculation. They could be cooperating. We don't know. It's very possible that if they were facing criminal liability that could have been paused as they cooperate and we see what the outcome of that is. I am very, very specifically with Meadows. I am very, very interested to see at the end of the day what happens there. I don't know what he's doing.

Joyce:

He is not cooperating. I will bet you-

Kim:

Do you think so?

Joyce:

... a Detroit hot dog, he is not cooperating.

Barb:

Yeah. I have thought with you until he got charged in Ricoh and then he's testified and all that.

Kim:

Yes.

Barb:

Yeah.

Joyce:

No way.

Kim:

But couldn't that just be a little bit of leverage?

Barb:

No. Uh-uh. No.

Joyce:

If he was cooperating, he blew his deal when he took the stands in Georgia.

Kim:

Yeah. That's interesting.

Barb:

That's interesting too.

Kim:

That's interesting. All right. All right

Barb:

Yeah. I don't know. That one's really, really curious.

Well, Joyce, let me ask you about one other issue for appeal. You're appellate specialist here. Navarro says, he moved for a mistrial and the judge denied it, but Navarro moved on the grounds that jurors may have been influenced by anti-Navarro protesters who are outside the courthouse.

Did you see at one point he tried to snatch away a protestor sign? I forget what it said, like, "You're a liar." Or something like that. And he missed, tried to grab her sign and she snatched it away and he kind of missed and just kept talking. But what about this idea that jurors may have been influenced by protesters? Do you think there's an issue there for appeal?

Joyce:

Nope, I do not. I think, poor Mr. Navarro from that moment in time, did you guys see this? I was actually waiting to do TV. They had asked me to comment after this interview where Ari Melber is interviewing Navarro, and he essentially talks about the Green Bay Sweep. And a very surprised Ari Melber says, "You know, you're describing a coup." And it was early on when people were still really hesitant to use the coup language, and Navarro was, "I'm shocked. I'm stunned to find out that there was gambling going on in Casablanca." From that moment, Navarro has just had a string of loser arguments that he's tried to put forward, and this one isn't any different.

Navarro would have to show that those protestors influenced the outcome of the case with the jury, and that's just not happening. Protestors show up at a lot of cases for a lot of courthouses. Judges know how to give juries instructions on ignoring these sorts of extraneous disturbances. And in the absence of evidence that the jury was unable to, this is going no place on appeal. But as a practical matter, I don't know that this happened in this case.

Typically, judges are very good in working with the US marshal to make sure that jurors are going in and out of the courthouse, in ways that actually mean they are not exposed to this sort of a protest. It's something that good judges are very savvy about. Just no reason to believe that there's anything going on here that benefits Navarro on appeal.

Barb:

Yeah. And of course it just delays the day of reckoning. If he were to get a new trial, it's hard to imagine it would come out any differently the second time around, right? The questions are the same. "Did he show up for the subpoena?" "No." "Case closed."

Jill, let me just ask you one last thing. Navarro is complaining that this prosecution is the result of the weaponization of government to attack political enemies. But of course, we've seen criminal prosecution of presidential administration officials before during Watergate, a number of Nixon administration officials went to prison.

And I think, it's easy to take for granted what happened at Watergate because it's now more than 50 years ago. There are a lot of listeners who may not have a fresh memory of that, but some very significant figures went to prison in that case. Can you remind us of some of the people who went to prison and on what charges?

Jill:

Absolutely. But I also want to say that the idea that this was weaponization of government is pure projection because if anybody weaponized it, it was the Trump administration. So that's a ridiculous argument.

But I mean, we unfortunately have criminals who sometimes get elected to office and sometimes are appointed to office, and they therefore are indicted and often convicted. And in Watergate, there was a huge number aside from the president who was forced to resign and the vice president who resigned, but because of a scandal of his own making in Maryland, not because of Watergate.

There were 40 government officials who were indicted or jailed, and they included the chief of staff to the president whose name was Haldeman at the time. It included the White House counsel to the president, John Dean. It included the Attorney General, John Mitchell. It included employees, White House staff, some of the most colorful characters were Howard Hunt and Gordon Liddy, who you could not make up. You would find them totally unbelievable if you made them up as they actually were. Colson, who was a special counsel to the president, and again, pretty much an unbelievable character.

The security director for the campaign went to jail. Marty, who was an assistant attorney general, is often forgotten. He ended up, his lawyer got sick and he moved for a severance. It was denied. He was tried with an excellent substitute lawyer who was from the same firm, but his conviction was later reversed because he didn't have the lawyer of his choice.

