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Jill: Welcome back to #SistersInLaw with Joyce Vance, Barb McQuade, Kimberly Atkins Stohr, and me, Jill Wine-Banks. It's time to get your SistersInLaw merch. We have hoodies, T-shirts, and our new mug. Head to [politicon.com/merch](https://politicon.com/merch) or just click the link in the show notes today.

And we have a great show for you today, where we're going to be discussing the latest in Trump world, and he had a sort of maybe bad, not so bad week. We're going to also talk about the Robert Hur report and the defamation case brought by a climate scientist that I think you'll find fascinating.

Before we get to those topics, though, I want the help of my sisters-in-law, and I want to ask all of you, how do you keep up with and how do you take notes for things like listening to the Supreme Court argument this week, and on the Hur report? It's 380 some pages. Do you take notes on it or what do you do? You can't print it out and underline. So what are your tricks for the really important SCOTUS argument and other arguments in trials?

Kim: Well, I have to say, having covered the SCOTUS in person for almost a decade as a reporter, at the SCOTUS, when you're physically there in the press box, you can't take in anything electronic. So all you have is your notepad and a pen. That's all you're allowed to take notes in with.

So I was very, very good at, rather than when I first started, I was trying to write down everything, which you can't, right? It just doesn't work. So I would just sort of keep my ear out for what I call money quotes. When one of the justices or the attorney said something that was fantastic and I would try to make sure I would get it down, every word of it down because yes, there's a transcript that was released, but it could take hours if not a day at that time for the transcript to come out. And I had to get my story out and I wanted to make sure I did it right. So I developed that habit.

So now with the arguments being live-streamed as they are, you have a little bit of a backup, like I will watch them. I generally now watch the arguments at home. I have not been to the court since they started live-streaming because as a reporter it's easier for me to listen to it at home. And you have the rewind button, like the back 15 button that you can use on C-SPAN if you miss a word or two. But I generally use that same practice. I don't write down everything. I don't try to be a stenographer, but I listen to what the real key points are and I jot those down, which really helps me not just take notes better but clarify my analysis and really get the gist and understand where the chord is going, which I think is really what you need to do in this case.

Jill: And Barb, what do you do?

Barb: Yeah, I am not using pen and paper. When I'm listening or I'm looking at the Hur report or anything else, I take notes on my phone. And it's very high level. It is the kind of more analysis along with it's not direct quotes so much. Like here's a point I might want to mention later when I'm talking about it.

And the reason I do it on my phone is my phone goes with me wherever I go. And so I don't have to worry about where are my notes, "Shoot, my notes are at home, and now I'm doing an interview when I'm at the law school" or wherever I happen to be. I also find it gives me the discipline of jotting down only that which is important as opposed to writing everything that I might hear. As Kim said, you probably can't keep up with that anyway.

And there was a time when I was taking a lot of notes and I had endless notepads of things and I never went back to them and I didn't know how to find them. But I find with notes on my phone, I probably have hundreds of them right now. I can do a search, I give a title, I'll put a date and I can search through them to find things I want to go back to. But it's really big picture stuff because I know there will be news reports, there will be transcripts, there will be other things. So what observations did I make that I thought were significant that I might want to share later?

Jill: And Joyce?

Joyce: So I do very much what Barb does when it comes to documents or daily events, I use the notes file on my iPhone, I run them... I do a new file at the start of every month, and then I do it by day inside of there. And sometimes, I'll do a subject matter file. I did one on the Hur report last night. Very top line, very what I need to know. And it is so helpful because those files are searchable and that means if I want to see every note I've ever taken about Robert Hur, I can do that pretty easily.

But when it comes to the Supreme Court or something like the January 6th hearings, I use an entirely different process. I debated in high school and college, pre-computers. Pretty good at taking near verbatim notes by hand. But now I use the computer and I don't try to take verbatim notes.

I try to do an outline of the argument with key quotes from key people. I was thinking yesterday, listening to the Supreme Court, how difficult it must be for people when you get audio and not video because if you don't know the justice's voices, you would be in a lot of trouble. It would be hard to follow the arguments. But that sort of is my goal for each of the justices or judge or when we're talking about Congress, for each of the Congress people, to try to figure out what their linear processes, what does their analysis look like, so that at the end of the argument you go, "Oh, I see what Chief Justice's Roberts' views are." That's what helps me the most in trying to analyze oral argument. I spent almost a decade in the appellate division in my US attorney's office. I ran the division for most of that time. I love oral argument, I love appellate practice. It is very different from trial practice and I think you have to approach it differently.

Jill: So I do sort of a combination of things you do. First of all, I take shorthand. And so sometimes, I will take, it's faster to write down verbatim without analyzing it, but I only write down the things that I think I would ever need to say again, I look for things that are, "What are the most important takeaways from this? What's the logic?" And take notes just on that.

When I was reviewing like the Colorado Opinion or something like that, occasionally I actually will print out something and I don't put it on my phone. I have an old-fashioned notebook, which I'm holding up for all of you to see. It's a little teeny thing that fits in my purse. But occasionally, I supplement it with a printout of parts of something where I want to quote it. And I think that there's great language there. And that makes it comfortable for me. And I always have my notebook handy and can stick it in my purse. So that's how I do it.

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Kim: Well, this week was chock-full of Trump legal news, the biggest of which were the arguments before the US Supreme Court in the Colorado Challenge to his eligibility to be on the ballot. Joyce, let's start with you.

I predicted that the court may not go with the original argument from Donald Trump's team, which is that the president somehow is not covered by the 14th Amendment's disqualification clause. That would be crazy, right? But I also didn't think they would buy the argument of the Colorado electors that Trump must be disqualified because he's an insurrectionist. I thought they were going to try to find some way to thread that needle to not rule either way. Do you think I was right, Joyce?

Joyce: I mean, I guess we'll know for sure when we see the opinion, right? But they seemed more inclined by the argument that the President, some variation of that argument about the President's inclusion in Section Three way more than I thought they would. I was totally in your camp on this. I thought it was a specious argument. They talked about it as though they were considering it.

But I do think that you were right, Kim. I think we'll probably see an opinion that's one, maybe unanimous, but probably with lots of concurrences pulling different threads from the arguments. I think though that we'll get a majority that agrees about the result that Trump stays on the ballot and that may not agree about the reasons that that's the correct result. The justices will certainly strive to come up to something that's as unanimous as possible. But given how crazy some of these arguments are and how much they have to contort themselves around the language and the intent of the people who wrote it, it's going to be really interesting.

