

Joyce:

Welcome back to #SistersInLaw with Kimberly Atkins Stohr, Barb McQuade, and me, Joyce Vance. Jill is out, but she'll be back next week. We are excited to say that it is that time of year. It's the season to get your #SistersInLaw merch. We've got hoodies, T-shirts, and our new mug. Everything's in stock. Just click the link in our show notes or go to politicon.com/merch today.

Now, we're onto the show. You all, it has been a week, right? I mean I'm looking at Barb and Kim and they have that, "Yes, it has been a week" Look on their faces. We'll be discussing the developments in all of the Trump cases, a new abortion case coming out of Texas that's disturbing and very interesting, and Hunter Biden's new problems. He faces serious tax charges in federal court in California. But before we dig in, I'd be remiss if I didn't ask Kim this question. So Kim, who do you like to win the Rose Bowl this year, Alabama or Michigan? Maybe I shouldn't put you on the spot like that. I'll give you a week to think about it, and we'll take this question back up when Jill is with us next week. But there is only one right answer, Kim, and it's Roll Tide.

Kim:

What's a football?

Barb:

Oh, don't try our patience that way.

Joyce:

What are we going to do with them, Barb?

Barb:

Yeah. Well, Jill's not here this week, but I think she's on strike because Florida State didn't get in. She and her husband are Florida State fans.

Joyce:

Oh, Florida shmorida. I mean, good football.

Barb:

Yeah, they're bitter. Undefeated, and somehow Alabama got in there anyway.

Joyce:

Good football [inaudible 00:01:52].

Barb:

I think she wants a word.

Joyce:

Don't make me sing the fight song.

Barb:

Oh, no not that.

Joyce:

We will leave that aside just for now and move on to a less divisive topic. This is the time of year for me. My student papers are all in. I'll be grading this weekend and early next week, and as soon as I'm done, baby, it is holiday TV time. I will watch movies. I will watch Charlie Brown, all the shows. So I'm looking for maybe some new things or some old favorites to add. What do y'all have to watch for it to feel like Christmas Hanukkah, the whole holiday spirit?

Kim:

Well, for me it is of course the classic A Christmas Story it is not Christmastime until Ralphie requests his BB gun and his mother says, "But you'll shoot your eye out." That really is what makes Christmas, Christmas. I like It's A Wonderful Life in part because George reminds me a little bit of my husband, but I got to go with A Christmas Story

Joyce:

I love that. That's such a good pick. Barb, what about you?

Barb:

All good picks. Charlie Brown, tick that is on the list. It's a Wonderful Life, heartwarming. Got to see that. But the family favorite in our household is Elf with Will Ferrell.

Joyce:

Ooh.

Kim:

Oh, good one.

Barb:

Every year, we all get... It's a crowd pleaser for all ages. All our kids love it and even the adult, it's a really fun movie. So I got to go with Elf. It's my can't miss

Joyce:

Elf is one of those movies that it doesn't matter what time of the year it is. If I'm flipping through the channels and it's on, I'll stop and watch it. Well, those are good choices. I think I'm just going to watch all the classics I have to confess to a certain love of the cheesy Hallmark Christmas movies.

Barb:

Oh, yeah. Those are the bests.

Joyce:

Always a happy ending, and I'm in the mood for happy endings, but I think I'm going to watch The Holiday. It has Jude Law and just this cast where everybody's good. You laugh, you cry, and then at the end you feel good about the world. So I'm here for that vibe.

Kim:

Listen, people love Hallmark. I might drop a link to it in the show notes because once when I was guest hosting on NPR's On Point Radio, it was a show about Hallmark movies. The whole hour was about Hallmark movies and I was...

Barb:

Oh, yeah. Kudos to Hallmark. Love it.

Kim:

Just making a little gentle fun at it. Oh, the listeners were not having it. They were serious.

Barb:

Oh, you made fun of Hallmark, oh.

Kim:

Oh, my goodness.

Barb:

That was fighting words.

Kim:

Oh, my goodness they were so serious about Hallmark movies, Hallmark Christmas movies.

Barb:

They're the best.

Kim:

And I learned a lot and had respect. So it was learning experience for me too. I'm going to drop a link in the show notes because it was a really fun show.

Barb:

I think-

Joyce:

I can't wait to hear that.

Barb:

So I think everyone who watches the Hallmark movies get it that they're a little bit formulaic, right? But they feel good and it's the kind of thing you can kind of have on in the background. No worry about losing the plot because you know right at the beginning that the meet cute, hated person is going to be their lover at the end. It's all going to be... They're all going to get tied up very sweetly and usually it's like a prince from a country you've never heard of before like Genovia. It's all going to be good.

Joyce:

I just saw that one with Genovia.

Barb:

Yeah, it's always something like that. It's all going to tie up tightly in the end and I'm pleased to see there's now more gender diversity.

Joyce:

Yes.

Barb:

Like there's L-G-B-T-Q Christmas holiday movies, right?

Joyce:

Yes.

Barb:

So it's all good, much respect for the genre. I think.

Joyce:

I saw a great tweet that said, "I just watched a Hallmark movie in reverse and the lead character, the woman dumped her loser boyfriend in the small city, went to the big city."

Barb:

Oh, I love it.

Joyce:

"Got a job as a lawyer and wore cute mini skirts and boots" And it was really funny.

Barb:

Hey, that's great.

Joyce:

I'm all here for Hallmark in the happy ending, maybe next year we'll have Sisters-in-Law, the holiday Hallmark movie.

Barb:

Oh, now that would be something. My mind is racing at what that would be like. Somehow Jill ends up with a wild job.

Kim:

Barb, you look very zen. What's going on?

Barb:

Oh, I'm always zen. I'm always calm Kim. I remember as a kid when the holiday season approached, I was beside myself with excitement because all I was thinking about is gifts under the tree and time off of school. But I remember my mother saying, "Oh, the holidays are so stressful, there's so much to do," And I didn't understand what she meant, but I do now and the holiday season is very busy. In addition to our jam packed schedules, we have additional things we need to do, like for some of you, I suppose baking, but they're shopping and traveling and wrapping gifts and I love all the visiting of holiday season, but it makes things busy.

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Joyce:

The topics of their meditations include anxiety and stress, relaxation and focus and taking care of your physical wellbeing. There are sleep stories with hundreds of titles to choose from, including meditations and calming music that will help you drift off to dreamland quickly and naturally. Plus, calm has expert led talks on topics that include tips for overcoming stress and anxiety, handling grief, improving self-esteem, caring for relationships and more. I love the sleep stories. They help me drop straight off with really no tossing and turning beforehand.

Kim:

Yeah, same here. I have a lot of sleep issues and Calm has really been helpful and the Calm app puts the tools you need to feel better in your back pocket. If you go to calm.com/sisters, you'll get a special offer of 40% off a Calm premium subscription and new content is added every week, stress less, sleep more and live better with Calm. For listeners of the show, Calm is offering an exclusive offer of 40% off a Calm premium subscription@calm.com/sisters. Go to calm.com/sisters for 40% off unlimited access to Calm's entire library. That's calm.com/sisters and you can find the link and inner peace in our show notes.

