

Kim:

Welcome back to #SistersInLaw with Barb McQuade. Jill Wine-Banks Joyce Vance, and me, Kimberly Atkins Stohr. We're heading into the new year. I know we're making our resolutions, but you should resolve to go get some SistersInLaw merch. It is available at our merch store. Everything from hoodies to my favorite new item, our mug. Just click the link in our show notes or you can go right now to politicon.com/merch today to load up and make sure your 2024 starts out right.

But before we talk about our own resolutions, we have a show to do. We're going to preview that a little bit. We're going to be talking about Jack Smith and his motion in lemonade. No, that's not a fruit or a drink flavor. That is very important legal stuff. We'll also talk about the 14th amendment challenges that are heating up in states across the country and what we learned about who Kenneth Chesebro is and is not cooperating with and what he is saying.

But first, as I said, we are at the new year and I want to ask you guys what your resolutions are. I don't make resolutions. I don't. I try to take a moment to think about the year that's passed and the good and the bad and how I can do things differently. But I don't say, "Oh, I'm going to... I resolve never to eat too much at the..." Stuff like that. I feel like that sets you up to fail, but what about you guys? When the new year comes do you have resolutions or any other tradition, Barb?

Barb:

Yeah, I actually do. I'm a big, I like to reassess my priorities for the year and think about how can I do better in the coming year. Sometimes I'm more successful than others. I have some personal ones just about spending more time with family, but one that I can share is, and it's related to that I guess, doing less multitasking, especially with my phone. And so, when I am with other people, setting my phone down, putting my phone away, going outdoors without my phone, that is my New Year's resolution. I have a friend who goes phone free Saturdays the whole day. Isn't that impressive?

Kim:

The whole day? I don't know if I can make it the whole day.

Barb:

It's a technology Shabbat. Yeah, there you go. That's exactly it. But I am trying to just, if I'm going for a walk with my husband, for example, just leave the phone behind and be fully present for the walk. That's my New Year's resolution. We'll see how far I'll get into the new year with that one.

Kim:

All right. I feel attacked because as Barb started talking, I looked down at my phone.

Barb:

Well, I'm not telling you it's in my lap right now.

Kim:

What about you, Jill? What are your New Year's resolutions or traditions?

Jill:

Well, I am like you, which is I don't make resolutions because it would be something that I would probably fail at. I used to do it when I was... Decades ago. But I was inspired by Jennifer Rubin's column today in which she said, "We can save democracy in 2024." And so I have decided that I will resolve to keep on working to make sure that we save democracy, that the election goes smoothly and that the right candidate wins.

That's my resolution is to really keep on doing what we're all doing by trying to bring the facts and information to all of our listeners and to say thank you to them, that we are not going away. We're going to be here.

Kim:

Yeah, just a totally unrelated fact, Jen Rubin's dog and my dog are friends.

Joyce:

That's amazing. Really?

Jill:

That is amazing.

Barb:

Wow.

Joyce:

She's one of my favorite columnists and she usually comes and talks to one of my classes about being a recovering lawyer who now writes a column in the post, but she never talks about her dog. I'm going to tell her I'm hurt.

Kim:

What about you, Joyce?

Joyce:

I'm not big on resolutions, but along the lines of Jill's insight, this year I'm just going to resolve to still be around at the end of the year, to get through everything, to survive it, hopefully to make sure that we still live in a democratic country at the end of it. I've been moody for the last couple of weeks, and I hope I can shake that off as we enter the new year.

Kim:

Same, same, Joyce.

Barb:

Joyce, I know I can be a little bit lazy about cooking, but is there anything out there that's ready, not just a pre-made meal, but a ready-to-eat meal?

Joyce:

Yeah, something I can tell you about Barb is Factor, America's number one, ready-to-eat meal delivery service. With Factor, you'll eat well at any time of day thanks to chef-prepared and dietitian-approved ready-to-eat meals and best of all, delivered straight to your door. You save time and stay healthy no matter what life throws at you.

Barb:

Wow, I don't even have to combine ingredients or measure things out. It all comes together. I love that you can save time and skip meal prep with Factor. That means no grocery shopping, no chopping, no prepping, no cleaning up when you get Factor's fresh, never-frozen meals delivered to your door. They're ready in just two minutes, so just heat and enjoy. There are 35-plus high-quality, delicious chef-crafted meals available every week that meets your meal preferences, whether it's calorie smart, vegan, veggie, protein plus, or other healthy and wholesome options.

Kim:

You can also count on extra convenience anytime of day with more than 55 add-ons that suit every taste. You can choose from quick breakfast items, lunch to go, grab-and-go snacks, ready-to-drink cold press juices, shakes, and smoothies. Another thing to love is that Factor offsets 100% of their delivery emissions and sources 100% renewable electricity for their production sites and offices.

Jill:

Wow, that is really impressive, Kim. This December get factor and enjoy eating well without the hassle. And as much as I love preparing meals, some days I'm just too busy, and this sounds like a great option, simply choose your meals and enjoy fresh, flavor-packed meals delivered to your door. Ready in just two minutes. No prep, no mess. Head to factormeals.com/sisters50 and use code SIL50 to get 50% off. That's code SIL50 at factormeals.com/sil50 to get 50% off. You can also find the link to this deal in our show notes.

Molly Gaston and Thomas Windham, two of special counsel Jack Smith's lawyers in the federal January 6th case before Judge Chutkan filed a motion in limine on Wednesday. That's Latin for a pre-trial motion, asking a judge to limit the evidence to what's relevant and admissible. It's a very common pre-trial motion and serves valid purposes.

Here the goal was to eliminate arguments at trial that prosecutors say are not supported by evidence or are irrelevant to the case and could mislead jurors. They said, "Although the court can recognize these efforts for what they are and disregard them, the jury, if subjected to them, may not." Let me go to you, Kim, and ask specifically what are Jack Smith's lawyers seeking to keep the jury from hearing and why?

Kim:

Well, I will do that. I will start by saying I prefer motions in lim and limeine...

Jill:

[inaudible 00:08:31].

Kim:

To motions in limine. It has a little bit of tang, a little more tang to it, but there's plenty of tang in this particular motion. What Jack Smith's team wants to do is to make sure that Judge Chutkan notes that and enforces the fact that while Donald Trump is free on the campaign trail to say all kinds of things that

he likes, whether they are true or not, because the first Amendment's protection of such speech is strong, in the courtroom and particularly when he's testifying, it is an entirely different deal.