If I had to guess, if the tea leaves hold up from oral argument, I think the core of this opinion will be rejecting the notion that a single state can decide the eligibility of a candidate for federal office to hold that office. Justices played with concepts around that, but Justice Kagan really put it down, I think where the cows could get it. And she looked the lawyer for the Colorado voters straight in the eye, Jason Murray, and she said, "Look, you've got to confront this issue of whether Colorado can create a rule for the rest of the country." He never did. There was no reason offered for why Colorado should be able to do that. And I think that tells us that that's where the majority will focus.

Kim: Yeah, I think you're right. I think they're going to come up with some sort of rationale or a series of rationales, as you point out. I think that's exactly right. I think that the main opinion... Here's my prediction, main opinion authored by Chief Justice John G. Roberts, something about this being in the purview of Congress. I think that's incorrect, but that Congress can taketh away, the disqualification. So Congress must giveth the disqualification, and that's something that states won't do. I predict it'll be eight to one with Justice Jackson, the originalist on the court saying, "No, no, baby. This is exactly what the 14th Amendment was supposed to do." That's my prediction. But Barb, one thing I was worried about-

Joyce: Oh wait, that's interesting though. Can we go back to that? Justice Jackson is your one-

Kim: I think so.

Joyce: Because Justice Sotomayor is mine.

Kim: It could be two-seven, but I think that because Justice Jackson was so much as she did in the Gerrymandering case, she broke down the meaning and the purpose of those reconstruction era amendments, including the 14th Amendment. And she was very, very clear that the 14th Amendment and this disqualification clause within it was meant to, with the foresight, that former Confederates should not be allowed to take office even if they've had office before, which is what this applies to, and be able to get back in and wreak havoc to disrupt the reconstruction of this nation. And it would apply regardless of whether you were at the highest office or if you were county sheriff. So this whole idea that Congress would have to come in and make the disqualification, do you really think that Congress will be coming in saying, "No, state legislature, you can't take this. No, county sheriff, you can't take this. You're a former insurrectionist"? No.

And so that really reveals how specious this argument is. But the Supreme Court does not want to rule either that Donald Trump is an insurrectionist. They don't want to be those fact-finders. But they also don't want to rule that presidents are above the law. Like that would be worse than Bush, v. Gore. They're self-aware enough to know how bad that is. So this whole, "Well, you know what, it's not up to us. It's up to Congress," I think is the easiest way out for them. And I think that Justice Jackson, if she is as... believes what she was saying during oral arguments enough, is not going to have it. And she would be happy to dissent from that and say, "No, that's not what the Constitution says in my eye."

Joyce: I like your read on that better than mine because I thought that I heard her saying, "This doesn't include a president, so the 14th amendment doesn't apply to him." I like your take way better than I like mine.

Kim: Well, let's see.

Barb: And I think she was distinguishing between the two places. You know how there's one place where they say-

Joyce: Yes, she was.

Barb: ... officer under the United States and then later officer of the United States, and I think she was pointing out some inconsistencies in the Trump lawyer's argument about those two things. So I thought she was going down that path originally also, Joyce, that she was maybe buying into that argument, but I think she was trying to point out the fallacy of one argument by suggesting that if it applies to one, applies to both.

Joyce: Yeah. Okay. I feel better now.

Kim: So Barb, one thing I was worried about was that it would be a five- four or even a six- three opinion, and that it would be Bush, v. Gore redux times a million, that it would really serve to tear the country apart. But as we've been saying, it looks like it might be way more lopsided than that. Do you agree?

Barb: If only five-four, right? I think it's not going to be five-four. I think it's not going to be six-three. I think it's going to be like eight-one or nine-o. I was really surprised actually, the questions that we heard from all of the justices, but especially the progressive justices. Like it doesn't seem like anybody is going there. If they were really serious about striking Trump from the ballot, the first question out of the gate would be about, "How do we define insurrection? How do we find who engaged in insurrection?" And we didn't get that until the very end. Like, "Oh, by the way." Instead, they were looking at all these things people have been referring to as off ramps about whether a state is the one that gets to decide who's on the ballot for a national election or whether the president qualifies as an officer of the United States.

And so I was really surprised they never got to the big question about whether Trump engaged in or there was an insurrection. They also seemed, as you said, Kim, to be focused on this idea that I think it was Justice Kavanaugh who talked about this, there has to be a process. It doesn't require enabling legislation, but there has to be a process, a fact-finding process to decide whether a person did indeed engage in insurrection, and what should that be. And they seem to be landing on Congress for that.

So it seems like there's a lot of consensus. As Dray said, Justice Kagan seemed to believe this idea that a state cannot decide who is and isn't on a ballot. So I don't think this is going to be Bush, v. Gore. I think it's going to be nine-o, eight-one. And my guess is Chief Justice Roberts will work hard to get a consensus because even if he needs to soften some language or massage some language to appease those who might otherwise dissent and maybe make this a narrow decision, because I think they realize how important this decision is, and they don't want it to be perceived as a political decision. They want it to be perceived as a legal decision. And it sounds like they're mostly in line. So I think that'll be Chief Justice Roberts' task over the next few weeks while they put together this opinion, is to try to see if he can get to unanimity.

Jill: I agree with you on that part, Barb, but I think it's wrong because I think it ends up leaving an unenforced 14th Amendment. And if you can say, "I'm not going to enforce the 14th Amendment," what else can you say you're not going to follow?

And it's very troublesome to me, and I don't think any of the arguments that were made really persuaded me that they were right. When I look at the language of the 14th Amendment and the purpose that it was to serve, and that it would bar and has been used to bar state officials, and it has to apply to federal officials, that's clear that that was the intent. So I'm troubled that that is the case. And especially because this one state idea, Texas is going to make a national change to whether mifepristone is available. And if Texas can do that, then why can't Colorado? And ultimately, of course, it's the Supreme Court. It's not Texas, it's not the Fifth Circuit, it's not a circuit court. It is the Supreme Court that will ultimately decide what is the meaning of the Constitution and how should it be applied to the entire nation.