Barb:

Well, we saw several developments in the Trump world of litigation this week. On Friday, the DC Circuit Court of Appeals upheld the gag order against Trump In the election interference case, criminal charges were filed against the fake electors in Nevada and a civil settlement was reached with fake electors in Wisconsin. Also coming up on Monday, Donald Trump will be testifying in his own defense in the civil fraud case in New York. That'll be interesting to watch, but what I'd like to focus on to start is two court opinions regarding Trump's arguments that he's immune from legal consequences for his conduct relating to January 6th. So let's talk about that first choice. We got this ruling from the DC Circuit Court of Appeals rejecting Donald Trump's immunity argument in the civil case, the one that was brought by Capitol police officers against Trump for the injuries they suffered on January 6th. Can you tell us about that opinion?

Joyce:

Yeah, so this is blazing them the civil case that's brought by Capitol Police and others including sitting members of Congress. And Trump managed to stay all of the proceedings for a year while the court

deliberated. We have talked before about the distinction between candidate Trump and President Trump, and I think that's the best framing for understanding this decision because that's the distinction that the court drew here. They held that candidate Trump was not immune from being sued. Here's what they wrote, "When a first term president opts to seek a second term, his campaign to win reelection is not an official presidential act." Then they concluded, "The office of the presidency as an institution is agnostic about who will occupy it next. And campaigning to gain that office is not an official act of the office." So no immunity for activity while campaigning this case now is set to proceed to discovery, which means interestingly enough that candidate Trump can be deposed.

Barb:

Oh, that's an interesting scenario, isn't it? I imagine he would invoke the fifth, but wow, that's an interesting thought. I hadn't thought about that.

Joyce:

Most interesting.

Barb:

Yeah, invoked the fifth just to avoid having his answers used against him in a criminal case but of course-

Joyce:

In the criminal case.

Barb:

But then of course his failure to answer can be used against him in the civil case. So that's-

Joyce:

Exactly.

Barb:

... an interesting scenario.

Joyce:

Exactly.

Barb:

Well the very same day, Kim, we saw Judge Tanya Chutkan issue an opinion in the criminal federal election interference rejecting Trump's immunity argument as well as some other arguments such as double jeopardy. Can you tell us about her ruling?

Kim:

Yes. So her ruling was based on a motion to dismiss that Trump's team made on two grounds. One was immunity as you just talked about, and the other was constitutional grounds as you mentioned. And after sort of recounting the assertions in the indictment for the purposes of this ruling, the inferences is that they were true. She went on to issue a very thorough ruling but she pretty much summed up the

immunity grounds right at the beginning. And of course Donald Trump's team had claimed that he's immune from anything within the "outer perimeter" of his official responsibility, outer perimeter of his official responsibility. Now that standard comes from the Nixon case and it was used to keep him from having to answer to civil claims, not criminal claims but Judge Chutkan said the constitution's text structure and history do not support that contention. No court or other branch of government she says has ever accepted it and this court will not so hold.

She went on to say that the presidency does not confer "a lifetime, get out of jail free pass." So TLDR, dude please like come on, get out of here with that. And when it comes to the double jeopardy claim, Donald Trump's team was claiming that since he was impeached based on his actions on and leading up to January 6th, that a trial based on the same facts constituted double jeopardy to that. She says that that does not preclude criminal convictions. And it's important to note here that a) Remember Mitch McConnell when he voted no to convict on the criminal convictions? Like well, no, that's for the criminal courts to handle, right?

Barb:

Yeah, they both pointed at the other one.

Kim:

There's another... So it would be crazy to certainly say, "Oh, well because that happened. He can't be prosecuted criminally," Even Mitch McConnell didn't think that. But it's also important to remember impeachment is a political process. It is not a judicial one. So there is nothing as Judge Chutkan again correctly noted in the Constitution that precludes that. In fact the Constitution actually mentions the fact that criminal convictions could be contemplated and that there were something entirely separate. There was also another point that Donald Trump raised, which is a First Amendment constitutional claim. And in that she was equally clear and she said, "Look, the right to freedom of speech is strong and it is foundational, but it is not limitless and criminal conduct can be punished even if an element of that criminal conduct involves speech." So she basically very clearly and in a way that makes it easy for an appellate court to uphold, knock down all of those arguments.

Barb:

Yeah, I like this opinion, especially the First Amendment arguments, this idea that, "Well I was speaking therefore it can't be illegal," I mean there's fraud, there's perjury, there's conspiracy. Just because you're using your voice doesn't mean it's protected by the First Amendment. So I thought that was an especially good. What'd you guys think about the language of the order? I think she got every decision right but there was one phrase in it. Tell me your reaction to this because I've heard some mixed things on this. She said words to the effect of president' language, you quoted Kim about lifetime, get out of jail free card immunity, whatever.

Kim:

Yeah.

Barb:

But then she went on to say, presidents do not have the divine rights of kings. What did you think about that language?

Kim:

I thought that it was pitch perfect. I mean that's essentially when you add all these arguments up, what Donald Trump's team is alleging that because he became president once, he has all of these powers that really make him untouchable. And that's so contrary to the principles of our democratic republic that it was specifically founded to not be a monarchy. And that's essentially what he was arguing in this case. And it's important to understand why that isn't true. And I think that her pointing it out was right on.

Barb:

Okay, what about you Joyce?

Joyce:

Did y'all get the feeling? I mean I thought she was arguing to the Supreme Court a little bit when she said that. She also said our tradition and our history is such that-

Barb:

Yes.

Kim:

Oh.

Joyce:

... it seemed to me-

Kim:

Oh.

Barb:

Yes.

Joyce:

... that she was saying, "Okay, you nine people in black dresses up across the street from the capitol, let me talk to you about what the founders intended because this guy ain't it." I thought it was sort of artfully done.

Barb:

Well, you both maybe have persuaded me, I always get a little cringey and wince a little bit. When people try to use the flowery language, I always imagine they're thinking, "Oh this is great, these will be the words they etch above the building that they name in my honor, I'll get a frame copy of this to hang in my chambers." I've seen this from time to time and I always say just decide the case and get out of there. I suppose it's more personal preference than anything. I mean I'm sure it's stunning to you in light of the way I dress and appear that I prefer simple to fancy, but I found it a little flowery from my taste. But I guess you both raise a good point, which is this idea of harking back to the founding and why a presidency is so different from royalty. So all right, I guess I'll be persuaded on that.

Joyce:

I'm a Judge Chutkan fan. I mean I think I should say-

Barb:

Yeah, I like her.

Joyce:

... I like how she writes some...

Barb:

Me too. I Like everything about her.

Joyce:

You said she did a good job with the cases. You're dead on the money. She is my kind of judge.

