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Kim: Welcome back to #SistersInLaw with Jill Wine-Banks, Barb McQuade, Joyce Vance, and me, Kimberly Atkins Stohr. And we are so excited that our tour dates are coming up for SistersInLaw Live. We will be in Jill Wine-Banks' hometown of Chicago on May 2nd.

Jill: Yehey.

Kim: We'll be going to the hometown of Barb and me-

Jill: Woo-hoo.

Kim: ... Detroit on May 9th. And we will go to one of Joyce's favorite cities on earth and one that's very dear to me as well, Boston, on May 30th. So don't forget to get your tickets before they sell out. There aren't that many left at some of these venues. So go to [politicon.com.tour](https://politicon.com.tour) and get your tickets today. And we have a busy show and lots to talk about today. Of course, there's the Trump trial where the attorneys in the case spent the week questioning jurors. And then we have a jury impaneled and their alternates, and we'll talk about what happens next.

There was also an impeachment trial in Washington DC that of DHS Secretary Mayorkas that went nowhere. But we'll talk a little bit more about that. And, of course, the Supreme Court made a ruling that made it easier for some workers to sue for employment discrimination. A lot was going on. But you know what, before we get to that, ladies, I've been in a bit of a funk as of late for a lot of reasons and no reason at all how funks go. And so one thing that I did is I posted a question on threads asking people what they did when you're more than not just down, but when your soul needs lifting, right? We talk about keeping ourselves physically fit. But sometimes, we need to keep ourselves fit in other ways to other aspects of our non-physical selves. And I got such a wonderful array of answers that I thought-

Barb: Oh, that's nice to hear.

Kim: Yeah, I thought I'd ask you guys what you all do when your soul needs lifting. It could be something small or big. But when you're in a funk, what helps you get out of it, Barb?

Jill: So Kim, before I answer what I do, I thought some of the answers you got were so fabulous. But, of course, the best answer of all was that the person listens to our podcast. And so that cheered me up. I loved that answer the best of all. But like many of the answers you got, of course, the best thing to do for you is Snickers. And for me, it's Frisbee. And all you have to do is have him jump up on the couch next to you and give you kisses, and you will feel better for sure. And I definitely use that.

Kim: Yeah. Snickers is hilarious. She gives really good hugs. And I know we dog owners are accused of-

Jill: Anthropomorphizing.

Kim: Thank you, our animals. But honest to goodness, Snickers literally hug. She takes both paws, wraps them around you and tucks her head to the side of your face or on your shoulder. It is a hug. And she's done it since the minute she came into our house after we adopted her.

Jill: Sweet.

Kim: She is a hugger. She hugs her friends. When she sees him on the street, she gives hugs.

Jill: That's funny.

Kim: So that really does help. What about you, Barb? What do you do?

Barb: I'm not fortunate enough to have a pet in my home. But I like to move. I think movement is something that will often shake me out of a funk. So running, swimming, playing tennis. Any of those things are great. I even will confess to enjoying doing physical chores around the house. I'll just set out to [inaudible 00:04:17], organize a closet or something like that.

Kim: That look that Joyce and I are [inaudible 00:04:21]

Barb: Yeah. Horrifying. [inaudible 00:04:21] I'm not like Dustin or [inaudible 00:04:24]

Joyce: Please come to my house next time, you're in funk, girl.

Barb: It's a feeling of accomplishment. A closet that you've needed to clean out for five years, hypothetically. It's a feeling of accomplishment to do that. And sometimes, that will get your mind off, whatever it is has you down. And just the movement and the focus and the accomplishment of accomplishing a chore can snap you out of a bad mood.

Kim: All right. What about you Joyce?

Joyce: I'm a big fan of self-care. And even when you feel a funk coming on, I think sometimes you can head it off. Y'all are so right about animals, dogs. And even my cats can be remarkably sensitive to when I need a little bit of extra attention. And there are those special friends, people like you guys, who are incredibly supportive and lift you up to reach out to friends.

I like to be outside. I like being in nature. Gardening sometimes will lift me out of a funk. We are in this minute right now in Birmingham where everything is in bloom all at once. I don't know if it's climate change or what it is. Every rose bush at our house is blooming. All of our perennial flowers are out. It's unbelievable. You cannot be in a bad mood when you're out with that going for a walk. My husband and I like to walk down for coffee or for lunch on the weekends. And so I have to say I'm pretty deliberate about doing all of those things because there's nothing worse than being in a funk.

Kim: Hey, Jill, do you know what one of my favorite words is?

Jill: What is one of your favorite words?

Kim: Undaria.

Jill: Oh, it does sound nice, and it's even better when it's in an OSEA Malibu product. And right now, with Mother's Day coming up, OSEA's Skin and Body Care is the perfect way to honor all of the moms, mother figures, caregivers, grandmothers, and mothers-in-law and grand godmothers because I have a grand goddaughter and a goddaughter.

Kim: And stepmothers.

Jill: And stepmothers, for sure stepmothers, and especially good stepmothers like you.

Kim: All the above.

Jill: And give all of them a reminder to make time for herself. So the Mother's Day special is something you should think about. Spoil the moms in your life with little luxuries from OSEA. Their clinically proven seaweed-infused skin care products have made my self-care routine the most relaxing and enjoyable part of my day. And, boy, do I need a relaxing, enjoyable part of my day with the news coming in so fast? And right now, you can get 10% off your first order with our code Sisters at oseamalibu.com.

Barb: I love that OSEA has been making clinically proven seaweed-infused products that are safe for your skin and the planet for more than 28 years. Everything is clean, vegan, cruelty-free and climate-neutral, certified. With OSEA, you never have to choose between your values and your best skin.

Kim: We love the rich, never-greasy and clinically proven Undaria Algae Body Oil. It instantly improves skin elasticity and visibly firm your skin to make it feel more sculpted and toned. It feels so good to apply and leaves your skin feeling silky soft and unbelievably glowing. Wherever I go, people have been telling me I light up the room. No, they don't. But-

Joyce: You do. You absolutely do. [inaudible 00:07:57] You and OSEA Malibu.

Kim: So you all should give it a try so you can light up your rooms too.

Joyce: Between the Mega Moisture Duo, Anti-Aging Balm and Undaria Algae Body Butter, there's so much more they have to offer. So pick your favorites, and spoil the moms in your life with clean, vegan skin and body care from OSEA. 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-malibu.com and use code Sisters for 10% off. Give the gift of glow. The link is in our show notes.

So this week, we've all been watching Donald Trump versus the rule of law. I have to say if I ever write a book that's my title. I'm a big Scott Pilgrim fan. It's probably too obscure of a reference for anyone else to get. Apparently, it was for my sisters. This is why I have to explain my jokes to my students when I teach by the way.

Barb: Scott Pilgrim, is everything to do with Thanksgiving?

Joyce: Barb, I adore you. That was a nice try, but the answer is no. Okay. So after you finish listening to the podcast, if you haven't, go and watch Scott Pilgrim. But onto the serious stuff because what's happening in Manhattan this week is not a joking matter. It is just clear that it is dead serious.

We now have a complete jury including alternates. This is Friday afternoon when we're taping. Things may change by Saturday morning. But right now, we're already starting to see the ways that defendant Trump impacts the process. There are concerns about juror's safety that are making this feel more like the trial of a mob boss than of a former president.

So let's start with basics, Jill. The theory of the case, lots of folks suggested before this trial that the case was not important, that it was just about a porn star or about minor bookkeeping errors. And as it has shaped up with the judge and lawyers talking to potential jurors, what are we learning about the case and its importance this week?