Kim: Yeah. Jill, I feel you. But I mean the Supreme Court does that all the time. They avoid constitutional questions that they don't want to answer, that they didn't ask for. They're perfectly fine deciding constitutional questions that they invited. So Roe, v. Wade is

something that they were gunning for, gun control, expanding the Second Amendment was something that they wanted to do. Affirmative action was something that they have been chomping at the bit for years, but this one, deciding an election in an election year, they're like, "Oh no, it's Congress. It's not us. Not it."

So that brings you to the next question, Jill, which is Jonathan Mitchell, Donald Trump's appellate attorney. He was the person in the room with the most Supreme Court experience in terms of argument. So I was actually surprised despite... that the Colorado electors attorneys didn't argue more along the lines that you're talking about, because as I pointed out, the 14th Amendment isn't just for federal officials, it was for everyone, state level, municipal level, federal level, whatever. So just really defying and saying, "Wait a minute, you really expect Congress to come in in these state elections and pass some sort of resolution that all of these individual people can't run?" I thought that would've been their strongest argument and they didn't make it. So what else stood out to you in this argument?

Jill: So I agree with you. There were a lot of things that were left out. I was just as surprised by some of the things that were argued. I mean, think about the consequences of how this was argued, because basically the court was saying, "Well, maybe he can run for office. He just can't hold office." So what are they going to do? They're going to make a decision after...

Speaker X: Yeah. That's crazy. That's crazy.

Jill: ... the election? That's insane. Talk about having-

Joyce: Yeah, just kick that can down the road, right?

Jill: Oh, yeah. And think about the riot as the Trump lawyers called it instead of an insurrection, think of the riot that would happen if he won the election. And then the court said, "Oh, actually, sorry, you couldn't run. You can't hold office. You could run, you can't hold."

Kim: Not even the court. They said that Congress would have to do it. So how did that work out on January 6th, 2021 with Congress trying to stop somebody from taking office?

Jill: Exactly, so I-

Barb: And it does disenfranchise voters, Jill, right?

Jill: Of course it does.

Barb: Because peoples think, "I'm going to vote for this candidate," and it turns out he was never eligible in the first place, they've wasted their vote. So I think that is just a technical application of the language to the point of absurdity.

Jill: Exactly. And it's true even at the primary level, you're throwing away your vote if you vote for a person who is not going to ever be inaugurated. So I think the decision should have been made first. I think waiting till after is ridiculous. I think it was interesting when you say what stood out, Thomas asked the first question, Justice Thomas. And man, I mean, he is the senior justice, he's the longest serving, and so that's his prerogative. But man, when he should be recused in this case, it made me sick. I couldn't stand it.

I think the state issue that you raised, Kim, is one that should have been argued. I think that the absence of discussion about the insurrection is definitely a problem. And I think you mentioned how experienced Trump's lawyer was compared to the elders who were either their first or second argument. I've argued in the Supreme Court and the first time you're there and you look up and you realize, "How-"

Joyce: Did we know that? Did we know you'd argued in the Supreme Court, Jill?

Barb: I think it has been disclosed before. Maybe it was in a day you weren't with us, Joyce.

Joyce: Okay.

Barb: It is one of the many legendary things and it's still [inaudible 00:23:39]-

Joyce: Sorry to interrupt. [inaudible 00:23:40].

Jill: I mean, my biggest debate was what do I wear to court? I mean, because it was the old days, the men wore morning suits. What does a woman wear? But it's very intimidating to stand there and to, "Oh my God, this is the actual Supreme Court" and the bench is... like towers over you.

Joyce: Is it you're like-

Jill: Oh, it's really enormous. It's very scary. And I think it definitely showed. I mean, Mitchell was very effective and handled questions brilliantly. He was very, very good. And the others were not... They weren't as prepared. They weren't as ready to answer questions.

And I think that maybe makes a big difference in what the outcome is because I think a really good lawyer... Jim Neal, who was the senior lawyer on Watergate, used to say, "There are some cases that even Clarence Darrow couldn't win." The facts are against you, the law's against you, but there's a small percentage where Clarence Darrow could make a difference. And really good strong argument maybe could have persuaded at least three or four of the justices to go in favor of the state of Colorado.

Kim: Well, it feels like it was 100 years ago now, but we also got a DC Circuit opinion this week, an important one, really ripping to shreds Donald Trump's immunity argument. And Trump has until Monday to seek Supreme Court review of that opinion as of this taping, he had not done it yet. But Jill, how do you think that might go? Do you think the



Supreme Court could split the baby, so to speak, and either deny cert or take it up and affirm the DC Circuit's community ruling while still ruling in his favor on the ballot question, as we've been discussing?

Jill: Well, let me start with, it would be wrong for them to split the baby in the sense of, "Oh, we are letting him stay on the ballot, so we'll hold that he's not immune." They have to judge each case on its own merits. They have to stand on their own. But I do think they may end up having a split outcome because the immunity case to me is really strong, really clear. It's hard to imagine how they could say that he has absolute total immunity. The District Court made a very good opinion. The Circuit Court made a brilliant decision. They laid out every argument that Trump made. They went through it step by step by step. They really analyzed it in a way that I think the Supreme Court could say, "Denied cert," because they don't need to add anything to what the Circuit Court said.

In any event, I think they will act quickly because for the same reasons we've talked about, this is an emergency issue, it has to be resolved. I think we could get back on track and have the trial date reset very quickly. And it was very interesting how the court said, "Okay, we will stay only if you go to the Supreme Court by Monday and ask for an emergency stay. You can go to the full en banc hearing, but we're lifting the stay if you do that." So he's kind of forced to not delay further by going to the full panel, the full Court of Appeals and going directly to the Supreme Court.

Kim: Right. They essentially said, "Go directly to the Supreme Court, do not pass go, do not collect \$200. Do not seek en banc review. Just go right to the Supreme Court." So Barb, how does this immunity decision by the DC Circuit, if upheld, affect the other cases aside from the Jack Smith prosecution over his January 6th activities?

Barb: Yeah, it's interesting because all the cases are a little bit different. The court actually went out of its way to say that they were making this decision as it relates to federal prosecutions only, that it did not bind the court or other courts in state prosecutions.

So that's not to say that Trump is immune from prosecution by the state of Georgia, but he might be. So it could be an issue that gets raised there, I suppose. I don't think it applies to his conduct in the Mar-a-Lago case because there he was acting after his presidency, and so I don't think it implicates anything relating to his presidency.