Generally speaking, in a court of law during a proceeding, whether it's a civil or criminal trial, testimony and evidence has to be limited to what is relevant to that case. You can't just get up there saying all kinds of different things, and this is an important principle because you don't want to send the jury's mind in all kinds of different places. You don't want subterfuge and you certainly don't want to be advancing things that aren't true.

Essentially what they're asking is for Donald Trump not to be allowed to make certain statements or claims such as that law enforcement is to blame for January 6th because they failed somehow to keep the Capitol safe. Or that there is some sort of conspiracy theory. For example, Donald Trump has been talking a lot about Ray Epps who was one of the January 6th rioters, claiming falsely, very falsely that he was an FBI plant and that he was actually there to foment January 6th on behalf of the deep state.

Jack Smith doesn't want any nonsense like that even being offered by Donald Trump. Or that Antifa was really behind January 6th, or that confidential sources or something else. Anything that's false, irrelevant, and it's just his way of trying to kick up dirt and obfuscate the way that he does politically, that's not to be done in the courthouse.

And that's a fairly common thing. These sort of motions to ensure that the judge keeps the testimony focused on the crimes and the charges at hand and not get out of hand is something that judges do all the time. It's something that prosecutors seek all the time, and I see no reason why this should be denied.

Jill:

And Barb, let's talk about the timing of this motion. Because Trump filed a motion to dismiss this entire case based on his claim of absolute immunity and claiming that it was because these were actions during his presidency so he's immune and because he had claims of double jeopardy since he was acquitted at impeachment, Judge Chutkan froze all the pretrial proceedings, at least the deadlines of things that were in the case pending before the outcome of Trump's appeals. Do you think she will consider Smith's latest request while the case is on pause. And if he will do that or won't do that, even more importantly, why file now?

Barb:

Yes, it's an interesting question. And I think some have even suggested, I think Joyce has even suggested that maybe it's even proper for him to be filing anything while this stay is in place. I think if you're trying to figure out his reasons, one thing he said is, "I know Donald Trump has been relieved of the burdens of litigation while there's a stay in place, but just to keep things moving, we're going to meet all of our deadlines." And so, we've got motion deadlines and other things we're going to keep going so that when this stay is lifted, we'll be ready to keep going and there won't be any further delay while we get our papers in order or file anything. And we'll have it right there and the clock can start right back up in terms of the..."

Because when you file a motion, the other side gets so many days, 14 days to file a response. And so, if they're there, then the moment the stay is lifted, that clock starts. I also think that the stay, it's unclear exactly when that stay is going to end. I think everybody expects the Supreme Court to take this case up. But they could even take it up simultaneously while allowing the stay to lapse, to even have the pre-trial activity continue. I think this is just an effort to avoid every bit of delay they possibly can. Joyce, you thought maybe it's inappropriate. Do you think so?

Joyce:

Yeah, I think that when a case is stayed, in essence what you're saying is that the trial court is divested of jurisdiction during an appeal and it's inappropriate to file anything during that period of time. Don't get me wrong, I get Jack Smith's motivation and the desire to avoid delay, but I think the way you do that is by asking for the stay to be lifted, not by just continuing to file stuff.

Jill:

And for both of you, whenever Judge Chutkan rules on this, even if the stay gets lifted, would Trump's attorneys be able to appeal that ruling before the trial is concluded?

Barb:

A ruling about the stay?

Jill:

No, the ruling on the motion that he has filed to limit the evidence. Is that something that is appealable during the trial or does it have to wait until post-trial?

Barb:

Yeah, no, that's something that would have to wait until after trial. In most instances, there's something called the final judgment rule that says you have to save all of your issues up for the end for one big appeal. And that's to avoid this idea of piecemeal litigation where the case keeps going up and down on appeal. But there are a few things right at the beginning where a person doesn't even have an obligation to stand trial such as immunity that is immediately appealable, but it's a pretty small subset of issues that are immediately appealable.

Jill:

Exactly. And Joyce, what would be the impact on Trump's defense if Chutkan grants the special counsel's motion in limine? Would it limit discovery of certain defenses if they're ruled irrelevant?

Joyce:

Yeah. It's a really interesting question, Jill, because Trump wants to blame a lot of other people for January 6th. He wants to say, "Oh, it's the fault of the Capitol police for not doing a good job of preventing insurrection." And he also wants to engage in discovery on some of his crazy theories so he can present some truly off-the-wall defenses.

What Jack Smith did in the motion in limine, and Kim referenced this, he asked the court to disallow these defenses. And of course that would mean that Trump isn't entitled to the discovery in that regard. Smith argues that just like a bank robber can't blame the robbery on failed efforts by security guards, Trump doesn't get to excuse his conduct by saying other people should have stepped in and prevented the insurrection.

And Smith really wants to prevent the introduction of baseless evidence that would base January 6th on take your pitch, Antifa, undercover FBI agents, foreign actors, I mean all sorts of crazy theories that he and his followers have tried to put forth, and the spaghetti doesn't seem to be sticking to the wall.

Even if these defenses were true and none of them are, they wouldn't have anything to do with Trump's guilt. And I think we'll see Judge Chuck can disallow all of this stuff. Trump will be the loser, I think, in virtually all regards to this motion in limine and especially this one.

Jill:

Yeah. And I think I want to just stress what you said, which is none of these defenses have any factual basis. They're all not true. And Donald Trump and his lawyers know that, so they shouldn't be allowed to do it just on background. Kim, in the motion, Jack Smith's lawyers noted that the court could recognize his efforts at dissembling and diverting, but that with a jury, you can't be sure. Would the motion in limine be necessary if this was a non-jury trial?

Kim:

I mean it wouldn't matter as much, because that's exactly right. If he says something in court, a judge can order that that be stricken or try to deal with that in real time, but the jury can't unhear what they heard. And so this motion would actually put some more enforcement teeth against it that would really, he could face greater sanctions if he forbid this order that prohibited him from doing that.