Barb:

Ooh, there's a good cautionary tale for what's going on this case, huh?

Jill:

Yeah.

Joyce:

Oh, good point.

Jill:

It is for sure. But anyway, there were a ton of others who were tried for crimes, for acts they did themselves, not for words, not for anything else, and it wasn't weaponization, it was accountability for crimes. And I think that's all that's going on here.

As you said, Barb, this is a very simple case. "Did you get a subpoena?" "Did you show up?" "No." Yes, to the subpoena. No, to I didn't show up. And that's the end of the case. So it's perfectly clear that he violated the rules.

Barb:

I just got a text from my daughter about her HelloFresh. I already asked her. "HelloFresh was delicious. It took me a while to make, especially since my roommates were also using the kitchen, but I made the meal and ate it for dinner and lunch today. So good and definitely healthier than other things I could have done. Thank you."

Jill:

Yay!

Barb:

That's a good endorsement.

Jill:

That certainly is.

Joyce:

Yeah.

Jill:

I had so much trouble deciding which meals to order for this week from HelloFresh. They are such a amazing series of choices. What do you think, Kim?

Kim:

I agree. In fact, we will switch sometimes between the meat package or the fish package or the pescatarian just to get a bigger variety of meals. We have made taco dishes with shrimp. We had this really great salmon glazed meal that was fantastic, and they were really easy to prepare because we're all busy.

With HelloFresh, you get farm fresh, pre-portioned ingredients and seasonal recipes delivered right to your doorstep. So skip the trip to the grocery store. That's always music to my ears. And count on HelloFresh to make home cooking easy, fun and affordable. That's why it's America's number one meal kit.

Barb:

Yeah. My college daughter living in her first kind of campus house has started using HelloFresh, and I know she told me this week she made onion crunched chicken and scallion pork and cheesy garlic rolls. She's eating better than I am, after she's doing it with HelloFresh.

So now is the perfect time to kickstart a fresh fall routine with HelloFresh. HelloFresh handles all the meal planning and shopping to deliver everything you need to cook up a tasty meal right at home. They do the hard part and you get to take the credit. It doesn't get much better than that.

Joyce:

And it gets even better because HelloFresh is more than just dinners. You can also stock your fridge with easy breakfasts, quick lunches and fresh snacks.

Just shop HelloFresh Market and add any of these tasty time-saving solutions to your weekly box. 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 a few taps on the HelloFresh app. Imagine getting fresh quality produce from the farm to your kitchen in less than a week, so you can enjoy the flavors of the season right from home.

Jill:

So I have a confession to make because I couldn't decide what to order, and so I selected about six or eight different meals that I was going to go through with my husband to get his input, but I forgot to eliminate them. So I got eight meals this week. And they are all delicious.

I don't normally do that. I usually only get three, but I ordered two prepared ones so that I didn't even have to cook. I just had to heat them. But I like the ones that come with the ingredients.

So if you want to join us, go to hellofresh.com/50sisters and use code 50Sisters for 50% off, plus 15% off the next two months. Again, go to hellofresh.com/50sisters and use code 50Sisters for 50% off, plus 15% off the next two months. Everyone can also look for the link to HelloFresh, America's number one meal kit in our show notes.

Kim:

I'm coming over to your house, Jill.

Jill:

I actually had to give two away. I mean, I just couldn't cook that many. Victor's in town, so I gave his mother two of the meals and it was, I ordered a salad, I ordered desserts. I just went berserk. It was insane.

This week, there is a fascinating development about the 14th Amendment Section 3, and I want to start by reading just exactly what the applicable language of that section is. "No person shall hold any office, civil or military under the United States, who having previously taken an oath as an officer of the United States to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house remove such disability."

Well, obviously that hasn't happened. So now there are two major articles, one by Laurence Tribe of Harvard Law and Judge Luttig, a renowned conservative and another by two professors, one from the University of Chicago and one from St. Thomas Law, both Federalists and both very conservative.

Who have concluded that the 14th Amendment Section 3 is self-executing and means that Trump can and should be barred from any ballot without any need for him to be convicted of insurrection.

So Barb, tell us about that theory and the legal support for it.

Barb:

Yeah. So as you point out, this is coming from people across the political spectrum, but the idea that the 14th Amendment was passed following the Civil War. But there's nothing about it that says, it relates only to the Civil War. It just says that you can't hold any office after you previously took an oath as an officer of the United States to support the Constitution and then have engaged in insurrection or rebellion against the same.