The other case is the one with Alvin Bragg as the prosecutor in state court in New York for this pre-presidential scheme to pay hush money. Now, he did make some payments after he was in the White House, and so he has not asserted immunity for those acts, but I would think that in this case, I guess because of that language about, "We do not address state court prosecutions here," he could try to raise it, but I don't think he's going to be able to raise immunity from prosecution because so much of this conduct occurred before his presidency.

So I don't think this ruling is going to have a lot of effect on the other cases. I suppose the most effect it's going to have is on the timing because this means at some point this case is going to come back to the trial court and get back and need to compete with

those other cases for a trial slot. And I think that's the part that's going to be interesting. I think that as long as things go reasonably well, and either the Supreme Court passes on this case or the Supreme Court affirms it reasonably quickly, the federal election interference case can be back on track by maybe early summer, but it's still going to have to wedge itself in to the trial schedule among those other cases.

Kim: Oh my goodness. So Joyce, we still do not have a verdict from Judge Engoron in the New York fraud case, but we did get some news out of that case regarding some, I don't know, alternative facts that Allen Weisselberg might've made under oath. In that case, what's going on there and how might that affect the verdict?

Joyce: Yeah, this is some really fascinating reporting that surfaced last week that Allen Weisselberg was negotiating a plea deal with the Manhattan DA's office for perjury charges. Shocker, right?

Weisselberg testified during the trial that he was never involved in the valuation of Trump's Trump Tower's apartment, didn't pay much attention to it, and that's the one where they tripled the square footage, inflated the value based on that, and used it to argue that Trump had a much better financial position than he really had. The problem was a reporter at Forbes had the receipts. And in connection with the Forbes billionaires list, that reporter had been hounded by people at Trump organization, including Allen Weisselberg, who lobbied him to include that inflated value as part of Trump's assessment. So yeah, oops.

The district attorney is reportedly working on a plea deal. We all know from Hunter Biden, no guarantee, no certainty there until a judge accepts that plea agreement in court, but Judge Engoron wants to know the details. This was a bench trial that he conducted, not a jury trial. That means he's the finder of the facts. He's the guy who's got to decide what does all of this evidence mean. And because of that, he's entitled to have accurate, clear, truthful evidence.

So he reached out to the lawyers and said, "Listen, you need to tell me what you know." And he even told Allen Weisselberg's lawyer that they had an ethical obligation under bar rules to disclose otherwise confidential information. So very interesting. I think, look, you ask about what the implications are. I think the most important one is that there will not be a final decision in this case until Judge Engoron gets his information. And typically, delay works in Trump's favor. But I think that's not true here, right? Imagine how disruptive it will be, for instance, if the decision on this case comes on the eve of the Super Tuesday primaries on March 5th. I think the slowdown here really has a potential to make life a little bit more difficult for the former president and his line employees brought it on him.

Jill: Barb, I can't believe it, but I just got hacked again and had to have the credit card company send me a new card, which is really a nuisance when you can't use it and you have to wait for the new one. I'm really glad that I had known about Aura. Have you tried Aura?

Barb: Yeah. And like you, Jill, I have been victimized a couple of times while I was working in government, when I've used my credit card while traveling. And so Aura gives you the peace of mind so that you don't have to worry about your family being online, with all the dangers lurking in the digital shadows. You can secure your family's online experience. It's essential and urgent, and it's why we teamed up with Aura, an all-in-one online safety solution committed to shielding your family from digital threats. Aura's parental controls are the protective shield every parent needs to ensure your family's online safety.

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Joyce: Well, the special counsel investigating Joe Biden's possession of classified material, Robert Hur delivered his report to the Attorney General this week. And Thursday afternoon, Merrick Garland made it public. No fake summary, claiming it fully exonerated the President, ala Bill Barr. Instead, they corrected a few typos and sent it out into the world.

The important thing is this, Robert Hur declined to prosecute Joe Biden. He acknowledged that, quote, "No criminal charges are warranted in this matter and that the evidence does not establish Mr. Biden's guilt beyond a reasonable doubt." Hur concluded that, "Biden's cooperation with our investigation, including by reporting to the government that the Afghanistan documents were in his Delaware garage will likely convince some jurors that he made an innocent mistake."

But Robert Hur was not content to stop there. He went on. He went on for some 388 pages. And I have really the same question about the report for each of my sisters, is what Hur did the right thing?

Robert Hur was Donald Trump's US attorney in Maryland, good friends with the former Maryland US attorney, and then Deputy Attorney General Rod Rosenstein, somebody steeped in the traditions of the Justice Department. And I guess my question is whether he followed DOJ rules around what one is to do when one makes the decision not to indict.

So I'm interested in your takes on this and how you think it plays out for purposes of the election, which it seems to me was the purpose that this report was intended for. It's maybe a little precursor of Donald Trump's view that the Justice Department is just another political tool in the White House's arsenal. Talk me off the ledge. Am I being too much of a cynic here? What do you think, Jill?

Jill: I think we're going to all agree that it was wrong in every way. It was, as far as I'm concerned, Comey Redux. It was absolutely a violation of Department of Justice rules and policy of just legal ethics to do this. And in my view, Hur went so far out of his way to skip the lines and step outside them by saying, as he did, you pointed out, he said, "One, there's not enough evidence to go forward with this case. I recommend no indictment. Number two, it's very different than the case against Donald Trump where he tried to conceal and obstruct the investigation. Biden was completely cooperative, did everything he could. He found the documents. We wouldn't have known about them if he hadn't told us." So he did that part right? But then he went on and said, "And besides, he'd be a sympathetic witness because he would present as an old feeble, forgetful old man." That was like sticking the knife in and twisting it to carry forward the Donald Trump message.

The White House has said, A, it's a lie. Daniel Goldman was on MSNBC today or maybe yesterday and today doing a fabulous takedown of that saying, "Look, I spoke to him from Israel on the day of the attack, and he was not only clear and lucid and not forgetful, he understood all the issues." So it's really wrong, and it's just is the one thing that, and I disagree with Chuck Rosenberg on this. He said, "Well, it's fair when you are making a report, as is required of all special counsel, to say why you are declining. And if one of the reasons you're declining is because a witness is incredible or is overly credible or would not be someone who the jury wouldn't feel sympathetic with, you need to say that."