But yes, it's very different in a jury trial than in a bench trial, which is run by a judge. For example, Alan Hostetter, who is one of the January 6 writers, he represented himself and he's said all sorts of things in court. He spewed off all kinds of conspiracy theories. And I'm sure that Trump's attorneys will try to say, "Well, look, he was allowed to say all this stuff. Why can't my client?" Well, he had a bench trial.

A judge knows what is relevant and what is not, but you can expect a jury to unhear everything that they hear. They're not lawyers, they're not judges. And they're going to try to make the best decision that they can, but how can they not be influenced by things like that if they hear it? That's why it's very different and the enforcement will be very different in this case.

Jill:

Well, there is one similarity, which is in either one, it wastes a lot of time to put on these irrelevant things. And so, it would make sense even if it was a bench trial, that they would move to limit the evidence to save time. But I thought it was pretty interesting, Joyce, that what was revealed in the motion by the special counsel. What do you think Trump learned from the filing?

Joyce:

Yeah, I think not much that he didn't already know. The only real place that Smith is talking about his witnesses as opposed to defenses that he thinks Trump is going to present is when he talks about preventing Trump's lawyers from cross-examining some of his witnesses. His concern is that they could be cross-examined in a way that might make them appear to be deceitful or withholding of information, when in fact they're just trying to prevent violating privilege issues.

The problem that Smith is anticipating with some of his witnesses is that they have knowledge of information that's protected by the attorney-client privilege or by the speech or debate privilege. And they might decline to answer if they were just asked point-blank in front of a jury with no prelude questions that would elicit that kind of information. Smith says that he's concerned about this and he wants the judge to prevent Trump's lawyers from diving into cross-examination in this sort of regard.

Unfortunately, this is more tantalizing than revelatory. It suggests that there are some interesting witnesses that Smith has up his sleeve without identifying them for speech or debate clause. That could

be members of Congress, but it could also be members of their staff or people who had privileged conversations with any of them.

And for attorney-client privilege, I suppose it could be some of Trump's attorneys, but it could also be government attorneys or folks like that. Trump probably already knows who these witnesses are. Smith has turned over his discovery, including most of his witness statements. If Trump doesn't already know, he'll find out when that process concludes. I don't think he learned a lot of new information from this filing.

Jill:

And not surprisingly, Barb, the former president slammed the government's filing on social media. Immediately after it was released, he called Smith's motion illegal and unconstitutional. He referred to the Special Council as Biden's errand boy. Is there any truth to what he's saying or is this a well-grounded motion? And is Trump's response just part of his overall disinformation campaign? I'm specifically asking you about disinformation for obvious reasons.

Barb:

Yeah, I mean, that's not a hard question to answer. I mean, of course it is. Any opportunity Donald Trump gets to portray Jack Smith as... What is his favorite phrase? A deranged thug carrying out the will of President Biden, even though he is a special counsel who has been appointed under regulations to distance himself from the Attorney General and the Department of Justice. That's just nonsense.

As I said earlier, the only quibble some might have is the idea that he went ahead and filed this even though there's this stay present, but no one is demanding that Donald Trump file a response until the stay is lifted. If anything, Trump's getting an early sneak peek at what he has to file eventually. He's getting more time to file a response.

And so, there's nothing wrong with the filing and the idea that this is somehow... His other favorite thing is that this is all about election interference just to get him off the ballot. I mean, he committed serious crimes allegedly in plain daylight that everyone saw on January 6th. The idea that he would not be held accountable for that is the part that I find so absurd. No, there's no truth to that.

And Jill, you ask about disinformation and thank you. As you know, I've got a book coming out on that and I think thank you for the plug. But this is a common tactic. It's been a common tactic of strong men throughout history of people like Hitler and Mussolini and Stalin. And that is to repeat allegations about your enemy again and again and again, oftentimes turning the tables and accusing them of the very thing that you've done. And convincing a large number of people who simply hear it often enough to believe there must be some truth to it. And so, he is undermining public confidence in the Department of Justice, which I fear will have a lasting impact on the rule of law in this country.

Kim:

Jill, I worry that 2024 is going to be a big dumpster fires, but you look so zen. How do you do it?

Jill:

Well, I share your concern about 2024. On the other hand, it's also an option that we will make this the best year ever. And Calm is very much a part of keeping us sane during this time. It's the number one app for sleep and meditation, and it's that for a reason. It gives you the power to calm your mind and change your life. Calm recognizes that everyone faces unique challenges in their daily lives, that mental

health needs are personal, and that our ability to meditate may vary. Self-practices are deeply personal, so Calm strives to provide content that caters to your preferences and needs.

Joyce:

My husband had been having trouble staying asleep. Not falling asleep, but staying asleep. And he really resisted my suggestion that he use Calm. But he's been using it for about the last seven days, and he has found that if he listens to a meditation before he goes to sleep, he actually stays asleep a lot better.

Calm also has meditations that cover everything from reducing anxiety and stress to increasing relaxation and focus, building healthy habits and taking care of your physical wellbeing. And there are hundreds of sleep stories to choose from. The sleep meditations and calming music really are great. They have you drifting off to sleep and staying asleep naturally.

Kim:

Plus, they have expert-LED talks on topics like tips for overcoming stress and anxiety, handling grief, improving self-esteem, caring for relationships, and much more. I hope they have focused topics on how to stay calm during tumultuous times. That would be very helpful to all of us in the new year.

The Calm app puts the tools you need to feel better in your back pocket. And if you go to calm.com/sisters, you'll get a special offer, 40% off a Calm premium subscription with new content added every week. Stress less, sleep more, and live better with Calm.

Barb:

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

Well, in the wake of the Colorado Supreme Court's decision that Donald Trump is ineligible for the ballot in 20 twenty-four in that state under the 14th Amendment's insurrection clause, we are now seeing other states addressing this issue. Of course, as we discussed last week, section three of the 14th Amendment bars from federal office anyone who has taken an oath to support the Constitution of the United States and then engages in insurrection or rebellion against the same. Joyce, I want to ask you about Maine. I know that's a state where you have some roots, right? That was your college place.

Joyce:

That's where I went to College, yeah.

Barb:

This week the Secretary of State in Maine issued a decision that Trump was ineligible to run for president under the law in her state. What was the basis for her decision?

Joyce:

Yeah. I have to say I have a huge fan-girl crush on Shenna Bellows who's Maine's Secretary of State. Maine, here's a fun fact, usually has the highest voter turnout in the country. And they have this long tradition of commitment to letting everybody vote without regard to what political party they belong to. A refreshing time in today's era.