Jill: We're learning a lot, and some of it is things we should have known from the very beginning. And maybe, we should have started calling it what it really is. It's been called the hush money case. It is not the hush money case. There is no crime for paying hush money.

This is a case of election interference. It is paying someone for silence to prevent the public from knowing the truth about the candidate. It's not a minor bookkeeping error. It is a deliberate conduct that was intended and did probably get a business deduction for something that had nothing to do with the business.

So it's a violation of the tax code. But mostly, it's not just a misdemeanor which mistakes in bookkeeping would be. But if they are in furtherance of another crime, then they become a felony. And here, there are several crimes alleged to have been the reason for the fake news in the bookkeeping entries. And some of those are election interference ones. So that's why it's important. It's as important as the other cases, maybe not as dramatic and compelling, but it is an important case. And I think we're seeing it's also not just about a porn star. It's about a porn star who seems more credible than the former President of the United States.

Joyce: Oh, Ouch, Jill. But I agree. Barb, we are former federal prosecutors. We are used to rather a different jury selection process than what we saw here. Were you surprised by how quickly they got a jury? And are you worried about any stealth jurors sneaking onto the panel?

Barb: Yes. So it took about a week, right? Monday through Friday-

Joyce: Yeah.

Jill: Minus Wednesday.

Joyce: Wednesday off. [inaudible 00:12:01].

Barb: That's true. [inaudible 00:12:02] So it went reasonably quickly. And what was interesting about it is they used this questionnaire, which I think is helpful, but they used the questionnaire in an odd way. When I used questionnaires in federal court, we had them fill them out in advance, and we reviewed all the answers so we could do a lot of pre-striking for cause pre-challenge for cause. This all occurred in the courtroom.

So that made me think it was going to take a long time. I really credit the judge here with moving things quickly. But I wonder responsive to your second question, whether he was not so efficient at the cost of accuracy because the way it was so efficient, I think, is that he asked everybody to sort of self-identify if they thought they couldn't be fair to Donald Trump, and they all left the case.

And so there was never really an opportunity for the parties to ask them follow-up questions. They just sort of self-identified, and off they walked. So then you got down to this other set of people. I think it would be fairly easy for somebody who really wanted to be on this jury for one reason or another. And I always worry about somebody who wants to write a book about it, and they're not there really just to do their duty as a citizen and decide the case, but they think this is going to be their 15 minutes of fame, and they're going to give a bunch of interviews and sell books and other kinds of things.

I always worry about that. So I think it would be possible for someone whether they've got it in for Trump or they're a Trump supporter to sneak in. They did get asked a number of follow-up questions relating to their sources of news, their employment, their membership in organizations, their attendance at Trump rallies. But you can be a big Trump supporter, I suppose, without ever having attended a Trump rally. So I do think there is some possibility of either way, somebody who's on that jury who may still have some biases. So we'll see how it plays out. But I think the judge put a primary focus on efficiency over thoroughness. We'll see whether that was good or bad.

Kim: Can I devil's advocate that-

Barb: Yeah.

Kim: ... or see the opposite view? I think it's definitely almost impossible that somebody went in for the purpose of jury nullification. I know there had been some social media posts urging New Yorkers to go do jury duty and try to get on the jury so that you can ensure that you're... First of all, you have to be called to jury duty. They draw from their own system.

You can't just show up and volunteer for jury duty. Once you were in there, it was not until the people who went into jury duty that day for any number of trials that were happening, it wasn't until later in the afternoon that they even knew which trial that they were going to be put on. A lot of the juries leaving that said they were actually surprised to find that it was the Donald Trump trial.

They had no idea that they would be on there. And I think just asking people like, "Look, do you have a problem? Do you have any issue? Do you believe you can't be impartial in letting them go," was a great move in part because it keeps the jury selection from taking

up so much time and giving Donald Trump grounds to say, "See, they're just trying to keep me off the campaign trail." This is just meant to stymie my presidential bid.

And also having been a juror in New York in both the state and federal courthouses, but in the state, they're incredibly efficient for the number of people coming in and out of that building for the number of trials that are going on in any one time. They have got efficiency down to a tee. And there's also a lot of specific rules in New York in terms of juries and trials that I think make it extra, extra safe that are meant to extra, extra ensure that a defendant has every protection possible way more than in federal and other courts. So I just think that the idea that this jury, somebody can purposely try to throw this jury is really, really low.

Barb: Yeah. And I don't mean purposely throwing the jury they were put in place-

Kim: Even inadvertently.

Barb: ... by Trump [inaudible 00:16:01].

Kim: It was quick, but it's thorough. It was quick, but it's thorough. I mean what you-

Barb: Right. I can't hold out jurors, right? There can be people who get in there and say, "I don't care what the facts are."

Kim: They're happy. There can always be a holdout. But what I'm saying is I don't think that there's any greater chance here than in any other trial. That's always a trial. But I don't think you're saying substituting efficiency for thoroughness. I think that they're very thorough.

Jill: I think they were thorough and efficient, but I don't think either of those things prevents someone who really wants to vote in a way that is predetermined from being on the jury.

Kim: But more so than any other trial?

Jill: The only reason it's more so than any other trial is because who the defendant is. Most people don't care about the outcome and are totally unbiased in coming in, and they have no predetermined outcome in this case. There may be a MAGA Trumper or a never Trumper who is determined to see justice done as they perceive it.

And if they lie, they may get caught as some did because there will be checks on their social media posts. And so they may be discovered to have misrepresented whether they were Trumpers or not Trumpers. And so yes, there's more chance that that could happen, but the system isn't why that happens. They did a great job. I think the judge was amazing in how he handled this, and I think it was the right thing to say, self-identify if you don't want to be on this jury. It saved a lot of time. It was efficient, and it was thorough. But I still think there is a risk. I don't think there's a risk that 12 people snuck by, which means that the worst you're going to get is a hung jury. You will not get an acquittal or a conviction without evidence to support one or the other.

Joyce: Okay. So that's efficiency and process. Barb, I want to dig a little bit deeper and ask if you think the judge put enough alternates on this jury. I mean six, that's a lot of alternates. I'm not sure I've ever had that many on a case except for one that was meant to go many, many months one time.

But a big question here has been juror security. We've had opting out after they've been selected because they're worried. Do you think that there are enough alternates to get us through the trial, and might the judge have to consider sequestering the jury?

Barb: Yeah. I don't know. I agree with you that six sounds like a lot. In a case like this, I would ordinarily expect maybe two, but I think it's wise to have six, and it may very well be in the end that it's not enough. And I think the reason is you have alternates in case maybe a juror gets sick or something happens, and they're not able to complete their service. You've got somebody who's been there all the way through. And by the way, in the court where I was a law clerk, the judge I clerked for never told the alternates who was the alternate because they didn't want anyone to pay less attention thinking like, "Well, I'm never going to actually get [inaudible 00:19:01]"

Jill: Oh, great idea.

Joyce: It is so weird how they do it.

Barb: He would put numbers in a hat and pull them out and say, "You're the alternates," so that everybody would listen equally. But here, they have actually a different selection process. They get 10 peremptories for the main jury, and then they get two more for the alternate. So it's definitely different here.

But nonetheless, the number, I think that there is some risk that we will see more happen like we did with juror number two earlier this week. She got seated early. She's all set. And then she comes in on the second day and says, "I don't think I can be fair anymore because I've been outed." My friends and my family are all saying, "Hey, is this you," because media on TV, there was someone saying juror number two used phrases like, "No one is above the law." And a broadcaster said, "I'm not sure I'm comfortable with that answer."