But this is the defendant not a witness. He's not necessarily going to testify. And so that becomes totally irrelevant to the outcome of the case, and it should have never happened. I think it's ridiculous that we have a Republican investigating Biden and investigating Hunter Biden, and that we have not had the same for Republicans who've been investigated. Or actually, we have had the same, we've had Republicans investigating them.

Joyce: Only Republicans get to be special counsels in this country.

Jill: In the old days, that wasn't true.

Kim: That's such a good point, Jill, about what kind of the credibility of Biden as a witness. That's so important. He's the defendant. He has a right not to testify. See, the prosecutor would have to determine whether or not they had a legitimate case with evidence other than the likely testimony of a defendant. I mean, I hadn't even thought of that, and that's such a great point.

Look, the point that stood out to me the most is once I saw this 388 page report, the first thing I did was go look at the superseding indictment against Donald Trump in the classified documents case. And you know how long it is? 60 pages. 60 pages. How on earth do you have more than five times to say as much to say about the Biden case than the Trump superseding indictment, which is damning? I mean, it's not sugarcoating what Donald Trump did by any means. And that to me said, "This is ridiculous." I don't know Mr. Hur, but he has to be aware that this is an election year. He has to be aware of exactly what happened with James Comey, and that he put this out. I can't believe. My cynical heart, my jaded, jaded heart cannot believe that this was an accident. I think that this was some sort of hit job. It had to have been. How else do you explain it?

Joyce: Welcome to my ledge, Kim. Let's put that on together.

Kim: It's really ridiculous. It's gobsmacking. That's all I can say.

Joyce: You know, Barb, Robert Hur was a special counsel. He was the prosecutor who made the decision about whether to indict this case. That makes him a little bit different from Jim Comey who is speaking as the FBI director. We're a little bit further out from the election than Comey was when he made his final comments. I mean, do you want to offer any defense of Hur or do you agree with your sisters?

Barb: I'll offer a little defense, although I still think that he went too far here. So first, I don't think we should lose sight that he reached a conclusion that I think is the right one, which is he said there was insufficient evidence to charge Joe Biden with a crime for willfully mishandling classified documents. That's the bottom line. He also said in his executive summary even, this case is very different from the case against Donald Trump because he immediately gave them back. He self-reported. He welcomed the FBI into his home to search. He answered all questions, whereas Donald Trump stonewalled it every step of the way. He obstructed, he concealed, and that's why Trump was charged and Biden is not. So to me, those are the important takeaways.

But I do agree with you, and I think that one reason it is like the Comey instance is shortly before an election, he is putting out bad information about a political candidate. Unlike Jim Comey's situation, Robert Hur is required to produce a report. Now, I suppose one defense of Robert Hur would be, "Look, he's required to produce a report." His assessment of witness credibility or defendant credibility, he might testify or even fairness to a defendant, I think does bring with it... I've written pros memos, and that's what really this is, pros memos to a supervisor who will review it so that they can approve or disapprove your recommendation.

And the prosecutor's assessment of their credibility or their ability to remember or whatever it is important to those charging decisions. So the fact that he included it I think is not so bad. He also knew, however, that this report, even though it is confidential, would become public because Merrick Garland said it would. And that was an effort to make sure that the public has confidence that there's no conspiracy afoot to protect Joe Biden.

And so he said it would be produced publicly and it was. That's where I do have a problem with the language that Robert Hur used. There is this series of guidelines called the Principles of Federal Prosecution, and they give prosecutors all kinds of advice and policy and guidance about making charging decisions, when you should charge, when you should not charge, and considerations. And one of those principles says, and I quote, "That the prosecutor must remain sensitive to the privacy and reputational interest of uncharged parties."

And so as he goes through this, and Jill, you mentioned Chuck Rosenberg, who's got a piece out in Lawfare about this, one point Chuck makes about the language that Robert Hur used that makes me think he's violated this principle of federal prosecution is he doesn't just say, "I am concerned about the witness's ability to recall the facts in this case." He says, "He's an elderly man with a faulty memory" or something like that. He also says on the first page something like, "He clearly perceives himself to be a historic figure." I mean it's just so pejorative.

Kim: He's President of the United States.

Barb: He is. Wait, I mean like-

Joyce: Can I just say he also spends a lengthy paragraph detailing Biden and Obama's disagreement over policy in Afghanistan.

Speaker X: Yes.

[inaudible 00:45:40].

Kind of unnecessary.

Joyce: He's way off. Yeah, way off.

Barb: A lot more detail. So I think the conclusions he reached there, like maybe there was a motive to demonstrate that he had the better argument in a policy difference with which he disagreed with the President, something like that. That would've been enough. But instead we get the cat fight that goes on. So I thought that he violated that rule of the Principles of Federal Prosecution, about avoiding harming the reputation of an uncharged person. And I think he could have communicated all that he needed to communicate to Merrick Garland and to the public without saying these kind of snarky things that seemed to go out of his way to harm the reputation of Joe Biden.

Jill: So I have two follow-up questions to that, because it's been bothering me. One, he says in the first page that Biden willfully held these documents, but then at the end he goes, "And there isn't enough evidence to convince anybody beyond a reasonable doubt that he did that."

Barb: I have a response to that. I have a response to that.

Jill: Let me ask my second question, then you can answer both because they're both related. The second is, what is Merrick Garland's liability in this? Why did he approve the release of an unredacted copy? It's sort of like what Barr did in reverse, where Barr said, "Okay, I'm going to give you my summary, which was inaccurate."

Kim: Nothing to see here.

Jill: Yeah, nothing to see here. And then by the time you get the actual report, it doesn't say that. And this was, as we've all said, none of this was necessary to the conclusion that this was not an indictable offense. So to me, Merrick Garland failed in his responsibility to the American public and to the Department of Justice, to the rules you just cited. You're not supposed to harm someone's reputation, not just the President, but any person who isn't ended up being charged.

Joyce: So I have a contrary view on that. I think once we had a report issued by a special counsel, Garland's hands were effectively tied. But I think your comments are dead on the money, Jill. And what that points to to me is the need to rewrite the special counsel regulations, right? I mean, they need to put together a commission of take your pick, former attorneys general, former US attorneys, whoever you want from both parties-

Jill: Former special prosecutors.