I think it's really interesting that Maine has this procedure. It's different than what we've seen in other states, where the first decision goes to the Secretary of State. And her decision is really pretty simple at its heart. She just says Trump didn't qualify for the ballot because of his role in the January 6th attack on the Capitol.

And she phrases it this way, in her opinion, she says, "I'm mindful that no Secretary of State has ever deprived a presidential candidate of ballot access based on section three of the 14th Amendment. I am also," she writes, "mindful, however, that no presidential candidate has ever before engaged in insurrection." And that really is her opinion, pure and simple. She concludes that Trump is ineligible to be on the ballot in Maine, and on that basis, she makes her decision.

Barb:

Yeah, I was very impressed with her. I have not seen her in action before, but I saw her on MSNBC the night of the decision. And what I found about her is she's being portrayed by her political opponents as a raging left-wing, lunatic, fascist, Marxist, whatever they like to call them. And I found her to be a very serious person who very soberly addressed the issue. She wrote a 34-page opinion that I found really persuasive. I've been not sure how this issue shakes out. And at least under Maine law, I thought her decision was really persuasive. Do you think, Joyce, what do you expect's going to happen next in Maine?

Joyce:

Yeah, Maine is different. What will happen next, and she actually flags it in her opinion, is that her decision can now be appealed into Maine's state courts. She has even stayed her order to give people time. They'll go to Maine's Superior Court, that'll be a trial judge somewhere in Maine. And that decision will go up through the courts.

And so it could be reversed, it could hold, but like you say, Barb, it's very, very impressive. It is a very sober, very legally-based decision. And like you, I started out, and I still am, to be honest, not a fan of taking Trump off of the ballot, but not for legal reasons. I think when you look at her opinion and the one in Colorado, legally this view is very well-grounded.

Where it makes my little heart shrink is the notion of the political cost of doing this and how, I mean, I think frankly, it may inspire violence. But look, that's not the court's job or Shenna Bellows's job. Their job is to look at what the law says and what it requires. I think that's what she does here.

Barb:

Yeah.

Kim:

Can I just make a point on that? Because I've spoken before, I do believe that the constitutional analysis is correct. I do think that Donald Trump's actions fall squarely with what the drafters of the 14th amendment had in mind when they included that disqualification clause. But that being said, Joyce, to your point, I do worry about the reality, the political fallout from this at a time when Donald Trump and others have made it such a point to foment political divisions and to the point that it has become violent.

And I think that it is more important than ever for us to be explainers, to explain to the public. Because it's totally understandable how it may look to someone, okay, you have this Democrat in Maine who is kicking Donald Trump off the ballot. That seems partisan. That may just seem wrong in my gut. I want to

vote. I want to make a decision no matter who I'm supporting, for who it is, it's my choice as a voter. It's not somebody else's.

I get that. It can look bad. And I think it's more important for us to give clear information and explanations. And to say to people, "Read that opinion yourself." And explain what it is to make it clear the difference between a constitutional analysis and a partisan action. Because that line has been so blurred so badly for so many years now.

Joyce:

I agree with that so much. And I've just got one more gloss, Kim, and then I'll stop so you can talk Jill. But this is what annoys me about this situation. We are here because Senate Republicans abdicated their responsibility to impeach. If they had impeached on this, then there would be no question. And I think about Mitch McConnell condemning Trump's conduct and saying he can be prosecuted. And did they not foresee this moment and that there was a consequence for their cowardice? Because we are now all paying the price.

Jill:

Joyce, of course, I agree with you on that, and I agree with Kim that we need to explain. And I think we should even attach in our show notes, the Colorado opinion and the Maine opinion. I mean I think that would be important.

But I take a very different perspective on this, and although I agree, there is a very high risk of political consequences and of violence, that is all the more reason to enforce the Constitution. That's what courts and secretaries of state have to do. Our constitution, I believe in section three of Amendment 14 is absolutely crystal clear that someone who took an oath, as Donald Trump did, and then engaged in insurrection or gave aid and support is not eligible to be in office.

You can argue about whether he can be on the ballot, and that may depend on state law. Colorado is very clear that if you are not qualified to hold office, you can't be on the ballot. Not so clear in Michigan, not so clear in Maine. Okay. But that means that you put off this decision until the general election or until after the election? That seems even more dangerous to me than doing it now.

It also because of the patchwork we're seeing, Maine and Minnesota and California and Colorado all having different outcomes under state law is why the Constitution needs to be interpreted by the Supreme Court. And I don't think they can get away with saying, "Well, it's up to the states," because then you're going to have a very strange election. I'm very, very adamant that the amendment needs to be enforced and that it is clear and that Donald Trump's actions and office fall within the amendment.

Barb:

Well, on that point, Jill, you were saying about how other states are making different decisions and there's a lack of uniformity. Last night, the big issue was Maine. And then suddenly I saw you texting me, "What about California?" What about California? What happened there? We saw something completely different there, right?

Jill:

Yeah. I just thought we needed to add it to this segment because it was the newest. And of course, what happened is that California law is quite different than the law in Maine. And in Maine, the Secretary of State has a specific obligation when a voter raises a question about someone's qualifications to rule on the qualifications.

And so in Maine, the Secretary of State did just that. And Bellows, as Joyce has pointed out, wrote a very, very good opinion that explained why. And she isn't disqualifying him. She's just interpreting the Constitution and his actions. He disqualified himself by his actions. But in any event, California does not give the Secretary of State that power. And so under California law, there was nothing the Secretary of State could do.

There you have it. Colorado has even, a very clear thing where it specifically says that voters can raise questions of qualification and can bring a lawsuit. And they did. And there was an actual trial in the trial court level in Colorado where they presented evidence, and the judge determined, based on the evidence presented in the courtroom, that Donald Trump had engaged in a insurrection.

And they also analyzed all the things like is he an officer? Is his oath of office the kind that disqualifies him? And ruled on all of those issues that yes, he was disqualified.

Barb:

Yeah. And so what's next in California? That's not the end of the story, right?