And so, I think they do an effective job of beating back this idea that it only relates to the Civil War or the other argument you hear is that, it's not self-executing. That is, there must be a separate finding in a criminal case or an impeachment before you can say the person engaged in rebellion or insurrection. And their theory is that it is self-executing, that there needs to be some sort of finding, but it can be done by say a secretary of state or someone in a proceeding to keep them off the ballot.

There is some contrary argument though that is out there. For example, Michael Mukasey, who's a former judge and a former attorney general of the United States has written that even if that's all true, that's all well and good, he argues that the president of the United States is not covered by this because the president is not, quote, "An officer of the United States." They take a different oath, the president does from other officers of the United States. And so this may apply to members of Congress, but it does not apply to the president himself. So it's an untested legal theory.

I think there's one case I'm aware of where someone has been removed from the ballot. It was a county commissioner in New Mexico who did participate in the events of January 6th, and he was challenged and removed from the ballot in New Mexico.

So this has never really been used. And so there's some conflicting theories as to whether this applies, but I think there's a sound legal theory that says, what Donald Trump did on January 6th should disqualify him from the White House. And so I guess we'll have to see how that shakes out in practice. And I think it's going to take a lawsuit, like one recently filed to bring this to a head.

Jill:

Well, that's exactly where I was going to go next because based on the theory of these four eminent scholars, six Colorado voters aided by the citizens for responsibility and ethics in Washington have filed suit asking their secretary of state not to put Trump's name on the primary or general election ballot. And there's talk about doing the same in Florida, New Hampshire, New Mexico, Ohio, and Wisconsin. So Joyce, talk about that Colorado lawsuit, including the relief sought there.

Joyce:

Right. So the theory in this Colorado, first of its kind cases precisely what Barb has laid out, this theory that the 14th Amendment disqualifies Trump from being on the ballot and the lawsuit got filed in state court, state district court in Denver with the help of a watchdog group called CREW, the Citizens for Responsibility and Ethics in Washington.

They're known for doing excellent legal work in these kind of areas. And the relief that they're asking for is that the Colorado secretary of state not put Trump's name on the Republican primary ballot. He just doesn't get to show up.

They've also asked the court to rule that Trump is disqualified in order to end any uncertainty over that issue. So it is a pretty stark presentation of the possible relief here.

Jill:

Yeah. It's going to be an interesting to follow this one. We'll stay on top of it. But Kim, Barb's already mentioned the Michael Mukasey argument about whether the president is an officer of the US. But there are some other arguments against using it, and they sound technical, but I know you can explain them standing and ripeness.

Kim:

Yes. So we've talked about some of these procedural issues before and during a press call with the attorneys from CREW as well as some of the attorneys, the local attorneys from Colorado, they discussed the issues both of standing and ripeness, which I presented to them.

So when it comes to standing, what that means is in order to bring a case, the plaintiff, the challenger in the case has to have some skin in the game, they have to show that they are entitled to bring this action because they've been affected in some way. And the attorneys pointed to the Colorado statute itself, which gives voters the ability to challenge the eligibility of a candidate on the ballot. And they say that that statute specifically gives them standing to bring this lawsuit. I think it's a pretty solid argument here. So I would be surprised if standing is a basis for tossing this lawsuit.

I think the ripeness issue is a little fuzzier. So ripeness means a court can't just step in and make a ruling, even if somebody is challenging, something like Donald Trump's eligibility. It has to be an actual case in controversy, meaning something happened and therefore a court needs to come in and decide this controversy between parties. It can't be something that could happen.

So if you're in a contract with someone and they say, "You know what? I'm not going to abide by this contract." You can't sue them then, just saying, "Oh, they said they're going to breach the contract." The court would throw it out saying, "Well, the contract hasn't been breached yet. You have to wait for the contract actually to be breached." So it's the same principle here.

But what they say to that is they again, point to the Colorado statute. And in the language it gives challengers up to five days after a candidate is certified on the ballot to bring a challenge, but it does not specify the starting point that that timer runs. And so they say because of that, they can bring the challenge at any time up until that five days after they're put on the ballot.

I think that that's fuzzy. I mean, I think that a court could very well say, "Okay, inherent in that." Is the idea that they actually have to be on the ballot first. So maybe that limits you to five days between their certified and the end of that statutory provision, but it doesn't mean that you can sue them way ahead of time. Who knows? I think that's an open question on the ripeness issue.