Joyce: Yeah, exactly. All of the above. And write something that requires the special counsel to conform to those same DOJ rules. Barbs, and my former boss, Eric Holder, tweeted last night and said, "If this report had gone through the review that's required of anything that comes out of a US attorney's office or main justice, the inflammatory comments would've been excised and they should have been here." That's tough to argue with. And I mean, that really does fuel my belief that this was done for political purposes. It was not done for prosecutorial purposes.

Barb: Jill, to answer the first question, I have seen a lot of reporting pointing out that discrepancy that you just described. And as I read it, it says there is evidence of a willful violation, but he ultimately concludes there is insufficient evidence to bring a criminal case. So there's some evidence, right? There's always some evidence of something. So I think it's being reported that there is a contradiction there, and I don't read it as a contradiction. I read it as there is some evidence, but is insufficient to bring a case or to achieve a conviction at trial.

Jill: You are technically correct, absolutely, legally, technically correct. But the purpose of it, I think, is to have gotten in, there's evidence of his willfully doing this before he says, "Yeah, but it's not sufficient evidence." In 200 pages later.

Joyce: Let's put some flesh on those bones so our listeners can understand the point that you're making, right? Because Hur says that Biden's conduct was willful. And when you read through the document, you see that at one point, Biden tells someone, "Oh, there's some classified stuff about Afghanistan." It's not really clear though, according to Hur what the reference is. It may be that he's even referring to stuff that is still lawfully in his home where he's entitled to have classified stuff when he's the Vice President.

And Hur says, but it's clear from where this stuff was found that it was just put aside. No one was aware it was there, it was untouched. Biden never mentioned it again at any point where he's being interviewed. And so he reaches the conclusion that, did he willfully, which means knowingly, have classified material at some point? Well, yeah, at one point he did. Did it violate the law? Is there proof beyond a reasonable doubt that this was a willful violation? Absolutely not. And I think you're so right, Jill, that the way Hur phrases this, it's clear to Barb and me as prosecutors who are used to reading this stuff, it's less clear to the general public. And that's who this was aimed at.

Speaker X: Same.

Joyce: Yeah.

Jill: Exactly. And he also said, there are innocent explanations for all of this, and we cannot refute them. I mean, that's 200 pages in. That's ridiculous.

Joyce: Fall in love with comfy clothes this February with today's sponsor, Honeylove. Honeylove has revolutionized its products by ditching bulky fabrics that trap heat, and it eliminates underwire. Honeylove's bras are made with fabric that's so comfortable and so soft, you'll immediately see and feel the difference. For a limited time only, you can get Honeylove on sale. Get 20% off your entire order with our exclusive link, [honeylove.com/sisters](https://honeylove.com/sisters) support our show and check them out at [honeylove.com/sisters](https://honeylove.com/sisters).

Kim: Honeylove's bestseller crossover will be your new instant go-to. It gives you all the support you want without using any underwire. Plus the smoothing fabric eliminates bulges and the mesh detailing gives it really amazing look, you'll enjoy wearing it on any occasion.

Jill: If you want a lounge wear vibe, I recommend their V edition. It provides great support and lift without underwire, making it perfect for a relaxing day. I really love it. And that's not all. Honeylove has so much more to offer. They also have incredibly comfortable shapewear, tanks and leggings for everyday support. You'll look great pairing your V bra with their breathable and versatile leggings, or by matching the shapewear to your crossover.



Barb: Save 20% off at [honeylove.com/sisters](https://honeylove.com/sisters). Use our exclusive link to get 20% off [Honeylove.com/sisters](https://honeylove.com/sisters). After you purchase, they'll ask you where you heard about them. Please support our show and tell them we sent you. Treat yourself to Honeylove because you deserve it. Look for the link in the show notes.

Well, there was an interesting story in the news this week unrelated to Donald Trump or special counsels or Joe Biden. It was a jury verdict in favor of a climate scientist named Michael Mann. He is best known for his famous hockey stick graph, and it's called a hockey stick graph because it shows that global temperatures were relatively stable or a flat line throughout most of human history until the Industrial Revolution when temperatures started moving upward sharply. So that's like the blade of the hockey stick. Suddenly it goes way up.

He sued two right-wing bloggers who falsely claimed that he had manipulated the data in his research. And this week, a jury awarded Dr. Mann, more than a million dollars in damages. Kim, let me start with you. This case is really interesting because the defamatory statements were about his research. The defendants were trying to undermine his findings regarding climate change. To what extent is there a First Amendment right to challenge scientific research?

Kim: Yeah, this is a really fascinating case. And as it goes up the appellate chain, which the defendants already said they're going to appeal, that's really where we're going to flesh out this question that you're asking, in the world of scientific research where the First Amendment is really important. Because the way scientific research happens is through peer review. You have people putting research out there and then other people double checking it, challenging it, disagreeing with it. And that's how we get to learn what the real, real is.

And so you want very robust First Amendment protections there, but those protections are not limitless. And in this case, what Michael Mann claimed was happening with these two conservative commentators is that they weren't just challenging the validity of his research. They were really defaming him as a person. So in both cases, there was a \$1 compensatory award, which shows that it wasn't that he was harmed.

It's also important to note that the court treated Michael Mann as a public figure in this because he's so prominent in the world of climate research that that meant that he had a higher bar to prove. He had to prove not just that people made false claims against him and that his reputation was harmed, but that it was made with malice, with actual malice, the standard that we've talked about before, which is a lot higher than mere negligence.

But they found that and against one defendant, they awarded punitive damages in the total of a million dollars. And in another one \$4,000, the million dollar award went against someone who compared him to Jerry Sandusky in the way that he, quote unquote, "Molested the research." Now that goes beyond scientific disagreement. The other defendant posted something to the effect that said, "Well, I wouldn't go that far, but this guy has a point." And that's where he got the thousand dollar punitive award.

I think honestly, in this case, he probably has the better chance on appeal if he didn't actually embrace this idea that his research was so fraudulent that it constituted some sort of offense against someone else and using really a horrific comparison. But I think in this case, there is room for the appellate court to find that there are limits to your free speech rights, even in the scientific realm. And I look forward to seeing how that plays out.

Jill: And just for our listeners who might not know, who aren't... And I'm not a sports fan, but Sandusky was the coach who was a pedophile and convicted and gone.