Jill:

Of course not. And that's actually true, not just in California, but in many other states. There are at least 16 pending hanging around. There one person, a very far-out Republican candidate for president, filed 27 challenges. He has withdrawn a number of them and has lost a number of them. But there are still, we have Oregon, we have Wisconsin, South Carolina, New Mexico, New York, Texas, Vermont, West Virginia, Wyoming, they're all pending. And so, we're going to see these go up through the chain on each of the different ways. Some will go to the court and eventually they could all end up in the US Supreme Court for a final decision on what the Constitution's 14th Amendment section three means.

Barb:

Yeah. We've gone from Maine to the West coast in California, and then right in between in Michigan. Kim, our home state, also addressed this issue this week. It seems like every time we turned around, every day this week there was some other state addressing this issue. How did the Michigan Supreme Court rule on this question?

Kim:

The Supreme Court sort of didn't rule. They said they upheld the appeals court decision that kept Donald Trump on the ballot. The only reason that was given was that the court was not persuaded that the question should be reviewed. There was a dissent by Justice Elizabeth Welch who said, "There are big constitutional issues here." How I personally think that they should be taken up and among the issues there.

As Jill mentioned, different states have different rules. And in Michigan and other states, the idea is, look, it is not up to the Secretary of State to decide who's on the ballot. It's up to the parties to decide who's on the ballot in the primary. And in Michigan, they take that stance, "It's not up to us. The parties in the state can put whoever they want on the ballot." Now, if they're constitutionally unqualified, that's something that can be taken up later.

But one of the points that Justice Welch brought up is, well, okay, if the parties are responsible for putting people on the ballot, there's still the open question then of whether the parties have a constitutional obligation to vet the qualification under the constitution of whatever candidate they put on. Just like they can't put up a 14-year-old because they haven't met the 35-year requirement, they

can't put up an insurrectionist because the Constitution also says that person is disqualified. This is a question that remains open and that we should have taken it up.

It just paints a picture of if the Supreme Court, and it seems that it's pretty inevitable now that the Supreme Court's going to take it up. It's not a black or white issue. It's not a yes or no question. There are so many questions about procedure, about whether Colorado gave enough due process in their trial. About whether Maine will have given due process because this is the opinion of one official. Whether or not in states where parties select primary candidates, those parties have a constitutional obligation to decide whether the person is... I mean this, there are so many questions. And the Supreme Court can take up any or none or one or more of them. It's so much unknown about how this will work out in the end.

Barb:

Yeah. One thing you said that is, I think, an excellent response to the argument that the 14th amendment is anti-democratic and therefore, should not be enforced. You mentioned a 14-year-old. There are a number of people that in a democracy we might want to elect president. Who's the most popular person in America right now? Taylor Swift. Sorry, she's only 34, can't be president. Or how about Prince Harry? Everyone loves Prince Harry. Oh, sorry. Born in the UK.

Kim:

He's not born here.

Barb:

Okay. Okay. Yeah. I got one. I got one we can all agree on, Barack Obama. Oh, wait, he already held office twice. Is it anti-Democratic to say none of those people can be president even if we wanted to? No, that's the Constitution. That's a constitutional issue here.

Well, I wanted to ask about where this goes next. I think we all agree that this seems ultimately destined for the Supreme Court. Joyce, did you see the state central committee of the Republican Committee in Colorado who was an intervener in the Colorado case? They weren't the plaintiff or the defendant. They intervened. It was actually a handful of voters who brought the lawsuit there, the original challenge.

They have filed a petition for review by the Supreme Court, the US Supreme Court. Do you think that the US Supreme Court will take up this petition filed by this intervener? You think they'll wait for Donald Trump to file a petition or are they going to punt altogether?

Joyce:

Yeah, I bet that they would absolutely like to duck this entire case and not have to decide it. They're probably not in a hurry. I think that they'll wait for Donald Trump to file his appeal. He has said that he will do that. And he must in fact do that, or else his name will be taken off of the ballot in Colorado. Look, I just don't think that the court can avoid deciding this case. I don't think that they are going to be in a hurry to remove Trump from the ballot. I think that they'll find an off-ramp. We've talked about that in the past, but ultimately shortly after the first of the year, I think they grant cert on this.

Barb:

Yeah, I think that's probably right. And Jill, we talked about a handful of states, but there are other states where this issue is brewing. Do you think we're going to see all kinds of different responses in these different states?

Jill:

There are many, many states. I mentioned them in an earlier answer because there are so many. Oregon is pending right now. So is Wisconsin, so is Alaska, Arizona, Nevada, New York, New Mexico, South Carolina, Texas, Vermont, Virginia, West Virginia, Wyoming, and of course, Colorado and Maine are not final, final decisions. They can be renewed. Minnesota, Michigan, California, Florida.

And so it's very interesting. And even those decisions like Michigan, although they said, "Yeah, he's on the ballot," it was for a very specific limited reason. And they clearly left open, yeah, but he might not be able to be on the ballot for the general election, even though he's on the... And it isn't it a stupid ruling that a state party would decide to put someone on the ballot who might get the nomination, but who, if he did, couldn't be on the general election ballot because he couldn't?

Kim:

Well, that's so crazy about this, Jill, is that because a lot of states have the rules that it's up to the party to choose. That the Secretary of State and other election officials are just like, not it. It's up to the parties to choose in the primary who is on it. I mean, I live in Washington DC. I'm not enrolled in any party, so I can't even vote in my primaries because it was ruled by the Attorney General here that it's up to the parties to decide how the primaries are run. And if they don't want to allow somebody who is not registered as a Democrat or a Republican to vote, they have that right. That's very common.

And there's a lot of ways, I mean, I don't know if voters realize there are a lot of weird rules in the primary season about who's on and off a ballot. For example, Joe Biden's not going to be on the primary ballot in New Hampshire. That sounds crazy, right? It's going to matter not. He's going to get the nomination.

I think there's such weird, divergent rules about elections in the primary that I think in the end, the big game, the big constitutional game that the Supreme Court decides is in the general, because that's when there is more of a federal guide as to who is supposed to be on or off the ballot. The Feds can get in and they have more of a say. Whereas in the primary level, there's a lot of let the states do what they do. We really don't want to get involved. But that brings it a lot closer to November, election day to really flesh this out, which just makes everything crazy.

Barb:

I suppose if Trump is not on a primary ballot, he could possibly be a write-in candidate? I guess I don't know.

Kim:

He could. Depending on the rules.