That's concerning. And then by the time you find out where she lives and where she works-

Kim: That's Aunt Teresa.

Barb: I know, exactly, like, "Hey, is this you? This sounds lot like you."

Kim: Yeah, which is a problem.

Barb: And so she's worried about... So imagine it doesn't take much to think about, we're a little worried about juror number seven. Juror number seven seems like she might be a good government juror. And so let's bait her a little bit, right? Let's start talking about her. And then she gets worried. And so now, she's off. And you have to use an alternate to replace her. So if those kinds of shenanigans continue, then I do worry whether six is enough. So

six sounds like a pretty good number. I think the case is expected to go, what, maybe about six weeks? So you can lose one a week. I guess it's a good number-

Joyce: Oh my gosh.

Barb: But I don't think it's too many.

Jill: And you know what? You asked about sequestration. I am sort of surprised that they aren't doing that, and I hope that they will reconsider it. The Watergate jury was sequestered. It prevents them from being exposed to media that they shouldn't see, which if they're walking down the street and they see a newspaper headline, it's going to give them information they should not be seeing. The threats that we're worried about in terms of security would be eliminated because they would be safely guarded by protection for the jury. I think it's something that needs to be considered. And, yes, six weeks is a long time and it is a huge court.

Kim: So how long was that Watergate trial? That was my question.

Jill: Well we started, basically they were sequestered by about October 1st. They had a verdict on January 1st.

Kim: Oh wow. That's a longtime.

Barb: Yeah. That's dreadful. Can you imagine?

Kim: I would really worry-

Jill: That meant Thanksgiving and Christmas.

Kim: I would be worried that people would not want to. I would try everything that I could to get off a trial if it was going to be sequestered. And I think that that would've delayed jury selection. I also think just one last point about jury selection, how New York is different than other places. Whenever I've been on a jury, the questioning was done, as Barb mentioned, by a questionnaire that lets you weed out people ahead of time.

And then the questioning was done by a judge. In this case, the attorneys do the questioning. And I believe that's one of the things in New York that is put in place, a New York rule that's put in place to reduce the chances that a verdict can be overturned based on improper jury selection or something like that, because the lawyers themselves have a say in who is on the jury and questioning them themselves, and they have more peremptory challenges.

But I think because it's the lawyers that was asking the questions is what made it so much more information about these jurors be said in open court in a way that a judge probably wouldn't have done it. So I think it's sort of a balance of interest, right?

You want to have everybody happy with the jury and not launch challenges against it later or something being missed. But on the other hand, I really wish the judge had put down an order that prevented any sort of identifying information. He should have known

what would happen to people if their identities were disclosed during the course of this trial.

And in the early days when those people were able to be identified based on what was said in open court, that's really awful. I know he admonished Warren because he can't stop them. But admonished Warren the press not to report identifying details. It's up to him. He's in charge of that courtroom. And I was really, really surprised that he was not more circumspect about what needed to be put on a document and given to the attorneys as opposed to set in open court.

Barb: Hey, Kim, I'm interested in... I just don't know the answer to this. Do you think he could... Is it a prior restraint to say-

Kim: I'm sorry.

Joyce: Absolutely.

Kim: I give you a prior restraint.

Barb: All right. You've already prior restrained me. So if I'd walk into court, I can look and see juror number one is a tall, middle-aged woman. And I can see that juror number two is a short, elderly Black man, whatever it is. Can the judge prohibit the press from reporting on what they can see with their own eyes in the court? Is that not a prior restraint?

Kim: So yes and no. So what happens is if a judge does that, I do believe that the chances are great that they will have been found to engage in a prior restraint. Of course, just because there is first amendment protections doesn't mean that it's limitless.

If there is a compelling state interest in trying to do, it has to be really compelling for a prior restraint. It's more compelling than the Pentagon papers. So I think the chances are that it would be found to be a prior restraint. But what happens in practice when you cover a court is that it's understood in the rules that reporters are not supposed to give out information about jurors. And the news organizations agreed to that as a condition to having access to the courtroom.

So there are certain things that you can and cannot do. You do it once, you better have better have shot, gotten what you want because you'll never cover. And your news organization may never be allowed in that courtroom again.

Jill: And I think, Barb, what happened here was careless on day one and was corrected as soon as it was seen that if you identify someone as working at a name law firm and name the law firm-

Barb: Yeah. They changed that, you're right, on day two.

Jill: ... then you go online. You look up that law firm and you can see the pictures and you know who it is. And when you give significant details, like person lives alone with her fiance in this neighborhood, and as an oncology nurse, of course, you can identify who that person is. And because of what is a very real threat in this case of danger to the

jurors, you have to avoid that. And I think the press you could see on day two people going, "I would say X," but I'm not going to because I'm being careful to protect the jury. And so I think that the press is being cautious, at least for now.

Barb: And they sure weren't on Monday. There were a couple outlets that were really outing people in a very reckless way.

Joyce: Well, I think that was individual people, and it was reprehensible.

Barb: Yeah.

Joyce: So fun fact you guys, did you know that until the early 2000s, all juries in the state of New York were sequestered by state law? And for some of the reasons you identified, the fact that jurors hate it, that it means a lot of people can't serve, right? People who can't be away from their families for that long or their jobs can't serve.

They actually changed the law so that now sequestration, I don't think frowned upon is correct. That might be too strong. It's just no longer the norm. But I'm very surprised that we didn't see... I mean everything that's happened this week was predictable. And to me, this is the one misstep we've seen from this judge so far. I think it's forgivable. He wanted to handle this case like others. But it just, I think, puts everybody on notice of just how bad the Trump environment is, how toxic it is.

Jill: And Barb, you suggested something that I had never heard of, which is sort of protecting individual jurors so that a person... I don't know what the New York state equivalent of a US marshal is, but that a person of that same type is assigned to each juror to accompany them to and from court, so that they will not be in danger. Maybe even if there are specific threats to guard their home so that they would be safe from the things that we worry about in terms of physical harm, intimidation, if someone gets a threat through email, then they would pursue that.

So I think that might be something that's less onerous than being sequestered for at least six weeks. And I don't think at this point you can sequester them because you've picked a jury who wasn't told they would be sequestered, and that would've changed the dynamic.

Joyce: You can't lock them up now. I think you actually can if something really bad happens. But I tried Dixie Mafia cases where we had real concerns about juries. We were trying entities that used murder as a form of enforcement against snitches.

And something that the US marshals would do is they would create a random rally point. All of the jurors would assemble there, and then the marshals would escort everybody to the courthouse. They were very careful to make sure that they were never followed leaving the courthouse.

And that seemed to make the jurors pretty comfortable. So there are intermediate steps the judge can take. Okay, I want to shift gears because right now while we're taping the podcast, the Sandoval hearing is underway, and the judge at this point is painstakingly with the lawyers going through every incident that the prosecution has identified that they

might want to use to cross-examine Trump if he testifies. So Kim, what is a Sandoval hearing? What is going on here?

Kim: Yeah. So what that is a hearing that gives the defendant's attorney a chance to indicate whether they may, they don't have to, whether they may call the defendant as a witness. And if they do, what areas can be questioned about that are relevant to this trial and also what the cross-examination from the prosecutors, what areas they can ask about too?