Barb:

Yeah, I like everything about her. That's why I wish she had just showed a little restraint from the flower weed language, but I'll blame it on a law clerk. It was probably some law clerk who talked. Well let me ask you an interesting question here. This is where the chess match of the case is occurring and this is the kind of stuff that I think is often invisible to the public because normally the press reports about indictments and then they report about trials and they miss all this interesting intrigue that goes on in between. And one of the things we're seeing right now is some of that, normally defendants are bound by something called the final judgment rule which means they have to wait until the end of the trial to bring all of their appeal issues together so as to avoid piecemeal appeals and delays by going up and down to the court of appeals.

But there are some issues that are immediately appealable and immunity and double jeopardy are two that even the special counsel concedes are immediately appealable. And Joyce, you explained this to me recently when I was trying to hang my hat on the final judgment rule and you explained why those two issues and maybe others are different. Why is it that Trump gets to appeal now instead of waiting at the end on the immunity and double jeopardy issues?

Joyce:

So this is such a good question because as criminal lawyers we're used to this notion that there are no appeals until after there's a conviction or not because if there's no conviction, there's no need for an appeal, right? The defendant has already won, his interests have been vindicated and there's no need to take up the court's resources with an unnecessary appeal. There are, however, as there always are in the law exceptions and immunity is a big one double jeopardy perhaps too. With immunity, the law is absolutely clear that a defendant can take an appeal before his criminal trial and here's why.

If you're immune from being prosecuted, that means you shouldn't be subjected to any of the process. You shouldn't have been indicted. You don't have to go through discovery and pretrial motions, none of it. And so immunity orders are typically viewed as appealable in advance of trial in order to protect a defendant's rights. So in this case it all goes up in advance of trial to be resolved.

Barb:

And so then that brings the other little chess move that's going on here about what happens in the meantime. So Kim, what happens? Does everything grind to a halt in the trial court or can the trial court continue to make progress with discovery and other motions and the jury questionnaires that we had read had been sent out to prospective jurors so that we can keep that trial date of March 4th on track? Or are we all in a state of suspended animation now until the court of appeals rules?

Kim:

Yeah, so that's actually a good question. I mean, it is clear that the trial can't proceed, right? You can't seat the jury and move forward until these issues are resolved on appeal. But as to whether discovery will stop, the questioning of potential jurors in the pool can stop. That's something that Donald Trump's team is saying of course they're incentivized to argue that because the more you completely stop all activity involved in the trials, the more likely it will be that the trial will drag on past the election. But whether that is true or not is really unclear. That's going to be up to the judge by enlarge. And so we will have to see but that sort of is one of the many unanswered questions in these cases that remain.

Barb:

Yeah, it's a really important one. I know it'll be really interesting to see. I think the judge has ordered briefing for next week, so we'll see how that goes. It's interesting. They might even be appealing the stay that postpones the appeal. A lot of interesting issue, I know we say unprecedented all the time, but there really are a lot of untested legal theories going on in this case that could unfortunately cause some delays. We also saw an interesting filing this week by Jack Smith, the special counsel under rule 404(b) of the Rules of Evidence. Joyce, can you explain what rule 404(b) is and how it gets used in criminal cases?

Joyce:

Ooh, this is my favorite thing, getting to be a legal nerd because this is some of that nerdy stuff that I like to indulge in. So rule 404(b) is one of the rules in the federal rules of evidence and it requires that the government provide the defendant and also the court with notice of any crimes, wrongs, other bad acts the defendant may have committed not part of the indictment that the government wants to offer into evidence at trial. It's a very broad provision by the way and what it prohibits and that's maybe the place to start because the rule starts by saying, "Hey government, you cannot use this evidence of other bad stuff a defendant did." It says that evidence of any other crime wrong or act to prove a person's character in order to show that on a particular occasion the person acted in conformity with that bad character, that stuff is off the table.

In other words you can't introduce evidence that a defendant is frequently a lying liar to show that he acted in conformity with that trait when he was committing the crime. You cannot dirty-up a defendant with his prior bad conduct. But again, there are exceptions. And so evidence of a prior crime or bad act can be offered to prove motive, the opportunity to commit a crime, intent, knowledge, a common plan, lack of an accident or mistake. And this is an exception that is broad enough quite frankly for Jack Smith to drive a Mack truck through in this case, and that's what he did. He'll use evidence of other misconduct by Trump. And I should say that Smith Equivocates in his filing, by the way, he says, "Everything that I want to offer into evidence really should just come in as direct evidence of the crime." But judge, if you decide that it's extrinsic, in other words that it's not part of the crime, it still should come in under 404(b).

Here's the last nerdy little detail for our listeners to be aware of, these decisions about whether 404(b) information can be admitted at trial and really any decisions about what evidence is admissible at trial that's left up to the sound discretion of the judge. And as long as the judge doesn't go really far afield, as

long as the evidence looks like it's relevant to any issue necessary to decide the case, then a court of appeals will affirm the judge's decision on appeal. And that means that the trial judge, whether it's this case or whether it's Eileen Cannon down in Florida in the Mar-a-Lago case, the trial judge has a lot to do with determining the outcome.

Barb:

Yeah, this is fairly routinely filed in most criminal cases, right Joyce? I know that I always had a checklist-

Joyce:

Always.

Barb:

... of the things I was going to take care of in a case, and my 404(b) notice was on my checklist. Usually there was a date by which you had to file it and I would think through, "Okay, is there any evidence I can use?" And I would go through the statute as you just did, to prove motive, intent, absence of mistake, modus operandi, and to explain it to maybe members of our audience in theme with your Christmas movie theme we've discussed here, Joyce, in the movie Home Alone, you may recall that the two guys who were trying to break in had an mo, right? And they called themselves the wet bandits.

And so even if they were only charged with robbing... Burglarizing, I guess the house where they got caught, which is the house across the street from, was it the McAllisters from Kevin McAllister's house in all the other houses where they found the faucets going, they could be charged there and use that all as evidence of a common scheme, a common method of operation to prove that they had committed the robbery where they were caught. So that's the kind of evidence that we're talking about that gets filed. And so in Jack Smith's filing in particular, Kim, he describes some of the evidence he intends to offer and some of it was pretty interesting. What struck you on his filing that stood out as being interesting?

Kim:

Yeah, so I might be biased, but he said that he would offer some evidence about what Trump and some of his campaign staff did with respect to the TFC vote Counting Center in Detroit on election night, if y'all will recall. They essentially summoned a crowd there and according to Jack Smith, one of his campaign staffers encouraged riots and other obstruction if the vote count in Michigan started to go in favor of Joe Biden and we all saw the images of what happened afterwards, there was a crowd of largely non-people of color outside of the center saying, "Stop the count." As people largely black and brown folks were counting the votes of the largely black and brown voters of Detroit inside in a way that really stopped my heart when I saw it. Donald Trump was also making false claims about what was happening at TCF, that there were votes being shipped in and all kinds of other nonsense, and we saw what the result of that was in Georgia with Ruby Freeman and the horrific things that happened there.