But I think courts also realize they're going to have to deal with this. They're going to have to start making rulings on this case. So it won't put it off forever. It may delay it a little bit. And the minute that Donald Trump is certified on that ballot, the second that he's certified on that ballot, they're just going to bring the challenge again.

Jill:

And Joyce, are there any political arguments against, doing this?

Joyce:

Yeah. I mean, I think this is the argument. We are already a very divided country. In the absence, and Barb makes this great point by the way. She talks about the New Mexico case, where someone not the president obviously is disqualified, and that was because they had a statutory provision that made it possible to do that.

With the 14th Amendment, there is this mechanism that says Congress can pass laws to enable it. Congress has not done that. And so I think, that you can make the argument, that in the absence of a conviction or even a charge, right? Two prosecutors have had the option. Neither one has charged Trump with insurrection that it would be inappropriate to do this from a political point of view, because it would be such a way of removing the issue from the hands of the voters. So I'm not sure that I buy that argument, but I think that that's the argument that can be made here.

Kim:

And I wrote a column about this. I'll put it in the show notes. That I don't think that it means that a case couldn't or shouldn't be made, but I think that the real way to eradicate the threat to democracy that Donald Trump presents is for the voters to indisputably reject him at the polls on election day.

And I fear, given everything that we have seen so far, including violence erupting. That well, A, I fear that if it gets to the Supreme Court, the Supreme Court will issue a decision that is very bad law. I'm not certain that the Supreme Court will rule that he's disqualified. I think that's the number one biggest thing. But I think regardless of which way the Supreme Court rules, it could tear our nation apart.

We already have citizens who distrust our institutions both on each side of the political spectrum and the middle. Whether it's the Supreme Court, whether it's Congress, whether it's Trump, whether it's his acolytes. And I worry that a Supreme Court decision, this won't be like Bush v. Gore or it's controversial for a little while, then everybody moves on. I think it'll be much, much worse, especially with Trump continuously fomenting his lies about election fraud attacking these institutions. I'm afraid of bloodshed.

I was just talking to my parents about how I used to ask them, "Wow, what was it like to live through the civil rights era? That seems so crazy in retrospect." And now I'm like, "Oh, it's like now it's like right now we're living through it." And everything is happening. The injustices happening in real time and the lack of accountability.

The only thing that's different is the assassinations. And my father said, "Well, I hate to say this, but just wait. That could come too." And I'm worried about that.

Barb:

Yeah. I agree with you, Kim. On the restraint part, I am certainly no fan of Donald Trump, and I think that he's been a terrible curse on her country. And it is sort of like what a prosecutor thinks about in terms of using power, "Can this be done?" And that's a legal question, and we'll have scholars work through it and decide what can be done.

But the more important question often is, should this be done? And in research from my book, I read this other book called How Democracies Die, and one of the things it talks about is the need for government actors to use tolerance and restraint.

Just because you can grab power and use power in a certain way doesn't always mean you should. Sometimes it means restraining that use of power, compromising in legislation, withholding a veto, giving somebody a confirmation vote when there's a nomination from the opposing party. That sort of mutual tolerance and accommodation and respect is what allows our government to keep on going.

And so on the one hand, we have this tool, maybe we should use it to protect the good of our democracy, but I do fear that like you, that the use of power without restraint could have a terrible backlash effect that could cause every president's going to have his opponents trying to find ways to impeach him and get him out of office, and use other techniques in the Constitution that's really going to upend our democracy.

Jill:

Of course, we're seeing that right now anyway from the other side. But one question that came up a lot from people on social media contacting me, was is there a difference between a secretary of state judging the age or birthplace, which are both qualifying factors to run for president, and them judging whether a candidate aided or comforted or participated in an insurrection? And I'm just wondering what you all think.

It bothered me a little when I thought about it, but then I thought about, normally you'd think of birth certificate is the answer, except if it's Trump against Obama. So even that's not a clear cut fact. So what do you think?

Kim:

Yeah. I think that that's a valid concern, Jill. I think in this case, and let's keep in mind the lawsuit that was brought in Colorado, this wasn't just come up last week. The attorneys working on this have been working on this for almost two years. They've been working on this since January 6th.

They chose Colorado carefully, in part because under that law they say the secretary of state is required to evaluate the constitutional eligibility of every presidential candidate. So what they're essentially saying is they can't ignore this. You can't put him on the ballot. They can't ignore this. The 14th Amendment says he can't be on it.

So I think that's one reason we're seeing this happening in this state here. They're claiming that it is different than just saying, "Oh, just minding your Ps and Qs and making sure everything is okay." That this is an absolute disqualifier and that the secretary of state has no choice but to exclude him from this ballot. I think in other states, depending on how those laws are worded, it will be perhaps more difficult.