Barb:

Depending on the state, right?

Kim:

It's all... That's the thing. What did you call it, Barb?

Barb:

Michigouse.

Kim:

It's Michigouse. It's Michigouse and Michigan and other states. It's all... There's so many unknowns in all of this, which is why I've been popping Tums.

Barb:

All right. At least she's off with the light. She's just popping Tums.

Joyce:

I know our listeners can't see my nails, but y'all, I just got a box from Olive & June in the mail yesterday. And look, I have navy blue fingers. I am so taken with them. And it's so easy to use Olive & June's nail polish that they went straight on.

I'm also going to break down and confess, I got some of the little stickers for the first time. I got little trees, which I think were meant to be for Christmas, but they're like pine trees. They feel very winter solstice and New Year's to me. And I am super excited about using them.

It's great to be able to give yourself the perfect home manicure with Olive & June's salon-grade tools. They've got everything you need for a DIY salon-quality manicure in one box, and you get to customize it with your choice of six polishes. I love how their polish doesn't chip and it lasts seven days, often a lot longer than that for me. And you're getting great savings because with Olive & June, you're only paying \$2 for each manicure.

Jill:

Thanks to Olive & June, you can get salon-worthy nails at home with their mani system. That means there's no appointments or traveling to a pricey salon. It's great knowing you'll be looking your best while saving time and money. My friends, family and sisters are always so impressed and once you try it, you'll never go back to using anything else.

Kim:

They even have amazing looking press-ons that go on quickly, look real and last a really long time. The press-ons come in every size you can imagine so you know you're going to get the perfect fit. With Olive & June's polishes. You can get a non-damaging mani in less than 10 minutes. They're an Allure Best of Beauty winner. And with their quick-dry polishes, you only have to wait a minute to feel confident, knowing your mani will last for five days or more with only one or two coats.

Barb:

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

Joyce:

At the core of Trump's plan to overturn the 2020 election was the crazy scheme to substitute a fake slate of electors in the key states that Trump lost with pro-Trump electors. The idea was that acting as president of the Senate, Mike Pence, would reject the true results for Biden, accept the fake electors, or at least generate enough delay for Trump to take matters into his own hands.

And Kenneth Chesebro, an obscure lawyer, was at the center of that scheme. He was its architect. This week CNN got its hands-on tape recordings of part of Chesebro's proffer to Michigan prosecutors. You

heard that right, state prosecutors in Michigan. Chesebro is also reportedly talking with prosecutors in other states, and he has pled guilty to charges against him in Georgia. But the news reporting says he has not talked to federal prosecutors. Barb, what do you make of that? It stands out.

Barb:

Yeah, it really does. Ordinarily prosecutors are very interested in talking to anybody who might have relevant information for them. There's no such thing as too much evidence. And so the fact that Jack Smith has rejected since October, it's not like he hasn't had time to get around to it, has rejected overtures from Chesebro to speak to Jack Smith suggests to me that Smith's not interested. And why might Smith not be interested? He would not be interested if he thinks Chesebro has a credibility problem.

And so, he may know things about Chesebro, things that he said, things that he has done that conflicts with what he is saying publicly. It's hard to know exactly what it is, but it reminds me of when, remember when Michael Cohen was trying to get federal prosecutors to bite and talk with him about the hush money payments? And he would go on TV and say, "I have information. You should talk to me. You should talk to me." And then he heard crickets from federal prosecutors.

I suspect there may be something else like that. Of course, we don't know. We don't have visibility into it, but the only time I can imagine, and I can remember as a prosecutor turning down someone who might have relevant information was when I was sure I could not sponsor their testimony as a witness at trial because their credibility was so bad that even I didn't believe them.

Joyce:

Yeah. I mean, Jill, Chesebro has always behaved in an unusual fashion for a supposed cooperator. He minimized his own role when he pled guilty in Georgia, said, "I'm pleading guilty because all I did was file this one false statement that's referenced in count 15." He maintains continuously that he did nothing wrong. His lawyer has said Trump has nothing to fear from his testimony. But there are these emails where he's talking down to the wire for January 6th with other Republican operatives about the fake electors scheme. How do you square what he says with what his emails say?

Jill:

Well, let me stress, you're right. He's been an unusual cooperator because normally you don't take a plea from someone who continues to maintain their innocence, that they did nothing wrong. And he seems to be in that category, which makes him really problematic. Maintaining that you're innocent.

But now we have tape recordings of his proffer. We have these emails, and I would say while the proffer tapes make him look like he's whining talking about he's going to lose his \$2 million condo, oh, poor him. Really, I can't feel too sorry for him. But the tape recordings, the emails rather, are so compelling if you read them up until January 6th, he is deeply involved with top campaign people and certainly puts the lie to everything that any of them are saying, "Oh, I got out of this as soon as I realized that it was a problem."

It really is bad for both him and the campaign lawyers that he was communicating with, for the messengers, and for members of Congress as senators who were involved in trying to deliver hard copies of the fake ballots to Vice President Pence. And so, I don't know how they can get away with it.

Kim:

Ron Johnson. Sorry, I didn't mean to sneeze there.

Joyce:

I mean, it really makes you wonder, and we just don't know. We don't have any insight into what Fani Willis's thought process was with this plea because, Kim, Jill references the audios of his conversations with prosecutors. And he really does sound more like a whiny child than a Harvard-educated lawyer who's taken responsibility for criminal conduct. What do you make of what we hear in these tapes?

Kim:

Well, yes, so that's a fair point. He has agreed, he has entered plea deals. He has agreed to cooperate, but at the same time, he's denying often that he's done anything wrong in this weird Giuliani-esque way.

And so, I wonder, and I actually, you guys are the prosecutors, so I want to ask your opinion of this, and maybe this sheds some light as to why Jack Smith champed at the bit yet. When you have someone who clearly has important information, but at the same time is claiming that, "No, but all this was fine. I will tell you exactly what happened." That is helpful, but it was fine. We could totally do that. What does that do to his credibility in terms of his cooperation? And do you think that's a reason that Jack Smith is like, "Thanks, but no thanks"?