So I think it was a way... I know when we first got Jack Smith's indictments and I lamented a little bit that it did not focus as much as I wish it did on the historic racial elements of what was going on, given that the counts that he was charging was based on reconstruction era statutes and the reason that was was to help prevent the intimidation of voting, particularly of people of color. But I feel like in a way he's sort of hinting at it in this evidence that he's offering. If it's not directly offered in at least it could be offered as supporting evidence. So I think that's really important.

Barb:

Yeah, good point. Yeah, no surprise that it's Detroit, Atlanta, Philadelphia, places with large populations of people of color where he is accusing fraud. I had some students at the TCF Center that night, it's now referred to as Huntington Place, it's since changed its name but they were inside and they said it was terrifying when these people were pounding on the doors and people are just in there, they've been there all day, they're exhausted, they're trying to do their best to count these votes and this crazed crowd is outside pounding on the doors. It was a frightening experience and I'm really glad that evidence of that is going to come into play. Well, all right, I can only imagine what more we'll have to discuss on this topic next week.

Joyce:

So Kim, the word on the street is that Barb has become quite the accomplished cook. Do you think that you can keep up with her and what do you know about her secrets?

Barb:

Are they trolling me?

Kim:

I'm trying to keep up, but I do think I know her secret, but I have to admit it's mine too. It's HelloFresh. With HelloFresh, you get farm fresh, pre-portioned ingredients and seasonal recipes delivered right to your doorstep, no trips to the grocery store and no time planning menus and a grocery list and no wasted ingredients. You all know I hate the grocery store. So HelloFresh is really wonderful and you can count on HelloFresh to make home cooking easy, fun and affordable. That's why it's America's number one meal kit

Joyce:

After a full day at work, there's still a lot to do and some days it feels like eating a wholesome dinner is next to impossible. But with HelloFresh you can turn busy weeknights into memorable mealtimes with delicious practical options that are designed to save you time. They have 15-minute meals. I mean it doesn't get any easier than that. HelloFresh has over 45 recipes and more than 100 seasonal add-on items to choose from every week. So it's easier than ever to find something everyone will enjoy. Even the very picky eaters in your family. Not that any of us would have any of them. HelloFresh works with my schedule, which means it's going to work with your schedule too. Their plans are flexible. 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 holidays right from home.

Barb:

Go to hellofresh.com/sisters free and use code Sisters free for free Breakfast for Life, one breakfast item per box while subscription is active. That's free Breakfast for Life at hellofresh.com/sisters free with Code Sisters free. Everyone can also look for the link to HelloFresh America's number one meal kit in our show notes,

Joyce:

The end of abortion rights started in Texas with SB 8 if you can remember that far back, the vigilante justice law that gave anyone who wanted to the right to sue people who aided women in getting

abortions. The writing was on the wall that Roe versus Wade was going to be reversed when the Supreme Court refused to stay that Texas law while it was being appealed. Now there's a new abortion case coming out of Texas, this one filed by a pregnant woman in state court who is seeking permission from a judge to get an abortion. Kim, talk with us. Get us up to speed on the facts of this case and how the judge ruled on her request.

Kim:

Yes, so Kate Cox found out in her second trimester at 20 weeks that her fetus was not viable. Now imagine that she has stated that she wants children, she wants multiple children, but this pregnancy if carried to term would threaten her fertility in the best of circumstances and threaten her life in the worst of circumstances. So she did what few women are in the position to, she went to court to fight for her own life in the face of Texas's nearly universal abortion ban, and a judge agreed with her saying "The idea that Ms. Cox, who desperately wants to be a parent and this law might actually cause her to lose that ability is shocking and would be a serious miscarriage of justice."

Joyce:

Barb, Texas's attorney General Ken Paxton weighed in, that guy the one who's been waiting out a federal indictment for securities fraud for years without going to trial. The guy who just narrowly ducked impeachment at the hands of the Texas state legislature, he wanted to talk about Ms. Cox's pregnancy and what she could or could not do. What's his take?

Barb:

Well, he argued against, as the State Attorney General, he was defending the statute and arguing against Ms. Cox's ability to have an abortion. And the idea that we've got public officials debating the healthcare needs of an individual woman is ridiculous, but he took the position that he was opposed and that the statute should be enforced. And then even after the judge ordered in her favor, the Attorney General Ken Paxton sent a letter to the hospital and doctors and said, "If you perform this abortion, you could still get yourself into legal trouble. I'm still going to enforce this law," Which itself is lawless. He says, "I'm going to violate this order." So my guess is he doesn't really mean it, but he's trying to appease voters, but it still has a chilling effect of the doctors and the hospitals by creating some legal uncertainty about what's to happen if they comply with the order. So it was, I thought a complete lawless violation of the rule of law just because he didn't like the outcome and wanted to signal to voters that he is a purist when it comes to the question of abortion.

Joyce:

Yeah, I think this is absolutely virtue signaling on his part. It makes me think like, did he not see all those ads Democrats were running where this couple's in their bedroom and the old white guy shows up and says, "Hey, I'm your Republican congressman, you elected me so I get to make your choices." I mean he really walked right into that stereotype because this is a woman who's carrying a pregnancy where the fetus has trisomy-18. That is not a survivable medical condition. If that baby is born, it will briefly suffer until it dies. It's appalling to me that he thinks he gets to make that decision than letting her make it. Kim, what do you make of that? I mean, Barb has suggested it's smart politics and in Texas it probably is. What do you think?

Kim:

I'm not sure because I don't think that Texas is as bright red as Ken Paxton seems to think it is. He clearly did not pay attention to the plethora of elections since 2020, since the overturning of Roe where anytime abortion has been on the ballot, abortion access and reproductive rights have won. He clearly didn't see that there are areas within his own state where this is appalling to people. It's even appalling to many Republicans. So I don't know if he has an Alito syndrome where he really thinks he's on some sort of religious crusade or he thinks that this is good politics. Either way, it's just wrong. I mean, how can you say that this is pro-life in this specific case, this is a woman who wants to have lots of children and if this law has its way she won't be able to if she survives it at all. That's crazy.

Joyce:

Yeah, it's nuts. So what do you think comes next? I mean, the real problem in the case, it's not that Texas law doesn't permit women to get abortions when their health dictates that they need one, right? It's the uncertainty in the law and aggressive folks like Paxton who are telling people, "Don't do it or I'll come after you," The law's not clear, they can't really assess what their personal danger is. So what do you think will happen next here?

Kim:

I don't know. I mean, I hope in this case that at the very least the courts make clear that this should be the subject of an exception. But what he is doing is basically, even though there are very, very narrow exceptions in this law, Paxton is trying to eliminate them judicially, and I hope at the very least the court follows along and takes up this judge's reasoning to uphold some exceptions in this case. Otherwise, I mean, the fact that she was in the position and had the mental financial emotional wherewithal to bring this challenge puts her in a very small minority. Most people cannot do that. So I hope that this serves as a way to bring greater justice to the people who can't.