And what this is focusing on are trying to nail down some prior bad acts, prior criminal and non-criminal bad acts that Donald Trump may have engaged in that could come in if he chooses to testify, and they would focus primarily on some other civil and criminal. Actually, they're all civil, right? Civil cases from New York that Trump was previously-

Joyce: He has no prior criminal convictions. [inaudible 00:29:42]

Kim: Yeah, no prior criminal. This is the first criminal, right? This is the first one. It feels like this should be like the 18th already.

Barb: Yeah. How can that be?

Joyce: No kidding.

Kim: This is the first one, but it's for civil matters that Trump was involved in. One was involved in his charity. Remember, he was no longer allowed to be a board member or run any charity in the state of New York. One was the Trump Corporation case that sent Allen Weisselberg to jail. One was a failed, frivolous RICO case that Donald Trump brought against Hillary Clinton, and one was the recent E. Jean Carroll that resulted in a verdict against him for sexual assault and defamation.

I think one of the things, some of the things that the prosecutors are going to want to hone in on are sanctions that Trump has faced, sanction for filing a frivolous lawsuit, sanctions for violating gag orders, sanctions for improperly using funds for his charity, just other things that he has done that shown him to be untruthful and engaging in fraudulent acts that can be used. In this case, it goes straight to it. If you're talking about fraudulent use of business records for the purpose of concealing a crime, it would get right to that. Of course, his attorneys will try to limit that, but that's what's going on here.

Joyce: So it's really interesting to me that for the DA's office, the attorney who's arguing this, Matthew Colangelo is the lawyer who led in a different job in earlier job, the New York Attorney General's successful attack on Trump's charitable entity, and that's one of the incidents that they want to be able to cross examine him on.

We know that this gets under Trump's skin because he's repeatedly identified Colangelo by name in some of his social media posts. And it'll be interesting to see if Trump is going to violate the gag order again and identify Colangelo. We will hear more about that and about gag orders in a hearing Tuesday that I'm sure we'll be talking about next week. But last question, it looks like we are geared up for trial Monday morning. We'll hear opening statements. I want to go around the table. What are each of you expecting to see next week, Jill?

Jill: Joyce, before I answer that, I just want to add to what Kim said that in addition to possibly having these pieces of information before the jury as proof that goes to the substantive crimes he's charged with, if that's rejected, if he testifies on his own behalf, they certainly can be used for cross-examination purposes about his credibility.

Joyce: Well, not certainly though. That's the whole point of the Sandoval hearing, is that the judge goes individually through them, and he has to engage in this balance of are they more valuable to the government than they are unduly prejudicial to the defendant. That's really the core of the Sandoval hearing.

Jill: Right. And the prosecution has asked for a decision as to both of those elements.

Joyce: Yeah, exactly.

So I think we need to keep that in mind. But going to what's going to happen on Monday, there will be opening statements, which is an opportunity for both sides to lay out what they expect the evidence to show. They cannot testify. But they can say, "We expect to call these witnesses who will say the following." Juries pay close attention and will look at whether or not they live up to their promises when they are done with the trial.

Now, there is something that not a lot of people talk about, which is the defense can waive opening statement and wait until before they start whether they decide to make a defense and then before they present their case. I've never seen that in all my years as a prosecutor or as a defense lawyer.

And that's because you don't really want the prosecution's version of events to be un rebutted. And so it's very rare that you would say, I'm not going to bother rebutting it now. You would want to put something forward in an opening statement, and I see very little advantage to not doing it here. So I expect both sides to make a presentation of what they expect the evidence to show.

Barb: And Jill, I've seen that happen. And I agree with you.

Jill: I have too.

Barb: I think it's a mistake too. I think it's a mistake, and they say we're deferring our opening statement. It's like in a football game when you defer the kickoff to the second half, which I also think is always a mistake because you want to go on the offensive, right? Get in there, score some points.

But they defer opening until after the government has rested. And I think the advantage in that situation, Jill, is when you're not sure what your defense is going to be. You want to see how the witnesses come in. If the witnesses aren't bad, you think your client can win. Maybe you don't put on any defense at all.

And so you just say the government has failed to prove the case, but if you think it came in well, maybe, now it's an alibi or now the client's going to testify or something like that. So I think in certain cases, there may be a strategic reason to do it. But I agree with you. I

think ordinarily, you want to get in there and say, "Hey wait, there's another side to this story."

Kim: That would be so weird. That would be so weird. Yeah. As for what I'm looking for next week, it's really going to be whether or not Judge Merchan and how Judge Merchan holds Donald Trump accountable for his multiple violations of the gag order that he's on.

He cannot seem to help him himself. We have seen from the Engoron trial that fines don't matter. It's just that's no punishment at all, no deterrent at all to him. And in this case, especially given if he's talking about witnesses, he's already tried to intimidate witnesses who's to say that he might say something about jurors. If he violates these gag orders, there needs to be a actual punishment for him. I know he seems to be egging for a jail sentence that he thinks it'll help him politically.

I say give it to him, call his bluff on that, see how much he likes it. But if I were using my cell phone, if I was a defendant, if I was posting all kinds of things about the people in the case and the judge and his family, I would've been in jail. So I would love to see real accountability on that.

Joyce: I think that's such an interesting point because when the DA's office filed this motion in the gag order, they cite a specific section of the New York Code, section 751, and what it permits the judge to do if there is a violation of the gag order that's just right in front of the judge. And I sort of think that when you post on social media, you can say that that's right in front of the judge. That's clearly the DA's theory of the case.

Then the defendant who violates the gag order of the party can be fined \$1000 per violation, or they can go to into custody for up to 30 days. So what the judge can do is cabined by the law, and I bet you what we'll see if the judge decides to put Trump in custody is he won't go straight to 30 days. Right?

He might do it for overnight in the courthouse lockup. And if that's enough, and if Trump can behave, that's great, but if Trump proves that that's not enough, then the judge can continue to do more and more. And I like the strategy of letting Trump show the judge what he deserves for punishment because that can't be assailed on appeal. I am so with you, Kim.

Barb: So I am all for locking up Donald Trump for violating this gag order because he is most certainly... has intimidated witnesses and jurors and all kinds of things. But I have a couple of questions for you, Joyce. Number one, do you think that posting something on social is the same as committing it in front of the judge?

Certainly, that rule was written before social media was a thing and couldn't Trump say, "Who knows if it was me?" I have people. So that's one thing. And then the other is what do you think about the Secret Service consequences of locking him up overnight? I guess he can have his celly be a Secret Service agent in there with him or does it require-

Kim: Right outside of-

Barb: Maybe, or does it require that it be some sort of secure home confinement instead of in a jail cell where you could have concerns about the safety of the jail cell, that a terrorist organization could come bursting through the door because it's not properly secured or something like that..

Joyce: Yeah. I'm so glad that you asked the question because I have answers. Even though this is my turn to ask the questions, I'll answer them.

Barb: Yeah, sorry.

Joyce: No, I mean I think it's really interesting. I do think that a social media post that the judge can observe rings the bell of the language and the statute. I spent a lot of time reading it and looking at cases. And it's clearly the DA's theory.

They have no other basis for asking the judge to put Trump in custody. And as for whether or not he can go in, okay, so I'm going to maybe talk a little bit out of school here, but my understanding from some friends at the Secret Service was that there was talk among Trump's team at a much earlier stage where it looked like there was some risk that he might be arrested.

The team actually sort of developed a plan for what they would do if Trump was arrested. And you know what? That's what the Secret Service's job is? They don't get to set the rules for when a protectee gets arrested. Their job is to keep them safe if it happens and to follow the procedures set forth by the arresting agency.