But I think this is as always in a case of first impression like this, and when you have 50 states with potentially 50 different rules, this can be complicated.

Jill:

And one last question is when I read the language of Section 3, the last sentence says, "But Congress may, by a vote of two thirds of each house remove such disability from ever holding office again." Is that a possibility that both houses would vote that way and save Donald Trump and allow him to run?

Kim:

Both houses can't even pass a budget?

Joyce:

Not for Senate.

Barb:

Yeah, I can't imagine. Not two thirds.

Kim:

No.

Jill:

They couldn't agree two thirds for anything.

Kim:

No.

Joyce:

No.

Jill:

But I just had to raise that because it sort of stands in starkness when you look at that language saying, "Well, even if you were a traitor to the country, you still could run if two thirds of Congress thinks so."

Kim:

No.

Joyce:

Two thirds of Congress can't agree to wish their mama a happy birthday. I mean... Honestly, they just can't seem to get it together.

So I have four kids, some of them have bedrooms at home, but also live away from home at school and elsewhere, and we all have Helix mattresses. They are just the best. I have been so won over by these. We were the people that ordered mattresses online and sent back the ones that we didn't like, but Helix is a family favorite, and here's why.

To find your perfect mattress, you take Helix's two-minute sleep quiz and you get matched with a customized mattress for your body type and preferences, and you'll get the best sleep of your life.

When I took the Helix quiz, I matched with the Helix Midnight Mattress, and it was exactly what I needed. I've had great sleep ever since I got it last year. My husband loves it too, so we're in harmony on that. With Helix, you buy a mattress that's tailored just for the way you sleep, and it really has been the best sleep of our lives.

Barb:

Well, I needed a good night's sleep after I stayed up all night to study for the Helix Quiz. Luckily, Helix knows that everyone sleeps their own way. So the Helix lineup offers 20 unique mattresses, including the award-winning Luxe collection, the newly released Helix Elite Collection, a mattress designed for big and tall sleepers, and even a mattress made just for kids.

Each is designed for specific sleep positions and feel preferences. Their memory foam layer models provide optimal pressure relief if you sleep on your side, and it cradles your body for essential support in any sleeping position, from back to stomach with enhanced cooling features to keep you from overheating at night.

I'm getting sleepy just talking about this. This could be like a lullaby hearing about all this comfortable sleep.

Jill:

Uh-oh, I hope you can stay awake for our discussion later. But Helix knows there's no better way to try out a new mattress than by sleeping on it in your own home.

So test yours out for a 100 night risk-free trial and see how amazing your rest is. If you don't love it, and we know you will, they'll pick it up for you and give you a full refund. Plus Helix mattresses are American made and come with a 10 to 15-year warranty, and the setup is fast and easy.

Kim:

Helix has been awarded the number one mattress by GQ and Wired magazines, leading chiropractors and doctors of sleep medicine use Helix as a go-to solution for improved sleep. And now Helix is offering 25% off all mattress orders and two free pillows for our listeners in honor of the Labor Day weekend, which just passed.

So go to helixsleep.com/sisters and use code HelixPartner25. This is their best offer yet and it won't last long. With Helix, better sleep starts now, and you can find the link in our show notes.

Joyce:

So by now, I think everyone has seen the pictures of the big red spinning buoys that the State of Texas placed in the Rio Grande River to prevent migrants from crossing that river. It's the border between the United States and Mexico. It flows through Texas, and Texas took it upon itself to do that.

You may have seen reports of injuries that migrants have suffered. Tired people trying to cross into the United States at the end of a long journey have been snagged. Kids have suffered puncture wounds. There are even some allegations that people have died in the river. Texas, on the other hand, claims that they are necessary for border control.

So the Rio Grande is a navigable waterway of the United States. That's a legal term of art. Barb, can you start us off by discussing the legal significance of that term and how it formed the basis for the lawsuit that DOJ brought to challenge what Texas and Governor Abbott are doing in Texas?

Barb:

Yeah. So we've talked on the show before about POTUS, as president of the United States, and FLOTUS, is the first lady of the United States, and VPOTUS is the vice president of the United States. SCOTUS is the Supreme Court of the United States, and we talked about WOTUS, as the waters of the United States. This is the navigable waters of the United States. So I guess that's NAWOTUS, the navigable waters of the United States.

And there's a legal definition. There are waters that are used or may be used to transport interstate or foreign commerce, and that is what makes it federal and not state. The constitution gives Congress the power to regulate interstate and foreign commerce.