Joyce:

Yeah, I mean it's such a good point, Barb. This is a state court case. It's filed in Travis County, Texas. There's another state court case in Texas involving a group of people. Does this issue end up going up to the Supreme Court and how do you think that they would rule on it after all in Dobbs they said, "Okay, every state can now write its own law about abortion." Is this going to be a situation that makes the Supreme Court very conservative on abortion? Will they be happy and proud to let Texas continue this way?

Barb:

I think so, but there are possible avenues of challenge. I think the basis on which Roe and Dobbs were decided the idea of substantive due process is a loser with this court because as Justice Alito wrote, he thought it was egregiously wrong when it was decided. So that's not going anywhere, but you could imagine other grounds for defending the right in certain circumstances like this one where you've got these judges trying to be super doctors and making decisions as opposed to deferring to the medical opinion of a doctor. I think there could be equal protection arguments.

We've talked about that before. That was a basis that Ruth Bader Ginsburg favored for grounding the decision in Roe as opposed to a substantive due process one that it is a denial of an equal protection of the laws to subject women to these rules. There has been some argument, we've talked about this before on a religious basis, that this is a violation of the establishment clause by favoring certain Christian religions over other religions that don't think that life begins at conception. So I think there are

more issues to be explored. I don't think Dobbs is going to be the last word on abortion in the Supreme Court.

Joyce:

Yeah, I sure hope you're right. Kim, I'm curious what you think. I think that there might be a void for vagueness challenge for this Texas law if nobody can tell when a woman's health is endangered or when a pregnancy will not produce a live baby. Maybe there's a challenge there. You're our Supreme Court expert. What do you think this court might do?

Kim:

I'm sorry, Joyce, I didn't hear your question from out here on the ledge where I've been since last week.

Joyce:

I forgot my job is to talk you in off of the ledge, not to push you back out further which I'm doing right now, shove.

Barb:

She's not coming, Joyce, I've tried. She's not coming. We can just-

Kim:

Listen.

Barb:

... give her some blankets and send some snacks up there.

Joyce:

Yeah, I think we'll send you a little bit of HelloFresh precooked food.

Kim:

Listen, I mean, what still is gobsmacking to me about the Dobbs decision is that not just that Alito found four other justices, well five to sign onto the outcome of the case, but four other justices to sign onto his absolutely unhinged opinion. You all go back and read this opinion again. This was not based on sound constitutional reasoning. He was a crusader, an anti-abortion crusader. It was a screed, right? When he talked about women, he didn't even speak of them in human terms. I was reading it and thinking he's writing about them like they're human incubators. So no, I don't trust the Supreme Court as far as I can throw it on the issue of abortion after Dobbs. I'm sorry, I just don't.

Joyce:

All right, now you've convinced me. Is there room for me out on your ledge?

Kim:

Yes. Come on. It's fine. The air tip is fine even though it's December.

Barb:

Joyce, you look particularly well rested this week. You getting good sleep? What's your secret?

Joyce:

I am well rested every night because we are a Helix household. Everybody in my house loves their Helix mattresses. And since Helix began advertising with hashtag sisters-in-law, I had not heard of them before, but we have now replaced every mattress in our house with a Helix mattress. To find your perfect mattress, take Helix's two-minute sleep quiz and match with a customized mattress for your body type and preferences. You'll get the best sleep of your life. I would not joke about something as serious as sleep when I took the Helix quiz. I matched with the Helix Midnight mattress and it's been perfect for me. I've had great sleep ever since I got it, and my husband loves it too. With Helix, buy a mattress tailored just for the way you sleep, we're getting the best sleep of our lives.

Barb:

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. 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 listening to this. If your spine needs some extra TLC, they've got you. Every Helix mattress has a hybrid design combining individually wrapped steel coils in the base with premium foam layers on top. It's the perfect combination of comfort and support.

Kim:

Helix knows there's no better way to test out a new mattress than by sleeping on it in your own home. That's why they offer a 100 night trial and a 10 to 15 year warranty to try out your new Helix mattress. Plus, the setup is fast and easy, and Helix mattresses are delivered in a box and straight to your door all for free. 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 20% off all mattress orders and two free pillows. For our listeners, go to helixsleep.com/sisters and use code Helixpartner20. That's Helixpartner20. This is their best offer yet and it won't last long with Helix. Better Sleep starts now. Find the link in our show notes.

The fallout from the implosion of Hunter Biden's plea deal this past summer just keeps coming. You guys, I have so many questions for you as former prosecutors. Please help me make it make sense. First, Barb, give us your take on the new indictment against Hunter Biden in California that just dropped Thursday night. It adds three felony counts and two misdemeanor counts to the charges he's already facing in Delaware. These involve tax evasion. Did you see it coming? And why do you think it's happening now?

Barb:

I did. I think that when that deal fell apart in the summer, it was inevitable that more charges would come. There was the gun charge and the tax charges that were both part of that plea deal. It fell apart. And I think as a prosecutor, if you're willing to offer a plea deal, you have to be prepared to back it up. If the deal falls apart, you can't say, "Oh, just kidding." You have to come through and usually a plea deal offers a better deal than what you would face if you were charged. So I expected it to be worse, but wow, it's pretty bad. I didn't expect it to be this bad.

He was previously going to plead guilty to something like a hundred to \$200,000 in unpaid taxes. This one alleges \$1.4 million in unpaid taxes. And there are a lot of gory details in here about living a very lavish lifestyle, belonging to sex clubs, owning a Porsche and a Lamborghini, and while spending these exorbitant amounts of money, refusing to pay his taxes willfully violating his tax laws by not just failing to file a return but evading the laws, concealing and taking affirmative steps to evade the tax laws. So pretty serious charges here. So I'm not surprised that charges were filed. I'm surprised they're so bad.

Kim:

Yeah, Joyce, I always thought that is fairly unusual for people to face prison time for tax evasion, particularly as in this case the outstanding tax that is owed has been repaid. I think it's only in cases... I don't know if y'all remember Wesley Snipes, he made some argument that taxes are unconstitutional or he had this totally wacky lawyer. Of course he was going to go to jail, right? Because that was crazy. In this case, it just doesn't seem like that he's facing, what is it, something like 15 years total time. Why do you think this goes so against the traditional wisdom and do you think his attorney's assertion that this is political, has any validity?

Joyce:

Yeah, so the 15 years, that's the statutory maximum sentence and Hunter Biden won't face anything close to that even if he goes to trial and he's convicted, he'll be sentenced under the sentencing guidelines, which are far more lenient. But that said, now that we have had time to read and to digest this very lengthy speaking indictment which is full of detail, and as Barb says, it's far more gory than what we learned in the course of the failed plea negotiation sort of hearing in court. This one is right on the line in my district. And Barb, I think I've heard you say this too, in your district the practice is for a basic tax case where somebody fails to file. If they pay it back, you don't charge them.

Barb:

Yeah, true.