Look, they could put Trump in the lockup in the courthouse here in Manhattan, or they could put him in the Marshal's lockup in the federal system. There are back and forth arrangements between those two for custodial holding. There are a lot of different ways to do it, but the fact that Trump gets Secret Service protection does not insulate him if the judge finds he violated the gag order [inaudible 00:39:28]

Jill: And Joyce, as you know, Eric Holder, our former attorney general, has already said, "Yes, he can be handled in the federal prison system, that it would not be a problem to incarcerate him." So I think your answer is 100% correct and is supported by Attorney General Holder.

Joyce: Well, I always like to be on the same side as the boss.

Kim: No. I was just going to say as for where the Secret Service are, I've reported on this as well. And the most likely scenario was that you can station an agent just outside the jail door. They may set up a bit of a parameter. So maybe, there can't be somebody in the cell right next to them or with the ability to stick something into their cell or something. There'll be a parameter around them, but he can sit right in that jail cell and pour a Secret Service agent task.

Barb: Yeah. That's an enviable assignment. Yeah. What's your assignment? Oh, I'm going to accompany the president to the White House Correspondents dinner. How about you? I'm going to jail. I got the bottom bunk.

Jill: Kim, I just got something wonderful. It's a sunblock and makeup primer, and it's from OneSkin. I only came today, so I can't wait to try it. Have you had that yet or what are you using from OneSkin?

Kim: Yeah. I have not tried it yet, but I really love the night cream especially to wake up feeling and looking at least looking like you got more rest than maybe even you did. It comes in real handy. There's nothing like the feeling of being confident in your own skin. That's why we have to tell you about today's sponsor, OneSkin. Their products make it easy to keep your skin healthy while looking and feeling your best. No complicated routine or multiple step protocols, just simple scientifically validated solutions.

Jill: The secret is in OneSkin's proprietary OS-01 peptide. It's the first ingredient proven to switch off the aging cells that cause lines, wrinkles, and thinning skin. And they've got several studies to back it up. We've been using their products for a while now and we're hooked.

But don't just take our word for it. Oneskin has over 4,000 five-star reviews and were recognized by Fast Company as one of the most innovative brands in 2024. Plus, for a limited time, you'll get an exclusive 15% off your first OneSkin purchase using the code Sisters, when you check out at oneskin.co. Try OneSkin and enjoy younger, healthier skin without all the extra steps.

Joyce: OneSkin's Head-to-toe Skin Health Trio has revolutionized my routine. I love having total coverage, and I know I'll be at my best with it. The formulas feel amazing to apply. It's a lot like getting a full body massage. The regimen has worked so fast, and it's really easy to use. I look forward to my OneSkin routine every day. And now, I take it everywhere with me when I travel. It's a major power player in my self-care routine, and we know you'll love it too.

Barb: Oneskin is the world's first skin longevity company. By focusing on the cellular aspects of aging, OneSkin keeps your skin looking and acting younger for longer. Get started today with 15% off using code, Sisters, at oneskin.co. That's 15% off oneskin.co with code, Sisters. After you purchase, they'll ask where you heard about them. Please support our show and tell them we sent you. You can find the link in our show notes.

Speaking of trials, there was another trial set to start this week in the impeachment case of Homeland Security secretary, Ali Mayorkas. Back in February, you may recall that the house charged in two articles of impeachment Ali Mayorkas for failing to enforce immigration law at the southern border and for breaching the public trust by misrepresenting to the public the true state of the border crisis.

So it may be this escape people's notice with all of the fanfare going on with the Trump trial, but this happened this week. And ultimately, we saw a last-minute avoidance of the trial, and we'll talk about that in a minute. But first, the idea that a cabinet secretary is impeached seems a little odd. First, Jill, can you remind us what the standard is for impeachment under the Constitution?

Jill: Oh, I certainly can. I know it well, as we all do because we've all witnessed multiple impeachments and the standard is high crimes and misdemeanors. Now, that's obviously

not exactly clear because it doesn't mean that you violated some specific statute that is a crime, but a high crime or misdemeanor is something that has been well recognized as being not a policy difference between the parties, but something that is much more than that.

And it is very clear that the accusations here are policy differences that have nothing to do with crimes. There was in 1840 something, like, 150 years ago, there was one cabinet member who had some articles of impeachment, voted and then resigned before there could be a trial, sort of like Richard Nixon who had impeachment but resigned before the trial, and he was charged with corruption for payoffs and other stuff that is the former secretary who was charged. So that would've qualified for impeachment. The charges against Secretary Mayorkas do not qualify, do not meet the standard even remotely.

Barb: Kim, as Jill says, it seems unusual to impeach a cabinet official. The President can be impeached, a Supreme Court justice could be impeached because there's no one able to fire them. For the president, they've been elected. For Supreme Court Justice, they've been nominated and confirmed for life. Why can't a cabinet official just be fired by his boss?

Kim: Well, the answer is he can. And it happened a lot in the Trump administration recall. It has not happened yet in the Biden administration. President Biden is perfectly fine with Secretary Mayorkas and the job that he's doing. We have seen Donald Trump fire just about... Is there any cabinet member he didn't fire? I think Elaine Chao finally resigned after January 6th. Maybe, he didn't fire her, but he fired both.

Barb: Or as did the secretary.

Jill: Secretary of Education. Yeah.

Kim: Right. Yeah. A couple escaped, very few escaped Trump.

Barb: They escaped. They escaped.

Kim: But yes, the cabinet secretaries are an unusual beast that they do serve at the pleasure of the president, which means that the President can fire them but also can be impeached. And the fact that this was a political stunt is why House Republicans tried to use impeachment as a way to remove him from his job, knowing full well even when the thing started, that it wouldn't be successful, that the Senate would not vote to convict him even if the House got articles of impeachment to the floor wouldn't vote to impeach him.

Barb: Yeah. In fact, that impeachment vote in the House was by a one vote margin. Even some Republicans voted against impeachment. But by a one vote margin, Mayorkas was impeached. And then of course the next thing that happens in the process is a trial in the Senate, and that was scheduled to begin this week, but Joyce in the Senate trial, Senate Majority Leader Chuck Schumer chucked the trial altogether by dismissing the charges as unconstitutional... See what I did there? He dismissed the charges as unconstitutional or the Senate agreed to dismiss the charges as unconstitutional. What's the basis for that move? How is it unconstitutional?

Joyce: Yeah. I mean it was just really a clear legal argument. Impeachment can only be done if there's a high crime or misdemeanor that's been committed by the person that you're trying to impeach. Beyond that, there's no constitutional basis for impeachment. And so Schumer argued that none of the conduct that they had accused Secretary Mayorkas of amounted to a high crime or a misdemeanor, no basis for doing it. It was unconstitutional, and that here was game over.

Barb: Yeah I think the theory was he's not doing his job. His job is to enforce the border laws. He's refusing to do that. And so his failure to do his job is neglect of office or something like that. Why is that not a high crime or misdemeanor?

Joyce: Yeah. I mean the argument here is that the facts don't align, that there's nothing that's consistent with prior precedent on what constitutes high crimes or misdemeanors. It's a little bit of a duck, but by the same token, it was entirely appropriate given the really shameful allegations that were made.

Barb: Yeah. And I think the idea is it's really just policy disagreement. And that is if you don't like the policies of the president, the remedy is to vote him out of office, not to attack his cabinet officials through impeachment.