So if you put a bunch of stuff in the navigable waters, you are interfering with interstate or foreign commerce. And so that was the basis of the Justice Department saying, "Texas, you can't put stuff in the navigable waters. That's only Congress may do that, so get them out of there immediately." And that was the basis of the lawsuit.

Joyce:

It's really interesting. This issue of what qualifies as navigable waterways of the United States has been heavily litigated. There's a Supreme Court plurality decision that doesn't help very much. I've handled cases like that in Alabama.

What do you do when you've got something that's a river in the winter, but it slows down to a trickle in the summer? Is it really a navigable waterway? None of that is relevant in this case because if ever anything was a navigable waterway of the United States, it was the Rio Grande River. So that's not the problem in this case.

Jill, on Wednesday, a federal judge ruled, how did he come down and how did he rule on the governor's claims in this case that he had to place these barriers to keep migrants from entering the country?

Jill:

So you're correct on all scores, but there is also a statute, the Rivers and Harbors Act, which says that the federal government's authorization is necessary before you can construct anything in navigable waters. And there's no question that this meets the definition. And just because I like to surprise you on every episode as general counsel-

Joyce:

Oh, no, you've been down there.

Jill:

Well, yeah, I have been, but no, it's just that I was general counsel of the army, which means I supervise the lawyers for the Corps of Engineers, and that's who has to give the authorization to allow any construction on navigable waters. So it falls within my past job description. And here it's-

Barb:

Jill had no WOTUS on her resume. I love it.

Jill:

I didn't, but I should have. Maybe I'll have to add that. And also, I was the general counsel for the Panama Canal Corporation during the negotiations to give back the Panama Canal.

Joyce:

I did not know that. That was amazing.

Barb:

You gave back the Panama Canal? I didn't know it was Jill who gave it back.

Jill:

Well, I only was a lawyer assigned to that, but we had other people doing the actual negotiations. But anyway-

Joyce:

You're distancing yourself from giving up the Panama Canal, is what I know here.

Barb:

I noticed that. I detected that too, Joyce, yeah.

Jill:

I am. Although I loved visiting there, it was a terrific place to be.

So the Corps of Engineers would've had to give some kind of permit to allow them to do this. And of course, Abbott did not ask for permission. In fact, he made a big point in his arguments of, "I'm not asking for permission." And the judge said, "Well, unfortunately you should have because the law requires that you do that."

The judge was quite clear on that. And ruled that he should remove them by September 15th and never construct any more, although that has been appealed and there's been a stay on that.

Joyce:

Yeah. So let's get into the stay because this is the issue of appeal. Kim, we're assuming that this appeal will now be heard by the full Fifth Circuit. Can you talk about what that process is going to look like and what you expect will happen in light of what Jill has just mentioned about the court entering a stay?

Kim:

Yes, I can. First, I want to say, Jill-Wine Banks is a national treasure. It bears repeating. Yes, despite the fact that the district court judge, as we pointed out, said that the Department of Justice lawsuit would likely succeed on the merits. We have to underscore that in order to get the stay in the first place. A judge has to find that they're likely to succeed in the end on the merits.

Despite that just one day later, the New Orleans based federal appeals court, the Fifth Circuit, granted Texas's request to halt the temporary injunction, meaning that they can leave those awful barriers in place. They did so without any sort of justification, without an opinion, without giving any further details why.

And as of the time we are recording this podcast, no hearing has been set, but considering that September deadline, that Joyce already mentioned, I think that that schedule probably will be set pretty expeditiously. So we will get more sunlight from there. But yes, it would be appealed to the full Fifth Circuit first of all. But I think given what we've already seen a day later, we can maybe guess what might happen at the Fifth Circuit.

They're a very conservative circuit, and it's a reason why things like this keep happening in places like Texas, not just because they're one of the states with a water border, so does California, and you don't see a lot of these claims. A lot of these barriers being set up there.

Joyce:

I was just going to say one day we should do an entire podcast on the many sins of the Fifth Circuit. I mean, it really has become predictably bad. It galls me.

My father-in-law used to sit on this circuit before the fifth was split into the fifth and the 11th, and it used to be a circuit where other circuits would read their cases and rely on them and not anymore.

Kim:

Yeah, it's really something else. So I don't expect much from the Fifth Circuit when it is appealed there, but when it gets to the US Supreme Court, and I think it seems pretty destined to do so, I think that it's going to be a lot different. I mean, when it comes to the NAWOTUS and the proper federalism avenues that states have to abide by, the federalism rules that states have to abide by.