Kim: It's awful.

Jill: So you can imagine molesting children being compared to molesting facts.

Kim: No, it's terrible.

Barb: Yeah. So Joyce, I want to pick up on this theme that Kim was talking about, about this idea of going after scientific research. I read there's something called the Climate Science Legal Defense Fund. How common is it for people to attack scientific discovery and what's the danger?

Joyce: Yeah, the flat-Earthers have been super busy. There were 34 cases last year, right? I mean, it starts to look like a war on science at some point. It used to be that scientists just fought it out in an academic arena that was dedicated to learning the truth. But no more. I mean, as we've pointed out, Mann, this legit scientist who is dedicated as a researcher, instead of talking about his ideas, they compare him to Jerry Sandusky, the assistant football coach at Penn State, where Mann also worked, who was convicted multiple times for sexually assaulting kids. I mean, that is just well beyond legitimate airing of scientific ideas. That's just not legitimate scientific debate. And climate has become a hyper-political issue in these weird times that we live in.

So this is what Mann said in his statement following the verdict. He said, "I hope this verdict sends a message that falsely attacking client scientists is not protected speech." The good outcome here would be if this verdict leads to a bit of a reset and people take the temperature down. But I think we all know the times that we lived in. So Barb, I was not familiar with the Climate Science Legal Defense Fund before this case, but they're the folks who provided a defense for Mann. They've been around since 2011. And their website says they provide free legal advice to scientists. It's sort of crazy that there's a need for something like that, but I think it's a great, great thing that they're there.

Barb: Oh, yeah. I mean, what great work, right? If you're a lawyer, protecting science and scientific discovery-

Joyce: I confess, I was looking wondering if they wanted some volunteers.

Barb: Yeah, right. [inaudible 00:58:49].

Joyce: Since I've done defamation work.

Barb: Our law students, take a look at the Climate Science Legal Defense Fund. Cool job. Protect science and scientific discovery.

Well, Jill, let's get into the damages. We all got a lesson on damages in defamation cases through the E. Jean Carroll verdict about compensatory damages and punitive damages. So as Kim said, only \$1 of this was compensatory and the rest was punitive. Can you describe for us the basis for the punitive damages here and whether you think they were appropriate?

Jill: I think they were appropriate, but let me also say before I answer that, that it shows how carefully a jury looks at this, that they could distinguish what is actual harm to reputation or emotional harm at a dollar, and then say, "But yeah, we got to stop this. It's worth a million dollars to punish this person from saying this."

And the punitive part is intended to stop someone, to make them not do it again. And it has to be high enough that it will stop, not just the person who did it, but will be a warning, especially given what you and Joyce were just talking about with the client science's legal defense fund, if there is so much that you need a legal defense fund for scientists, you got to stop it broadly. And a million dollars ought to get somebody's attention. So I think it was a good decision and appropriate.

On the other hand, what the jury probably didn't take into account is that when you have only a dollar of compensatory and a million in punitive, the court may knock down the punitive damages because of the differential. So that would be too bad, but it is something that could happen.

Barb: Yeah. I think that a case like this though, if you're Dr. Mann in this case, it's a worthwhile case to bring just to deter and discourage people from doing this. You know what, reminds me of like Taylor Swift brought a lawsuit for \$1 in damages over a dispute she had with the producer, and Gwyneth Paltrow with the countersuit against the guy who sued her for the ski accident and won \$1. Even if it's just \$1, I think there is a symbolic value there of saying, "You lied. You did it to harm my reputation," and to send a message to others who might so inclined that there's a price to pay when you say deliberately false things that defame people and ideas.

Kim: Yeah, and to clear your own name.

In the winter months, it is really clear how dry the air is from my skin. And that is one reason why I absolutely love OSEA Malibu products. They offer a full spectrum of skin care and it's the secret to looking and feeling good, which is most important, right? It's why we want to tell you about OSEA, especially their Andaria Algae Body Butter. It can help you have healthier, glowing skin all year long. And OSEA is clean, it's vegan, and it's sustainable, which is really important to me, and it really is my year-round go-to self-care regimen and I know you'll love it too.

Joyce: But let's talk some more about the body butter, which is my favorite thing. It's made with ceramides and Andaria seaweed. Those ingredients are normally reserved for the face. And when you use it, you'll notice that it will transform even dry and crepey skin into smooth, soft, supple skin in no time at all. This is not your typical body butter. It's amazing.

Jill: Joyce, you are so right. It is wonderful. The Andaria Algae Body Butter keeps my skin hydrated even in the coldest of Chicago's winters. And I love how silky it makes my skin feel even when the heater is blasting. It takes the shower experience to the next level, too. When you're using it after you dry off, it feels like being transported to the beach for a luxury massage.

OSEA has been making seaweed-infused products that are safe for your skin and the planet for over 27 years. Everything is clean, vegan, cruelty-free and climate-neutral. It's certified. And with OSEA, you never have to choose between your values and your best skin. And I have to add, they also now have a tea that is really delicious. I don't normally like tea, but I love their tea.

Barb: Get yourself some clean vegan skincare and body care from OSEA. And right now, we have a special discount just for our listeners. Get 10% off your first order site-wide with code sisters at oseamalibu.com. You'll get free samples with every order and free shipping on orders over \$60. Head to O-S-E-A amalibu.com and use code sisters for 10% off. And remember, you can always find the link to your new glow in the show notes.

Jill: It is now time for our favorite part of the show answering your questions. And in order for us to answer them, you have to send us questions. So if you have a question for us, please email us at sistersinlaw@politicon.com or tag us at @SistersInLawPodcast on any of our accounts, threads, Twitter, X, any of theirs, at #SistersInLaw.

If we don't get to your question during today's show, keep an eye on our threads and other feeds throughout the week because we sometimes answer the questions that you asked that we didn't get time for during the show. So I want to start with you, Kim. We have a question from LaurenceChicago1976. Of course, I love that she's from Chicago. She asks, "What precedent does the Jennifer Crumbley verdict set for other mass shooters in schools and out of school, for example, the Highland Park shooting?"