Joyce:

This case is a little bit different because what we're seeing now is that it's more than a failure to file. There are three of the counts that he's charged with are felonies involving making false statements that were designed to conceal some of his income or to mischaracterize it. And so it really depends on the details, but I have this enormous question about why the government was willing to offer a misdemeanor plea deal and now all of a sudden we learned these additional facts and there are felony charges. So it's very interesting. I think Abby Lowell, Hunter Biden's lawyer is clearly going to file some form of selective or vindictive prosecution charges saying that Hunter Biden is only being charged because his last name is Biden.

And that I think is going to be a heavy lift because the Attorney General right now is named Merrick Garland, and he was appointed by Joe Biden and he permitted the appointment of a special counsel, and the special counsel has now brought those charges. There would have to be some sort of evidence, quite frankly that Donald Trump impermissibly demanded this tax prosecution and that somehow David Weiss, who's a career guy in the Delaware office, the US attorney now, a career prosecutor before then, that he was susceptible to that pressure that he caved in. It's very murky. There's a lot more for us to learn, but I'll make one last comment about the severity of these charges.

Typically, a first time offender convicted on a tax charge is probably going to end up in a sentencing guidelines range where they serve little, if any jail time, they might get home confinement. They might even get what's called a split sentence where they would spend a little bit of time in a minimum security camp. Hunter Biden though, is on a fast track to be prosecuted on these gun charges in Delaware. In fact, his lawyers got motions due in that case on Monday. And if he is convicted in that case before the tax case goes to trial, and if he's convicted in the tax case he will be sentenced to someone who has prior criminal history and that changes his sentencing outlook completely. That puts him into a much more serious category for the imposition of a sentence on the tax charges and he could be looking at real time there. So it's, I think important to be aware of how these two prosecutions interact.

Kim:

What do you think about that, Barb? I mean both about the point that Joyce made and also as she said, this is a speaking indictment. What is this indictment saying to you?

Barb:

Yeah, it speaks a lot of gore, right? We use the word gory. I mean it's lengthy. It details really the sort of off track life he was living at a time. They even quote from his book where he talks about moving from one Airbnb to another in Malibu and all the different cars he was buying and all the different women he was supporting, and he was running payroll through his business to pay some of these women, concealing membership in a sex club calling it a golf club. Just a lot of really, I don't know, icky.

Kim:

Salacious.

Barb:

Yeah, salacious is good. Icky, icky is one of my details. And that may be by design, but I also think it's important to show that he had the ability to pay the taxes and was choosing not to. I think to the extent people have sympathy for Hunter Biden, and I think we should, he was addicted to drugs. He's working hard to get his life in order. That doesn't mean you're free of the consequences of your conduct. And it appears based on these allegations willfully engaged in tax evasion. And I think if I were advising him, I would probably encourage him to put together a global guilty plea that resolves both cases and does so with the minimum amount of sentence and as early as possible if he cares about protecting his father's campaign get it off stage now as opposed to next November.

With regard to the gun charge, I agree there that that's one that probably would not have been filed against anyone not named Biden. I don't know so much about the tax charge because of the efforts to conceal the payment. It wasn't just failure to pay. There were these active efforts to conceal it, but I think he could probably get a plea deal that offered little to no jail time if he were to accept responsibility, enter a guilty plea and do it promptly before the government has to go through a lot of effort at a trial.

Joyce:

Can I just say, Barb, we're thinking about this exactly the same way. I mean, this new indictment is serious stuff and it doesn't matter to me if it's Hunter Biden or somebody whose name I don't know. If you engage in tax fraud, you're stealing from the people of the United States, from taxpayers like me. And you should be held accountable, and sure I regret the situation for Hunter Biden just like I always

felt compassion for criminal defendants at sentencing. Everybody has a story, right? Nobody commits... Or very few people commit a crime, especially like this one because they just wake up one morning and decide I want to be a tax cheat.

Usually there is a story of addiction or financial problems or family dysfunction, and people deserve our compassion and they deserve a second chance after they've been held accountable and repaid their debt to society. So as much as I'm willing to be forgiving, I think he needs to be held accountable if the government can prove all of the salacious details in this new indictment.

Kim:

Well, Joyce, let me ask you this. If this goes to trial, the timing will be politically perilous. It'll basically be coinciding with the general election in 2024. As a former prosecutor, would that be a consideration? Is that a consideration for the prosecution in this case and how might it affect it at all?

Joyce:

Nope. If I'm the prosecutor in this case, I don't really care what Hunter Biden's daddy's day job is. I'm going to go ahead and take this case to trial and do justice for the American people. I don't think though that this case takes that long. I mean the central district of California where he's indicted, they are a little bit more backed up than some of the other courts. This isn't going to go to trial within Speedy Trial Act limits, I don't think. But it's not complicated. The evidence is pretty black and white. I think this case goes to trial late spring, early summer, and it's done. Unless Hunter Biden-

Kim:

That's still bad.

Joyce:

I mean it just is what it is. But look, Barb's advice to Hunter Biden is outstanding. If he believes that the government can prove it, he should go ahead and conclude a global plea deal where he doesn't have this extra criminal history where he's sentenced. And if he thinks the government's got it wrong and they can't prove it, then by all means put them to their proof.

Kim:

What do you think, Barb?

Barb:

Yeah, I mean, you have to have a conversation with your client. Are you guilty? I mean, if you're not guilty, you can't plead guilty because you have to under oath, explain what you did that makes you believe you're guilty. But this is a case that gets proved on the documents. And so the evidence to me seems very strong. And so I think some sort of global resolution where you resolve the two of them and try to minimize the amount of jail time is in the best interest of everybody. I mean, even if he has to go to prison for a period of time, you do the crime, you do the time. But I think if he wants to help his father, he does that sooner rather than later. I mean, delaying the trial until next fall and then getting convicted doesn't help anybody. The way to reduce your criminal exposure and the length of your sentence is with a prompt guilty plea. And so I think that is certainly something he ought to be considering.

Joyce:

Kim, your skin always looks lovely even when you're wearing no makeup whatsoever. What's going on?

Kim:

I have been taking better care of my skin because I think that's important. Our skin is our biggest organ, and one thing that I really love is OneSkin products. In fact, I like them so much that I just gave some to my stepdaughter because it's a really great product, especially right now when the air is dry and taking care of your skin is more important than ever. The holidays are here which is perfect timing for today's sponsor, OneSkin. We all know that with all the holiday fun and festivities come, stress and harsh weather and it can really take a toll on your skin. Not to mention the eggnog, you all, it's true talk.

But thanks to OneSkin's disruptive approach that targets skin aging at the source, you can finish off 2023 with your skin at its healthiest. Let us tell you what makes OneSkin the best. Their products are powered by groundbreaking peptide, OS-1 which is the first ingredient, specifically and scientifically proven to prevent the accumulation of aged sentient cells, the primary culprit behind skin aging. The real magic is that OS-1 has actually been proven in the lab to reduce the biological age of skin by several years. Meaning that it not only prevents but slows down aging, leaving you with healthier, more hydrated and glowing skin.