The Supreme Court up to now, again, I'm on record saying I don't trust the Supreme Court, and who knows what will happen. I make no predictions, but they have been pretty clear that states cannot overstep their federalist bounds when it comes to things that are squarely within the purview of federal government and being in control of navigatable, what? I'm going to blame it on my cold. I can't... Today, I came back from vacation with a bit of a non-COVID cold, and it's affecting my brain function. Waters that can be navigated.

Joyce:

There you go. There's always a way. That works.

Kim:

This really is federal party.

Jill:

When you mentioned what's within federal power, there's also another argument which is foreign relations is clearly the federal government's authority, not the states. And Mexico has complained about this interference with the river that adjoins both countries.

So it seems to me there's another argument here, which is foreign affairs trumps everything else, and Abbott can't interfere with that, although he has argued that there's a treaty with Mexico that specifically says that it's okay to put something in the river and that they're not a deterrent to navigation. I don't think that's at all an accurate rendition of fact.

Kim:

Yes. Foreign relation, governing waters, immigration. These are all federal responsibilities. And Abbott knew when he did this that he had no business doing it. And I would hope that the US Supreme Court will find that.

Jill:

I have been a Thrive Causemetics user for many years, long before they became an advertiser for us. I have loved their mascara ever since I saw it on a makeup artist, in one of my favorite cosmetic stores.

Thrive Causemetics makes high performance beauty and skincare products made with clean skin loving ingredients. There are no parabens, sulfates, or phthalates, and their products are certified 100% vegan and cruelty-free.

That's important to me as is the fact that cause is in their name for a reason. We love how every purchase supports organizations that help communities thrive, and their products are perfect for any look.

Joyce:

I really love their sheer strength hydrating lip tint, that hydrates lips with a hint of tint that applies evenly and lasts for up to six hours. It's a really nice, lightweight, balmy, non-sick formula that hydrates lips to make them visibly softer and smoother.

Plus, I can put it on without a mirror, and that's a big plus, sometimes. The application is effortless and it feels great. It glides on smoothly with beautiful colors and 6 tints to choose from, and it's comfortable to wear all day.

Kim:

I know, it's the best, especially in the drying late summer heat or in front of an air conditioner blasting all day. Or if you're like me, I've been on a lot of airplanes recently and that can really dry you out.

Thrive has so many more amazing products in great colors and textures, plus lotions for your skin and more. So you need to get over to Thrive Causemetics and check them out. We truly can't get enough of Thrive, especially how they contribute to helping communities thrive with every purchase through their

Bigger Than Beauty program. They give to over 300 causes spanning colleges, cancer research and homelessness along with many more.

Barb:

You have to try Thrive Causemetics to see for yourself. Right now, you can get an exclusive 20% off your first order when you visit thrivecausemetics.com/sisters. That's thrivecausemetics, C-A-U-S-E-M-E-T-I-C-S.com/sisters for 20% off your first order. The link to this deal also looks beautiful in our show notes.

Kim:

And now we have come to what is truly, truly our most favorite part of every episode, which is answering your questions. We love it because your questions are always so, so good. If you have a question for us, please email us at sistersinlaw@politicon.com. If you are on Tweet, X or whatever it's called, you can use #SistersInLaw.

And if you're on Threads, you can send us a question, but make sure that you tag either [sistersinlaw.podcast](#) or one of the four sisters or all of us to make sure that we see it because the hashtag doesn't work quite the same.

If we don't get to your question during the show, keep an eye out on our Thread feeds throughout the week and we'll answer as many of your questions as we can.

Our first question comes from Denny in Clearwater, Florida who asks, "Is it proper for the Fulton County grand jury to reveal the names of people who were not indicted by District Attorney Fani Willis?" Barb, we just got the news of that unsealed document a little bit before we taped. What do you think?

Barb:

Well, on the one hand, this is proper under Georgia law, when you have this special grand jury, they're required to submit this report. It's required to be public. Fani Willis was successful in keeping it under seal while she was preparing and working on the indictment, that indicted 19 people. And now her reason for keeping it sealed has passed is so the judge revealed it.

And some pretty amazing names on that list. Senator Lindsey Graham, former Georgia Senators, Kelly Loeffler and David Perdue, Michael Flynn, Trump lawyers, Cleta Mitchell and Lin Wood and Boris Epshteyn. I mean, those are some big, big names of people who are not indicted. And so part of me is really intrigued by that as an avid follower of all of this drama surrounding the January 6th events, I'm really eager to know that.