Joyce:

Yeah, I mean, I think, Barb, that that's exactly to the point that you started with. And it gets even worse because we learned during the January 6th committee hearings that Wisconsin Senator, Ron Johnson, played a role in this scheme at the time. He notoriously ducked questions about it. I think it was Frank Thorp from NBC who tried to ask him about his role, and Johnson said, "I can't talk to you now. I'm on the phone." And Thorp looks at his phone and says, "You're not on a call, you're just faking it." But Johnson successfully ducks the question and won't talk about it. And now there's word that Chesebro is talking with prosecutors in Wisconsin too. Might it be that the Senator has some problems?

Barb:

Yeah, I think that's the article, this was all broken in a CNN article. It said that the prosecutors in Wisconsin were very interested in grilling Chesebro about this point in particular. And so, I don't know whether they'll find any there, there. But it reminds me of, do you remember the day a reporter was following Senator Ron Johnson from his office building to the Capitol or vice versa on foot? And he asks him some questions about this. "What was your role in delivering these ballots?" And Senator Johnson says, "Oh, sorry, I've got a call. I've got to take it. And he puts the phone up to his ear and the reporter keeps walking and says, "No, you don't. I can see your screen. You're not talking to anybody."

That's the lovely little detail that prosecutors love as consciousness of guilt. A normal person doesn't do that. And so why was he so desperate to avoid a reporter's question. We don't know. We don't know the facts, but he was involved, it appears. He claims he was only involved for a few seconds about the whole thing. But he does concede that he was involved in some way. And so it does seem that this is an area that prosecutors are very interested in and that Chesebro might be able to deliver.

Kim:

The 14th amendment is worth noting.

Joyce:

No kidding.

Kim:

It applies to members of the Senate.

Joyce:

No kidding. I mean, Jill, Kim makes a good point. Even if your involvement in insurrection only lasts for a couple of minutes, it's involvement in insurrection. And the reporting says that Chesebro-

Barb:

Aid in comfort.

Joyce:

Aid in comfort. Thank you. Yes. The reporting says that Chesebro is talking to prosecutors in a number of states where there are ongoing investigations about the fake elector scheme. Is there anybody else who you think should be worried?

Jill:

Oh, there are plenty of people who I think should be worried, but particularly the two lawyers, Roman and Morgan, are definitely involved in this, but clearly Johnson.

Joyce:

The two campaign lawyers, right, for the Trump campaign?

Jill:

Trump campaign. And in addition of course, it's clear that Johnson should be plenty worried. And the text messages also support his involvement. I think it's not just Chesebro's own words, it is the texts and emails. And you can even hear some of the proffer testimony. It's very convincing, and I think that there's a lot of people who should be very worried about their role as couriers and messengers and delivery people, and knowing that they were trying to deliver fake electoral ballots. It could mean that a lot of people are subject to indictment.

Joyce:

I mean, it's really fascinating because as we've discussed, Chesebro is a problematic witness. He's a witness who says, "None of this was illegal. The fake electors scheme was a legitimate way of preserving Donald Trump's rights."

But nonetheless, he is very unhappy about the way he's been treated by some of the campaign lawyers. He thinks that they threw him under the bus during the January 6th committee hearings. And he would talk about what they did and what they said, and whether Ken Chesebro thinks it's a crime or not. Jack Smith does, other prosecutors do. He could end up being one of these really weird, bizarre witnesses that helps the case in some ways because of his denial of criminality. But like we've all said, it's tough to figure this one out. It's nuts.

Kim, based on what we know, at least right now, it seems like Chesebro is a bigger player in the state cases than in the federal one. And the federal case is on hold, as we've already discussed, while the immunity issue is appealed. We saw Trump's opening brief earlier this week. Jack Smith's is due over the weekend. And then the case gets argued in early January.

What's your expectation? What do you think happens when the immunity appeal is heard? And are we still on track for an early March trial for Trump in the federal case?

Kim:

Oh, I didn't expect this to actually go to trial in March. I mean, I thought there would be any number of... And this is very normal. In the normal course of any civil or criminal trial, really. You get that trial date and you have an expectation that it will get moved out just because of pretrial motions, because somebody's attorney gets sick. Somebody asked for an extension on a file.

I didn't expect this to start in that March date at all. But when it starts, given the number of outstanding questions, I think it's anybody's guess. I hope that it's not too long. I do know that certainly Jack Smith and Judge Chutkan are eager not to delay it unnecessarily, but I'm not sure. I think it depends on what happens. I don't know if they'll be able to prevent it from being delayed. It's still a lot of known unknowns, to quote Rumsfeld.

Jill:

I have discovered a really wonderful new skin care. It is so light to go on. It absorbs so well, and yet it protects even in this horrible cold weather. And now that the holidays are here, it's the perfect time for today's sponsor, OneSkin. We all know that the holiday fun and festivities come with stress and harsh weather that can really take a toll on your skin. But thanks to OneSkin's disruptive approach that targets skin aging at the source, you can start 2024 with your skin at its healthiest.

Joyce:

Their products are powered by a groundbreaking peptide, OS-I, which is scientifically proven to prevent the accumulation of aged cells. It reduces the biological age of skin by several years and leaves you with healthier and glowing skin. Now for a limited time, our listeners can enjoy an exclusive 15% off OneSkin products using the code Sisters, when you check out at Oneskin.co. Remember, it's Oneskin.co, not .com. Something that held me up when I was ordering Christmas presents, but I finally got it right. This holiday season. Give yourself and your loved ones a head start on a New Year's resolution to tailor your skin care for skin longevity.

Kim:

Their formulas feel amazing to apply, especially when I use it on my face. The regimen worked so fast. And we love that Oneskin just launched their mini bundles, which include face and eye topical supplements and body lotion and cleanser, and all in this really cute travel bag. We're on the road a lot, and that just makes it really easy to know wherever you go, you're going to have your skin care regimen in check. And if you're still partying this holiday season, I know some of y'all probably have some New Year's Eve plans, enjoy responsibly. But you know they will make the perfect host or hostess gift at your party.

Barb:

Well, my 19-year-old daughter has already gifted herself my Oneskin kit. She's 19 years old, so she needs skin care, but her skin is already radiant. But-

Kim:

I have to say, I gave mine to my step-daughter.

Barb:

I love it. She loves it.

Kim:

She has mine too.