Joyce:

OneSkin helps me look and feel great. It feels amazing on my skin, and I've seen the results fast. All of us love that OneSkin just launched their mini bundles which include the face and eye topical supplement, body lotion and cleanser, all in a cute little travel bag. Cute little black sort of a... Makes me think about Neoprene. It's very nice and very stylish. If you're traveling this winter, OneSkin has your mini skincare essentials covered, and if you're gifting this holiday season, it makes the perfect stocking stuffer.

Barb:

That'd be a large stocking for that kit.

Joyce:

It is but [inaudible 00:59:23] I mean we have big-

Barb:

You've got some big foot choices.

Joyce:

... stocking people, and this it's like a little bit bulky but you know how you put stuff on the outside of the stocking. It's perfect. I'd be delighted to [inaudible 00:59:35] stocking.

Barb:

Stuff from the outside of stocking. All right, I got to get myself a bigger stocking. And for a limited time our listeners can enjoy an exclusive 15% off OneSkin products using the code Sisters, when you check out @oneskin.co this holiday season, give yourself and your loved ones a headstart on New Year's resolutions to swap your skincare for skin longevity. OneSkin is the world's first skin longevity company. OneSkin addresses skin health at the molecular level, targeting the root causes of aging. So skin feels

and appears younger. I'm 96 and I look like I have the skin of a 58-year-old. It's time to get started with your new face, eye, and body routine at a discounted rate today. New customers get 15% off with the code sisters@oneskin.co. That's 15% off oneskin.co. with code Sisters the New Year's approaching. Now is the best time to invest in your skin. Age healthy with one skin and look for the link in our show notes.

Joyce:

Okay, you all. It is time for the favorite part of the podcast where we get to answer listener questions. Our listeners have great questions this week. They do every week, but this week there is a lot going on and these questions are particularly insightful. So we'll dive straight in. If you've got a question for us, please email us at sistersinlaw@politicon.com. Tag us @sistersinlaw.podcast on threads or tweet using #sistersinlaw. We're so excited that hashtags are working on threads now, so you can easily get us there. If we don't get to your question during the show, keep an eye on our feeds throughout the week because we'll try to answer as many of them as we can on social media. So straight to it. Kim, I think the first question is for you, it comes from Diane in Utica, New York. And Diane says, "I often hear you make references to the 11th circuit along with others. Can you explain the circuit system? How many are there? It sounds like different ones have their own personalities. How does that happen?"

Kim:

Oh, well, I will start, but I also want to hear what you guys have to say particularly about the personalities. So there are 13 circuits. 12 of them are arranged by geography with one asterisk that I'll get to in a minute. So basically each circuit is, well, 11 of those 12 circuits are comprised of multiple states, right? So the first circuit, for example, has Massachusetts, Rhode Island, and a bunch of other New England states. There is also the DC circuit which technically is also a geographic circuit, but it's its own circuit just for DC because it encompasses the entire federal government, all of the federal agencies.

So just dealing with appeals from those brings it up to about as much, if not more of a caseload than you get in each of the other geographic circuits. That's why it's its own circuit. Also, because it deals with all the federal agencies. It hears a vast array of different kinds of claims which is one reason why it's called sort of the JV circuit for the Supreme Court. Many Supreme Court justices are picked from the DC circuit and the 13th Circuit is called the Federal Circuit, and it is a subject matter circuit which deals with patent law, international claims, things from the Federal Claims Court, really boring stuff. Nobody from there gets picked from the Supreme Court, but in part because most of the circuits are geographic that's part of what gives them their personalities, right Joyce?

Joyce:

Yeah, I mean, I think that's fair. I've spent time as an appellate lawyer and I've argued in front of a number of different circuits including the Second Circuit, that's New York and that area up there where they do a lot of their arguments telephonically, and we're doing that 15 years ago, 10 minutes on the phone. They would argue every case. It would be, in some ways it almost just felt routine. The 11th Circuit is one of the circuits that has the lowest number of cases for oral argument. The judges like to brag that they're down around 20% these days, and when you go for oral argument, it is a very formal affair in one of the beautiful courtrooms set aside for oral argument.

The judges take it seriously in the 11th Circuit. They expect you to be extremely collegial towards the other lawyers. They don't put up with any form of hostility or bickering, and so it's important for lawyers when they're arguing in the different circuits to understand their character and their practice. In fact,

every circuit has formal, written local rules that govern their procedure and can be very outcome determinative.

Barb:

Yeah. I'll just add, I practiced in the Sixth Circuit Court of Appeals, which covers Michigan, Ohio, Kentucky, and Tennessee, which is an interesting mix of states, and the court sits in Cincinnati. So we would go down to Cincinnati for oral argument, very similar, very formal, strict deadlines on the amount of time that you have to speak. Strict deadlines on court filings, but all very collegial and old fashioned. The Ninth Circuit is one that President Trump has blasted when he was in office as being the one that is the most liberal, I suppose that is a reputation of the Ninth Circuit. It handed down some rulings against him in immigration cases, so he was unhappy with that one. And the Second Circuit covers New York. So that's one that's often quite active, and we hear a lot of rulings from.

Kim:

[inaudible 01:05:29].

Joyce:

Barb. I love your comment about strict time limits. One of the things that some of the judges in the 11th Circuit will say to lawyers who are arguing, they'll say, "Ms. Vance, the red light is not aspirational." There's this light system up front. You got a green light when it's your turn to talk, it turns yellow when there's a minute left, when it's red by God you better shut up and sit down because [inaudible 01:05:55].

Barb:

Mid-sentence, the end. And then of course, the Fifth Circuit has been kind of out of control with a lot of Trump appointees with all of these crazy decisions in abortion cases, and whatever is the opposite of progressives.

Joyce:

It used to be a lovely circuit.

Barb:

They've lost their minds.

Joyce:

You would go to New Orleans to argue you would have breakfast at Mother's First. The Fifth Circuit and the 11th split in, I forget the year 1978 or 79. My father-in-Law was a Fifth Circuit judge and then he became one of the first 11th circuit judges. I used to love going to New Orleans to argue, and I think you're right, Barb, and it's something important to think about. Presidents get to appoint judges, and sure there's going to be a little bit of political lean but we want presidents who will appoint good jurists first. It just really matters, and it shows in some of these wacko opinions coming out of the fifth.

Kim:

Yeah, if y'all forgot there was a First Circuit, which is where I argued, it's because that's where very boring cases are argued. They very rarely make it to the Supreme Court. They're about lobster law and

whatnot. Although one that was interesting was Varsity blues. The varsity blues cases were out of the First Circuit, but aside from that nobody pays any attention to them.

Joyce:

I love the First Circuit. I wrote my college thesis on International Law of the Sea, and there were some of the rule of law cases ended up going to the First Circuit. I've always thought they seemed real nice and real common sense in a New Englandy way. And that goes-

Kim:

The law of the sea, that's why you've never heard of them.

Joyce:

Right?