Joyce: Yeah. It just doesn't ring the constitutional bell. It's a little bit like if the players from another team tried to fire the best hitter on an opposing team. It's like you don't get to fire the players for the opposing team.

Barb: Oh, I love it when you use sports analogies.

Joyce: I do it so rarely.

Barb: Those are the best.

Jill: You'll never catch me doing that.

Barb: Jill, let me ask you, do you think Schumer's move is a savvy one? Democrats probably think it is, or is it just the Democratic Party equivalent of a Mitch McConnell move who refused to permit a vote on nominees to the Supreme Court, power move exercise of power that some might see as overreach and could be used politically later to come back to bite him? What do you think?

Jill: Well, now that you mentioned McConnell, he did vote against the second impeachment of Donald Trump on this very ground. So it's really disingenuous of him to now be saying that this is wrong. As to whether it's politically savvy, I'm definitely not a political commentator, but I do have an opinion. That's because I started thinking about your question, and I made a list of 12 factors and only one of them could possibly be seen as not supporting Schumer's move.

Barb: Wow. 12 factors. Go.

Jill: Well, okay, I will. I'll start with the one that I thought was, well, maybe there isn't a reason, and I don't think this is exactly what people have in mind and the reason that

maybe they should have let the trial go forward is because it would've showed the absence of any evidence.

So it would've actually helped Democrats to have the trial and to show that it was only a policy difference, that it wasn't corruption or high crimes or misdemeanors. But on the other hand, I'll name just some of them because, otherwise, we'd take too much time. But first of all, it would be a waste of time. It's not a high crime or misdemeanor. It could never meet that standard.

It would waste the Congress's time when they should be passing a border bill that they already had before them, a bipartisan one. And so they shouldn't waste their time and taxpayer money on something that we know what the vote is going to be anyway.

It's not going to go forward. It's not going to convince anyone to change their mind on either side. They have pre-existing views. And so why bother with it? It could show that the solution is the bipartisan bill and not impeaching Mayorkas.

So why go ahead with it, or maybe that is a reason to go ahead with the trial is that it would show that. Only other cabinet members I said before was impeached for actual corruption. And so this doesn't, again, meet the standard. The bar for impeachment would be so low if this trial went forward that it would be meaningless.

It would not be a meaningful sanction. So it shouldn't go ahead for that reason. There is no evidence that would be presented. Even Republicans don't support going ahead with this. Obviously not all, but enough that it didn't go forward in the house, that there were people who would've voted against it.

And policy differences have alternative solutions, you pass legislation to solve those. You vote someone out of office who appointed the person, so you don't need to go forward with a full trial. I think one of the most horrifying things that as I was researching this, I saw was Representative Greene said that he was deporting Mayorkas using the word deporting Mayorkas from his position.

Barb: Yeah, I saw that too.

Jill: Just was like, that's what this is really about. This is the, "Oh my God, I thought that was horrible."

Barb: It was highly inappropriate, I thought.

Jill: So yeah, those are some of the reasons that I came up with.

Barb: Okay. Well fair. I think you make a good point. Kim, do you think, and Jill hinted at this a little bit, that these repeated uses of impeachment, we are seeing this weapon used more and more. It used to be a very rare thing. And now, it seems commonplace. Trump, it got impeached twice. Now, Mayorkas gets impeached. There's been an impeachment inquiry of Joe Biden. Do you think that it will have either the effect or that maybe there is even the intent of diminishing the impact of impeachment altogether, like, to neutralize it as a tool?

Kim: I would say that it would, but for the fact that the impeachment power was pretty much killed in the two Trump impeachments, which I should say were not brought up for political reasons, in my opinion, that they were based on actual facts of actions that you do not want to see in a president, that it was a president violating his oath and committing high crimes and misdemeanors, one which was trying to extort President Zelensky for dirt on Joe Biden.

We have seen what has happened in Ukraine, and that in itself is validation of that inquiry and that trial. Ad the second for January 6th. Donald Trump should have been impeached for both of those things. And the way that Republicans absolutely, for political reasons, prevented both of those convictions, including Mitch McConnell in both instances, I think, rendered the very important impeachment power as a guardrail for our democracy rendered them basically useless at that point. So at this point, what are you going to do? Beat a dead horse is dead.

Barb: Yeah. I have a theory too about overusing impeachment as a tool. One of the things I wrote about in my book about disinformation is how in Russia, part of the strategy is not to convince you that Putin and other leaders are not corrupt. It's to convince you that everyone is corrupt.

Everyone in the system is corrupt. So there all crooks and truth and honor and integrity is for suckers. And one way you say everybody is corrupt is by impeaching. Everybody gets impeached. So it's no big deal. So sure Trump got impeached, but everybody gets impeached. It's just a political weapon, and it doesn't really mean anything. So I think it is to the harm of our institutions of government to see it used in this way in a very political way.

Well, Joyce, let's get to the main issue here then, which is it seems that the real issue is addressing immigration. Immigration is a challenge. And even Majorca says that our immigration system is broken, but it feels like Republicans. And we've seen this, that Donald Trump didn't want Republicans to accept a border bill that could have made some inroads on the immigration system because he'd rather use it as a political issue, a wedge issue for the upcoming election. Is there some more constructive way to deal with the issue of immigration, and why is it we are unable to make any meaningful reform on immigration in our country?

Joyce: There was an exchange on Fox News of all places yesterday that really illustrated the question that you're asking and the answer. It was between a host on Fox and Oklahoma Republican Senator James Lankford. And the host says to Senator Lankford, "It was your colleagues in the Republican Party who torpedoed your border bill, not Democrats." And I'm sort of jaw dropped because this is a host on Fox.

And Lankford says, "It was. Trump said 'Don't fix anything.' So my colleagues looked for a reason to shoot against it." And that of course is God's truth. So the host then keeps digging, and he says, "That's on Trump." And Lankford's response pretty much answers your question, Barb. He said he, Trump, has got an office he's running for.

Solving difficult problems requires a commitment to real leadership, not just partisan politics. And no one gets everything that they want in Congress. It's meant to be a system that works on compromise. The immigration deal that Republicans walked away from

gave them virtually everything that they have been asking for, for years, and it still wasn't enough. All they wanted was an election issue that they could run on, not a fix to one of the nation's critical problems. True immigration reform is simply not going to be possible until that changes.

Barb: Yeah. It's very frustrating that it seems that rather than governing, our elected leaders are always campaigning.

Kim: As believers in sustainability as we are, we would love for you to commit with us to use only environmentally friendly toxin-free products whenever you can. And you know where a great place to start is? Your kitchen. It's especially critical to use all-natural products when you're cleaning near our food. And so many cleaning goods come wrapped in plastic, which is terrible. That's why we switched to Reel's New Bamboo paper towels.

Joyce: Like all Reel's products, their paper towels are free of ink, dye, BPA. And they're 100% tree-free. The packaging is plastic free too. Even the box tape. Other so-called sustainable paper towels don't cut it. Their public restroom quality, AKA flimsy, unabsorbent, and rough. And who needs that?

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Jill: It sounds too good to be true, but it is true. Reel Paper is available in easy hassle-free subscriptions or for one-time purchases on their website. All orders are conveniently delivered to your door with free shipping in 100% recyclable plastic-free packaging. If you go to [reelpaper.com/SIL](https://reelpaper.com/SIL) and sign up for a subscription using our code, SIL, at checkout, you'll automatically get 30% off your first order and free shipping. That's R-E-L-P-A-P-E-R.com/SIL, or enter promo code SIL to get 30% off your first order, plus free shipping. So let's give Reel's tree-free paper a try. Reel is paper for the planet. You can also find the link in our show notes.