Barb:

Yeah. She loves it. She loves the skin care routine. But Oneskin is great. It's the world's first skin longevity company. Oneskin addresses skin health at the molecular level, targeting the root causes of aging. Like you need that at 19. Skin feels and appears younger. It's like 18 and a half. 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 at Oneskin.co. That's 15% off Oneskin.co with code Sisters. Order now for the New Year. Age healthy with Oneskin and look for the link in our show notes.

Kim:

Now is truly our favorite part of the show, which is where we answer listener questions. If you have a question for us, please email us at sistersinlaw@politicon.com, or you can tag us both on Threads and on X, whatever that place is called now because the hashtag on Threads works now. You can tag us at #SistersInLaw and ask us your question.

If you don't get your question answered in this episode, keep an eye on our feeds throughout the week and we try to answer questions in real time when time permits. Our first question is from Jeff in Portland Oregon, who asks, "If the insurrection clause of the 14th amendment is self-executing, then isn't the emoluments clause also self-executing?" Oh, we get deep into the constitutional weeds here. Jill, what do you think?

Jill:

Jeff, I think it's a great question, and I wish the answer was that they both were. But the insurrection clause has built into it a consequence that if you do the things specified in section three, you engage in an insurrection after having taken an oath, then the consequence is you cannot hold the office that you would otherwise want.

But the emoluments clause just says you can't take emoluments, but it doesn't say what happens if you do. And so I think the difference is that one has a consequence built in and the other doesn't. Unfortunately, the emoluments clause needs to be amended to put in a consequence. Either that or a statute needs to be passed saying that if you take emoluments that are defined in the statute, that you would then have X consequence.

Kim:

All right, Professor Wine-Banks. Now our next question is from RickRig17 who asks, "The SCOTUS seems so worried that they're losing public confidence, does a drop in public esteem make a difference?" That's a good question. Joyce, what do you think?

Joyce:

It's a really good question. And it goes back to something that I think we've actually talked about before, which is that the Supreme Court does not have an army that goes out and enforces its decisions. Its

decisions have force because we give the court the ability to decide these difficult situations that we can't decide amongst ourselves. Cases that really in many ways go to the heart of some of the deepest disagreements that we have among ourselves as Americans.

And so, the loss and credibility of the court really is damaging. And not to be alarmist about it, but we've seen and we've discussed these stories about ethics lapses at the court. We've seen the court try to head that off by enacting or adopting some voluntary guidelines for ethics that don't seem to have done a very good job, at least in terms of getting certain justices to recuse from cases that they should not be involved in. I guess more to be seen on that.

We've watched the court roll back longstanding precedent without any reason, given the law for rolling back precedent, the end of Roe versus Wade. And now in 2024, it seems very likely that the Supreme Court will decide the outcome of the election. In other words, just at the point where we most need their integrity to be unimpeachable, it will be at a low watermark. And yes, that's damaging to us as a country. They should not have frittered away the country's trust.

Kim:

Oof. On that cherry note, we move on to a question from Patti in Woodstock, New York who asks, "For those who can afford it, the opportunities to stall trials seems endless. Is there ever a circumstance in which the appeals process can justifiably be cut short?" Barb, what do you think?

Barb:

Yeah, Patti, I think we are getting a warped view of how appeals normally work in criminal cases because of the way Donald Trump has used the system, appealing every opportunity he gets. Ordinarily there is something called the final judgment rule. And that means in most cases, in a criminal case, a defendant must wait until the whole trial is over, they've been sentenced and there's a final judgment in the case. And only then are they able to appeal every mistake they think was made along the way. That is to avoid delay and to avoid piecemeal litigation.

There are a few exceptions to that, but Donald Trump has really, I think, used and abused the opportunity for these exceptions to really drag out all the litigation he's involved in. In fact, just today an amicus brief has been filed in the DC Circuit Court of Appeals saying that this issue of immunity by Trump is not immediately appealable and ought to go right back to the District court and pick up where they left off that this was a mistake to allow this to be immediately appealable. And they point to some case law and they say, "Unless the Constitution explicitly provides for a right not to go to trial, then it should be a question that should wait until the very end."

And so, I think it is really just Trump's very aggressive use of the law that causes us to see these delays again and again and again. And ordinarily the system does try to achieve efficiency with this final judgment rule. And we'll see if these lawyers are successful in their amicus brief.

Kim:

Well, thank you for listening to #SistersInLaw with Jill Wine-Banks, Joyce Vance, Barb McQuade, and me, Kim Atkins Stohr. And thank you for listening with us all year long. 2023 was a good one, at least in terms of our listeners, our shows going out to see you and we're happy that you're closing the year out with us. And remember that you can send in your questions for next year, see what I did there, to sistersinlaw@politicon.com or tweet or Thread or X or whatever them, using #SistersInLaw.

And please, show some love for this week's sponsors, Factor, Calm, Olive & June and OneSkin. You can find their links in the show notes. Please support them because they really help us bring this show to all

of you. And if you haven't already, remember to follow us everywhere you follow your podcast, Apple, whatever else. Follow #SistersInLaw.

Give us a five star review, because you know what? That helps your friends find it. Or just tell your friends, or just get your friends' phones and just subscribe for them. All that stuff is okay. See you next week and next year with another episode #SistersInLaw, and we wish you all a very, very happy and prosperous New Year.

Speaker 5:

Should all acquaintances...

Joyce:

Hey, Barb, did you see what I just texted you?

Barb:

Well, no, because I'm not using my phone. It's still 2023.

Joyce:

Look at you, your phone.

Barb:

It's still 2023, so I'm going to sneak a look. I do.

Joyce:

Y'all, one of Barb's and my old DOJ colleagues is out at the Rose Bowl.

Barb:

Oh, yuck.

Joyce:

She's out watching the... No, it's both of them. She's watching the floats get made. Before the Rose Bowl, they meticulously put all the flowers in.

Barb:

Oh, okay. She's got Michigan in there too.

Joyce:

Yeah, she sent us the Michigan and the Alabama floats.

Barb:

Yeah. All right. And thank you for including Michigan. I saw that first Alabama one there. I was about ready to throw my phone. I don't want to see that.

Joyce:

This transcript was exported on Dec 30, 2023 - view latest version [here](#).

The Alabama one is better. It's much better than the Michigan one.

Barb:

Oh, stop it. Just stop.

Speaker 5:

Auld lang syne. We'll take a cup of kindness yet for auld lang syne.