But on the other hand, as a former federal prosecutor where an investigation that ended without charges never saw the light of day, and the public was not supposed to know about it because it did not result in an indictment, in an effort to protect the reputation of the person that their identity was never revealed.

So I'm kind of conflicted about it, and if anything, it kind of feels wrong to me. I know Joyce and Jill, you were sharing some similar thoughts, I think, right?

Jill:

Absolutely. I am appalled that people would be revealed to have been recommended for indictment when they weren't indicted. I believe the federal rule is a much, much better way to protect people who aren't indicted, and we don't know if they weren't indicted because the standard at the investigative level is probable cause. But the standard for indictment would be beyond a reasonable doubt.

And so the prosecutors may have decided that there wasn't enough evidence for that standard, or maybe they're cooperating or who knows what the reasons are. But in any event, I think it's really a bad thing to have names revealed like this. But you're right, under Georgia law, it's not only, okay, it is the practice.

Kim:

Our next question comes from Michael, who asks, "Would a shutdown put trials on hold or otherwise interfere with DOJ operations?" Joyce, what would a government shutdown mean for federal prosecutors?

Joyce:

So good news here, it will have absolutely no impact on prosecutions. For one thing, Jack Smith's budget as a special counsel comes from a different line item. So not impacted by shutdown, but even as a general rule. And Barb and I, Jill, I bet you two, we've been through multiple shutdowns. I've done preparations for shutdowns in cases where they didn't actually happen.

And a very painful part of that process is that you have to designate some of your employees as essential and others is non-essential and the essential ones, and I always hated doing that, because I believe that everybody in my office was essential. But the whole point of the designation is essential employees continue to work during a shutdown, whether they're getting paid or not.

And that is essentially everyone who is touching a criminal case, because that work is dictated by the Speedy Trial Act clock. You've got to keep going. So shutdowns do not impact, DOJ's criminal function.

Kim:

And our final question comes from sisters, Kris and Mary who asks, "Could you explain how the Fifth Amendment prohibition against self-incrimination in criminal trials might protect Donald Trump in the civil trials in which he is a defendant? Is there any circumstance where he could be compelled to take the stand or provide information?" Jill, what do you think?

Jill:

So it does vary depending on the jurisdiction you're in. But basically, you do have a Fifth Amendment right, even in a civil case. And so he could invoke that. But there is a difference.

In a civil case, you can draw an adverse inference from that invocation of the Fifth Amendment. And so the jury could be instructed that they can assume that the answer would have been contrary to the position being advocated by the person who invokes it. So that would mean it's not really much protection.

Kim:

Thank you for listening to #SistersInLaw with Joyce Vance, Barb McQuade, Jill Wine-Banks, and me Kim Atkins Stohr. And remember, you can send in your questions by email to sistersinlaw@politicon.com. You can X them for next week's show using #SistersInLaw, or you can tag us on Threads.

Please support this week's sponsors Olive and June, HelloFresh, Helix and Thrive Causemetics. You can find their links in the show notes. Please support them as they really help make this show happen.

And go to politicon.com/merch to buy our hoodies now that the temperatures, I hope will stop dropping, our shirts, totes, and other goodies. And to keep up with us every week, follow #SistersInLaw

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See you next week with another episode, #SistersInLaw.

Barb:

Kim, you doing anything fun next week?

Kim:

I am. I'm actually going to see Duran Duran, which a band that I just loved-

Barb:

Duran Duran.

Kim:

... for 40-ish years. I mean, I used to sign my name in my notebooks in middle school, Kim Taylor, I mean John, because there were three band members named Taylor. So I have to specify John Taylor. I just knew I was going to marry him, so I'm excited.

Barb:

Did he have the biggest hair of all of the Duran Duran?

Kim:

His wasn't that big. I think so many other, I think Nick Rhodes had the biggest hair, but he did have big hair.

Barb:

They were big hair guys.

Kim:

But he still, they were a big hair guy, but he's not the biggest, but he's still...

Barb:

Which side are you looking forward to singing along to most?

Kim:

I think Rio. Either Save a Prayer. No, Save a Prayer. Save a Prayer.

Barb:

Yeah. How's that one go?

Kim:

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(singing) That's a good one. When I was little, we used to have lighters, which is a terribly dangerous idea. So now I have to turn on my phone light, my phone flashlight. But I'm ready. I will be ready for Save a Prayer. So it'll be a lot of fun.

Barb:

Excellent.