I felt like I was back in law school reading the opinion in *Muldrow versus St. Louis*. It was a rare unanimous decision of the court, but with three separate concurring opinions. Not only did the unanimity make it rare, so did the headlines that read Supreme Court makes it easier to sue for job discrimination.

We've seen a long list of cases that make it harder to bring discrimination suits, to bring voting rights, suits, et cetera. We no longer expect the court to make anything easier for plaintiffs based on gender, or race or ethnicity. So let's go beyond the headlines. And,

Kim, can you tell us what the facts and the procedural history of how we got here with this case?

Kim: Yeah. So in layman's terms, this was an employment discrimination case brought by a police officer in St. Louis who claimed that she was transferred to a less desirable position because she was a woman. And she sued under Title VII, which is the job Federal Gender Discrimination statute that prohibits that.

So in appellate courts, in some federal appellate courts, they have ruled that in order to bring a claim to even state a claim that you were discriminated against based on gender or any other prohibited reason, you have to show some sort of substantial harm above and beyond the discrimination itself.

You have to say that your salary was docked by a significant amount or it forced you to do labor that you didn't want to do additional labor, or some other harm that you suffered except for the discrimination. In other circuits, other federal courts, they said, "No. The discrimination itself is harm enough to state a claim to bring the claim."

Whatever you have to prove of your actual damages, you'll still have to do a trial. But you don't have to state that when you bring the case itself. So the Supreme Court took up this case because that is called a circuit split. We've talked about that before. When circuits disagree, it's a job of the Supreme Court to sort of set down the law. And in this unanimous decision from Judge Kagan, the court said, "No, no. You don't have to prove substantial harm to state a claim." The fact that you were discriminated against under the terms of the statute is harm enough.

Jill: So Joyce, Kim has laid out what the issue was and has told us what the outcome of the case was. But when there's a difference in standard, when you have to prove significant harm versus you just have to show that there was some harm versus just being discriminated against is harm enough even if it doesn't change your wages or something. So let's talk about the specifics of her case. Was this police officer's harm enough to satisfy the stricter standard so that it doesn't really matter whether the Supreme Court lowered the standard or not?

Joyce: Yeah. So I think these are fact issues that are left up to trial courts and juries. And parsing the standard here is what really makes the difference because the Supreme Court held that title VII of the Civil Rights Act bars employers from discriminating in decisions like lateral transfers without requiring employees to show that the discriminatory decision caused significant disadvantage.

In other words, they no longer have to show that they lost employment status or pay. And that could be very helpful to her on these facts. The Eighth Circuit's ruling was that it wasn't enough for her to show that the transfer decision affected her conditions of employment.

They said she had to show either that the reassignment or her denied transfer request imposed a material employment on disadvantage. This might just sound like word salad, just fine parsing of language, but it has real impact on the outcome of these cases that

materially or significantly adverse standard often was a death blow to very meritorious claims by employees.

And so the fact that the court has now adopted this some harm standard will give them an easier task, but it will be up to the lower courts to flesh that out, and they'll have to decide essentially if Muldrow has enough evidence under this or frankly if she would've won under the other standard with a judge who had maybe been inclined to give her claims a little bit more credence.

Jill: So, Barb, I was going to ask you what's next. And Joyce has sort of told us that what's next is it's a fact question. So we'll go back for a hearing on the facts. And based on what the Supreme Court laid out as the allegations that Officer Muldrow made, what can we say about what she's going to show how she was hurt?

Barb: Yeah. So her allegations, and she'll have to prove them, but now she'll get her day in court, she alleged that she got reassigned to a position she was working for nine years in a plainclothes position in the intelligence division at her police department and got reassigned back to uniform position supervising patrol officers. And she said that the commanding officer said he wanted a male officer in that intelligence job. I think if she can prove that, she's probably got a pretty strong case.

And in fact, she also added, and these are the kind of details that I think can matter to jurors that instead of calling her sergeant, the male officer, the commander called her Mrs. Muldrow, instead of Sergeant Muldrow, the way they refer to everybody else. And so it may be a subtle thing. There may be some jurors who think that's no big deal, but I could see how that is a sign of disrespect if he's calling everybody else Sergeant.

So those things might matter. But she was moved to this less prestigious job. It was more administrative than it was substantive. It required working on weekends. She lost her police car that she got to take home. And so as Justice Kagan said, she was certainly worse off after this demotion, and so she'll get an opportunity to prove that the basis for this was her gender.

Jill: I for one think calling her Mrs. is end of case. I mean it is. I think that her boss, assuming this is proved in court, said out loud what is no longer sayable out loud. It was when I graduated law school because there was no EEOC. There was no protection for women. Now, there is. And you can't say these things. You might still think them, but you can't say them. So Kim, is a title VII win a rarity, or is it getting more common?

Kim: It actually isn't as rare as you think at the US Supreme Court a couple of years back, really substantial Title VII case was one with Justice Gorsuch writing the lead opinion saying that cases of employment discrimination based on gender by transgender and gay individuals falls under the language of Title VII, which prohibits discrimination on the basis of gender. And that was a big deal for federal cases and it was done in an ideological... What's the ideological version of bipartisan?

The majority went across the ideological spectrum in that case in ways that you wouldn't expect in this case the same because it was a unanimous decision. There were some concurrences based on specifics about the rationale. But overall, when something falls

clearly within a statute like Title VII that has been well established and it's just a matter of statutory construction, you get more consensus on the court often than you don't.

Jill: So Joyce, I want to go into the concurring opinions to start because I found it fascinating that, well, let's start with the one from Kavanaugh, obviously more conservative than Kagan. But he may have gone in my mind a little broader than even Kagan went because he said before, you used to have to show at least some harm or that the court now says you have to show at least some harm. And he says, "I disagree with the court's view because no court has adopted some harm requirement and no party or amicus advocated that requirement." So it's, in his opinion, adding to the text of Title VII. So what do you make of that?

Joyce: Yeah. It's really interesting. This is a unanimous opinion, but there are three separate concurrences written by Alito, Kavanaugh and Thomas, and they sort of split the baby. As you point out, Kavanaugh would maybe require plaintiffs to prove a little bit less. Justice Thomas agreed with the court's description of the standard and said, "Muldraw, her claim should fail." He just wasn't buying it. No matter what the standard was, plaintiff loses.

And Alito issued this sort of kooky concurrence where he characterized the court's opinion as unhelpful and shared that he has no idea how the guidance will be interpreted by lower court judges. Well, you could say that anytime the Supreme Court issues a new standard, right?

His job was actually to write a good opinion. So to the extent that he's critical, that's on him. But your point about Kavanaugh is accurate. It's a very odd concurrence. He goes the other direction. This isn't the Brett Kavanaugh that we know. And he would make it easier for plaintiffs to get their cases to trial. He thinks that the some harm standard goes too far because the statute doesn't require it, and that as long as the transfer decision is made on the basis of protected characteristics, it violates title VII.

Jill: Yeah, I love that. And now Barbara, I'm going to go back to the court because they rejected the city's textual claim. And, of course, you would think that there are at least six people who would support the textual complaint. And they invoke something that I, of course, I love speaking Latin, and I may be pronouncing this wrong, all you Latin scholars out there, let me know, Eiusdem Generis Canon, which is a Latin phrase, meaning of the same kind.