Kim: Yeah, that's a really great question. So of course Jennifer Crumbley this week was convicted for her role in the mass shooting that her son engaged in, Ethan Crumbley in Oxford, Michigan. It's really historic because it's really the first major case where a parent is held accountable for involuntary manslaughter for the actions of the children because they failed to heed the warnings of his dangerousness and keep guns away from him. Of course, also, his father is set to stand trial too. Hopefully, just as an aside, I hope that he has the presence of mind and the good sense to plead in that case just to not put the families through more and to save the taxpayer money of the good people of Michigan after this conviction.

But I think so while it can't apply in any way retroactively, you're talking about the Highland Park shooting, I'm not sure anything can be done in that case retroactively, but what I do hope is that this serves as an example to prosecutors in other parts of the country, that they can put parents on notice to say, "You know what? If something like this happens, there's not just going to be a potential price to be paid by the shooter in a case like this, but also to parents."

I would hope that they would go even further and try to strenuously enforce gun safety laws and safe storage laws in a way that would also lead to liability if guns get in the hands of children. It's important to note that despite how horrific these mass shootings are, gun violence is the number one killer of young people in America, of people under 18 years old. The number one killer are firearms. Think of that. And the vast majority of those happen in the homes. So I think holding parents accountable is so important. I hope that prosecutors are more robust in this and use this as an example.

Jill: Next question is for you, Joyce, and it comes from Beth. "During the Little Rock School crisis in 1957, President Eisenhower issued Executive Order 10730 which placed the Arkansas National Guard under Federal control. Can Joe Biden place the Texas National Guard under federal Control to stop Abbott's shenanigans?"

Joyce: This is such a great question. I've been following this situation in Texas carefully where what's going on is that Governor Abbott and other Texas political figures are essentially taking issue with federal policy on immigration and saying, "We can do it better. We're going to do it our way." They've put up razor wire. They've put up spinning buoys. People have been harmed.

And so the Federal Government, Joe Biden sees, takes him to the Supreme Court and the Supreme Court says, "Texas, you are out of line here. The Federal Government is entitled to cut through your razor wire so that it can do its job." And Governor Abbott says, "I don't really care what the Supreme Court says. I'm going to keep repairing the razor wire when they cut through it."

This is not just a theoretical dispute, by the way. In the record in the Texas case, there was evidence that showed that the razor wire was so thick that in the case of a medical emergency when federal ICE agents were trying to get to someone in distress, the razor wire was so thick that it could take 30 minutes to go through all of it to get to the other side.

So not a theoretical problem, but it's a great question. The answer to the question is yes, that Joe Biden could federalize the guard. It would probably require him to invoke the Insurrection Act, and that's fraught. I think it likely makes more sense here to wait and see if Texas is going to go on to clearly violate the order. Right now, they're just on the fringe. They're replacing some wire, but they're not interfering with the Federal Government's efforts to go through it. You could want for that to be a little bit more clear, but it's a serious situation with people's lives at risk. And Biden may well end up having to ask here.

It is also a cautionary tale, by the way, for the other states that have sent members from their guards down to Texas to help. At least 13 Republican governors have either sent or are planning to send their own guard forces or state troopers to the southern border at Governor Abbott's request. Joe Biden might nationalize all of them and take control away from the Republican governors. So stay tuned on this one. It's very interesting.

Jill: Great question, great answer. And we have time for just one more question, and this is for you, Barb from Misty, and it's about amicus briefs or amicus briefs depending on where you're from. She asked, "Can anyone submit them? Does the Supreme Court have to accept them? How do they pick and choose which ones can be submitted?"

Barb: Great question, Misty. And I am in the amicus camp because the plural of amicus is amici, and so I don't know if I would say amicus and amici. So I'm in the amicus and amici category.

So it's a great question. Depends on the court. Many courts do accept them. At the US Supreme Court level, there are two ways you can get the ability to file one. One is if all parties consent and sometimes all the parties will consent to any amicus brief being filed. In a very significant issue they might say, "You know what? There might be lots of people out there who are affected by this decision in one way or another, and so have at it. Anybody can do that." And if so, then anyone can file them. Without the consent of all parties, then the parties must get leave of court. So they have to ask the court for permission to file one.

And then there have to be some specifics about what will be included. They can't simply duplicate the arguments of the parties. You can't say, "I really like what Colorado had to say in that case, and I'm just going to piggyback on and duplicate their arguments." You have to say that, "I'll be affected in some way. I have some interest or I have some insight, or I have some perspective to share with the court that might be valuable to the court's decision."

For example, I can remember a time when the University of Michigan Law School was involved in a significant affirmative action case before we had the Harvard and North Carolina decisions. And in that case, there were a number of amicus briefs filed that were very persuasive with the court. One was filed by the military and another was filed by General Motors, and they each talked about the value of having diversity in their ranks and that the value that they believed their employees obtained by attending a diverse institution of higher learning.

And so those were amicus briefs. I sometimes sign on to amicus briefs. I get asked to sign on amicus briefs sometimes involving former prosecutors with a perspective of a former prosecutor. For example, the Bruen case, the gun case, I signed an amicus brief as a former prosecutor talking about the dangers to public safety of preventing a city like New York from licensing people to use firearms.

Jill: Thank you for listening to #SistersInLaw with Barb McQuade, Joyce Vance, Kimberly Atkins Stohr, and me, Jill Wine-Banks. Remember, you can send in your questions for

next week by email to [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com). You can also tag us at [@SistersInLaw](https://twitter.com/SistersInLaw).Podcast on threads or tweet, using #SistersInLaw. Remember, if you want to snag a #SistersInLaw mug, go to [thepoliticon.com/merch](https://thepoliticon.com/merch). And please, some love to this week's sponsors, factor, OneSkin, Aura, Honeylove and OSEA Malibu. You can find their links in the show notes. Please support them because they make this show possible. Please follow #SistersInLaw on Apple Podcasts or wherever you listen, and please give us a five star review. It really helps others to find the show. See you next week with another episode, #SistersInLaw.

Sorry, I just sent Brisby away because he wanted to jump up and he's...

Kim: We love Brisby.

Joyce: Brisby is always welcome.

Kim: Brisby has really strong...

Jill: But he's barking now.

Kim: Brisby has very strong gun safety views, and I-

Jill: He clearly does.

Kim: ... support Brisby saying, "Look-"

Speaker X: His voice must be heard.

Kim: It's like, "Look-"

Jill: He was approving you, Kim.

Kim: Dogs can get hit by bullets, too. Lock those guns up. Tell them, Brisby.