Barb:

International law of the Sea. Wait, so Joyce...

Joyce:

There is a fishing war on the Georgia Bank, and that was what I wrote about.

Kim:

Oh, my God.

Barb:

So Joyce, when you're in your backyard in the coop, do you ever talk about the Chicken of the Sea?

Kim:

Ooh.

Joyce:

Oh, God. Okay, this conversation about courts has gone on for far too long.

Kim:

Far too long.

Joyce:

But seriously, thank you for the question, Diane. I mean, these are the things that we take for granted and I think they're always fun conversations to have. Our second question comes from Al in Accord, New York, and he asks, "Let's say Trump is found guilty in the documents case, Judge Cannon, her sentencing is a very weak penalty. I think he's speculating, let's say she sentences low. Is there any recourse?" And this is such a great question and I will talk about it because it's in the 11th circuit where I know the law pretty well. Here's what she has to do when she sentences. If Trump is convicted, she has to start by correctly calculating the guideline range, whatever it is, but she's not bound by the guideline range. She can sentence higher or lower.

She's still required to justify her sentencing decision. And there's an entire litany of factors that are found in federal law. Things like the facts and circumstances of the case, the defendant's background. She actually has to consider all of those facts and all of those circumstances, and she has to include them on the record that she's considered them. So in essence, she has to justify her decision. Judges have a lot of latitude in sentencing. It's very hard to reverse a sentence. There are only two ways to do it. One is to argue that the sentence is procedurally unreasonable. That's if the judge gets one of those procedural hoops she has to jump through wrong.

Most judges are way too smart to do that. Occasionally you get one, but it's very rare. There is a limited niche where prosecutors have been successful in reversing judges in my circuit, and that is substantive unreasonableness. So there was a case involving a company called Health South and the founder of Health South, a guy named Richard Scrushy and a lot of his CEOs were accused of committing a massive fraud that impacted shareholders, employees, all sorts of folks, and the CEOs all pleaded guilty and for whatever reason, the judge they had goes through all of this and then sentences them to peanuts.

In one case, it was a couple of hours in custody. And so I actually was able to appeal those sentences on substantive reasonable grounds and get them reversed and order the judge to re-sentence. In one case, the judge was actually removed from the case. The 11th Circuit ordered him to recuse and to have someone else re-sentence. I don't want to pretend that this is easy to do or that there's broad scope here for prosecutors to reverse, but if she does something that's really beyond the pale, then prosecutors will be able to go in and appeal. Our last question comes for Barb, and it's from Nina. Nina asks, "When did 'originalism' become a thing? I don't remember hearing it as the basis for Supreme Court rulings until Scalia, would love to hear more about how long that has been an approach to judicial philosophy. Does it go back to the beginning of the court?"

Barb:

Oh, Nina, this is such a great question. And Nina, Justice Scalia was known as Nino, wasn't he? Wasn't that his nickname?

Joyce:

Yes. Nino, yeah.

Barb:

How appropriate, Nina, did you ask this question? It's a great question. I've done a little research, Nina, in response to your question. So it appears that sometimes there was original intent what was tossed around by the court. It was used in footnotes in the 1960s and 1970s. But you're right that it really was Justice Scalia in 1986 when he gave a speech that all about this concept that he referred to as the original public, meaning originalism and that is sort of what the current version of originalism is all about. It is what was the public meaning of the words used in the Constitution at the time of the framing or in the case of an amendment at the time of the amendment.

So he kind of made it up in 1986, which is why you don't hear anything about it predating that. And it fits well into the conservative philosophy because it locks our constitution into the time of the framing. And what I personally find so disingenuous about originalism is a lack of consistency in applying it. If you said we're going to apply it to everything, then at least it would have consistent integrity. But where it breaks down is the fact that the world has evolved so much since the framing.

For example, the case that I always come back to is the Heller case, which is one of the big cases decided, I don't know, 10 or so years ago, maybe it's 20 by now, in which the Supreme Court written by

Justice Scalia said that the right to bear arms is a personal right. And they did all this hocus pocus with a bunch of words using originalism, but they completely omit the phrase, the need for a well-regulated militia. That doesn't count for anything. We're going to throw that out. And they also throw out the argument that at the time of the founding, a firearm was a one-shot musket. So original public meaning of firearm, certainly meant that. It doesn't mean a six shot or an automatic weapon or anything like that and they just dispense with the wave of a hand, "Oh, that can't possibly be anything."

Same thing when it comes to things like electronic surveillance. Well, how does the Fourth Amendment apply to the surveillance when the Fourth Amendment is all about persons, papers, homes, and effects? They certainly didn't contemplate in the original public meaning of those words, the ability to intercept phone calls or cell site location information and they kind of just blow that stuff off. So I find it to really be a lot of hocus pocus. I think it's... This is my personal opinion, a way to reverse engineer a conservative result. "Oh, this is what the framers would've liked, if we look at the history and tradition of the Constitution, of course they were beating their wives because that's what people did back then." So I think it's a way to lock America into a vision of the country from the 1780s.

Joyce:

Barb, I love that you're not an apologist for originalism, that you just go straight for its throat. I couldn't agree with you more. There has been a mood among progressives and some of the progressive Supreme Court justices to try to encapsulate it and fold it into their view and say, "No, really this is what the founders meant." And I think it's important to have this sense that the Constitution was meant to be a living breathing document and unless the Supreme Court wants to take Heller back and say, "Okay, the Second Amendment protects muskets and nothing more," Then they really should... I think they won't, but at some point, they should be forced to acknowledge the hypocrisy that this originalism approach is just pervaded with.

Thank you for listening to #SistersInLaw with Kimberly Atkins Stohr, Barb McQuade and me Joyce Vance. Remember that you can send in your questions for next week by email to sistersinlawpoliticon.com or tweet them for next week's show using #SistersInLaw. Please show some love for this week's sponsors, Calm, HelloFresh, Helix and OneSkin. You can find their links in the show notes. We love them and we hope you'll support them because they support the podcast. It's why we can bring you the show each week. If you're listening, I know you've already done this, but if not, what are you waiting for? Follow #SistersInLaw on Apple Podcasts or wherever you listen, and please give us a five star review. It really helps others find the show. See you next week with another episode, #SistersInLaw.

Barb:

Die Hard.

Kim:

Die Hard.

Joyce:

Die Hard. Die Hard is a Christmas movie.

Barb:

I know, it's a Christmas movie.

This transcript was exported on Dec 09, 2023 - view latest version [here](#).

Joyce:

Absolutely. We watch it every year. Love Bruce Willis. I'm so sad he's-

Kim:

I mean, all respect to Bruce Willis. Poor thing.

Joyce:

It's a Christmas movie. That's the only way to perceive Die Hard. We've talked about that before.

Kim:

I was on the opposite side of it, but just out of respect for Bruce Willis, I will say, yes, it's a Christmas movie.

Barb:

Yep.

Joyce:

We have won a hard fought concession from Kim. I am really proud to see that civil discourse is alive and well.