And that rule requires that where a statute has a general word following a particular and specific words, the general word must be confined to the things of the same kind. And so I heard that. I read that and I went, "Whoa, does this have anything to do with how the court is going to decide Fisher," where the meaning of otherwise is being does that otherwise have to be limited by the other things about documents? So tell me what you think. And anybody else weigh in on this.

Barb: It's a really interesting insight, Jill. Of course, the issue in Fisher is whether in the obstruction of justice statute, which applies to this man Fisher, who was somebody who was convicted for his conduct on January 6th, and is also charged against Donald Trump relates solely to documents. And that's because in that statute, we discussed this last

week, it has this first paragraph about whoever corruptly alters destroys mutilates or conceals a record, et cetera, et cetera.

And then it's got this other provision that says or otherwise obstructs an official proceeding. And the otherwise obstructs an official proceeding is what Fisher's been charged with. It's what Trump's been charged with and many, many others.

And this argument has been made in that case, which is you have to read otherwise obstructs only as relating to alters, destroys. Mutilates or conceals a record. And so it has to relate to documents or records in some way.

So interesting because they seem not interested in that argument in this case, but they seemed very interested in that argument in the Fisher case. And so I guess I'll come back to this.

The textualists and the originalists are inconsistent, and they cherry-pick when they want to use these things. It's like Justice Scalia in the Heller case that recognize an individual right to firearms where they blow off the militia clause. And when someone says, "Well, if we're going to go with original common meaning at the time the statute or the constitution was written, shouldn't firearm be related to a single shot musket?" And he just sort of dismisses it with the wave of a hand and says, "Oh, that would be ridiculous." So it's a fascinating argument, Jill, that I don't know that they care about consistency.

Joyce: Every time you say that, Barb, I think we need T-shirts with a big cherry tree on the front and the justices up on ladders picking like Heller and Dobbs. It's just such an important image because it's exactly what they do.

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Barb: The Helix lineup offers 20 unique mattresses, including the award-winning Luxe Collection, the newly released Helix Elite Collection, mattresses designed for big and tall sleepers and even a mattress made just for kids. There's something for everyone. Helix Designs cradle your body for essential support in any sleeping position with enhanced cooling features to keep you from overheating.

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- Jill: Helix has been awarded the number one mattress by GQ and Wired Magazine. Leading chiropractors and doctors of sleep medicine use Helix as a go-to solution for improved sleep. And now, Helix is offering 20% off all mattress orders, plus two free pillows for our listeners. Go to [helixsleep.com/sisters](https://helixsleep.com/sisters), and use code, HELIXPARTNER20. This is their best offer yet, and it won't last long. With Helix, better sleep starts now. You can also find the link in our show notes.
- Kim: Well, our listeners know what this part of the show is. It's our favorite part. It's when we answer your questions. If you have questions, you can submit them to us via email at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com), or you can tag us on your social media platform, wherever that is at #SistersInLaw, if we don't get to your questions during the show. Keep an eye on Twitter feeds throughout the week or Threads or something else because I don't talk to my ex anymore where we answer your questions when we can. First question is from Kathy in Vacaville, California. Forgive me if I said that wrong.
- Barb: Vacaville.
- Kim: Vacaville. Thank you.
- Barb: I think it sounds like eternal vacation, Vacaville.
- Kim: I know. I want to go to Vacaville.
- Barb: Vacay.
- Joyce: We used to go fishing up there. It's really pretty cool.
- Kim: Okay. So Kathy's question is seven jurors have been sworn in at the point of this now. All 12 plus six alternates have been sworn in. "The four person was selected before all the jurors were sworn in," Kathy points out. How can a four person be selected even before all 12 jurors are selected? What qualifies as a four-person, Barb?
- Barb: Yes. This is such a great question Kathy, because in many courts, including the court where I practiced federal court, the jurors themselves elect the four-person. They go back and maybe somebody volunteers, or someone volunteers them or they decide one person is maybe better with organizing notes or something. And so they decide among themselves. But in New York by court rule, it says, "Unless otherwise determined by the court, the juror whose name was first drawn shall be designated as the four-person." And so the very first person who sat in seat number one as juror number one and got qualified after all the strikes were made by virtue of just being first, they get the prize of being the four-person.
- Kim: And you know who that happened to once in that very courthouse? Me. I was juror number one in New York State Court.
- Barb: Lucky winner.
- Kim: And I was the four-person in that trial. Our next question comes from Lisa in Portland Oregon, who asks, "I just finished reading Watergate Girl and was struck by Jill's

comment that she could write another book about other life adventures. Well, we're waiting, Jill."

Jill: Okay. Well the answer is, number one, I wanted to answer this question because it was from Portland, Oregon, and I was just there and I'm returning for my grand goddaughter's graduation from Lewis and Clark. So that sort of encouraged me. But the truth is I'm so busy having adventures that I don't have time to write that book yet, but I will.

In the meantime, I can tell you that I am working on a children's book aimed at right now target audience of fourth graders, something I know nothing about but have some help with. And then I might be doing a YA, young adult version or my memoir. Maybe that one will include more about, I wrote a whole book about basically a year and a half and about a period that lasted a year and a half and then did a 40-page epilogue about 40 years that followed that. So there's a lot more to be said than the epilogue says about that period to say nothing of what's still going on now. And SistersInLaw isn't mentioned in the epilogue, but it should be. So I have to get back to that one of these days.

Kim: That's going to be a long book, Jill, if you get all the jobs you had and everything that you've done.

Jill: Yeah. And if we look at something Biden said this week, I've been to New Guinea. I've stayed with headhunters. There are indeed headhunters, otherwise known as cannibals. So when he referred to cannibals, it's a true statement that there are cannibals. Now, whether it's true or not that his missing uncle had to do with cannibals or just crashing in the ocean, I don't know.

Kim: Wow. That next book's going to be bestseller, Jill, I can tell. And our final question comes from Maggie in Maryland who asks, "Please explain why Aileen Cannon does not have to recuse herself from the documents case. Isn't the fact that she was appointed by the defendant a glaring conflict of interest?" Joyce.

Joyce: So this is a really great question, Maggie. Thank you for asking this. And I think the short answer is she is not inclined to do it on her own, and there is no one to force her unless the government files a motion asking her to recuse. That would trigger a process where she would have to respond in writing, and they could appeal if they disagreed. But it hasn't come up yet.

I'm going to equivocate a little bit here on whether the fact that she was appointed by Trump is enough to force her to recuse. I think in and of itself, it's not. Every federal judge gets there because a president from one party or the other appoints them, and they do rule in cases involving those presidents. Now, look, it's in civil cases, but they're often very significant policy cases like the Muslim ban. A judge ruled on that who happened not to be a Trump appointee.

We've never seen a criminal case before. So maybe, this is a little bit different, but my thought is it's not on the basis of who appointed her alone, that she is recusable. It has more to do with this standard in the Eleventh Circuit that says that after a judge has been smacked a couple of times by the circuit, maybe another judge who would be more

inclined to take a fresh look would be better capable of handling the case, so the public could have confidence in the outcome.

So I think that's where this case will hopefully head. I have been a fan of Smith making that motion to recuse really since the moment this case was assigned to her. I just think that under the prevailing standard in the Eleventh Circuit, she should be ordered to recuse if she won't do it herself.

Kim: Thank you for listening to #SistersInLaw with Jill Wine-Banks, Joyce Vance, Barb McQuade, and me, Kimberly Atkins Stohr. And if you all live in or near Chicago, Detroit, or Boston and you have not bought tickets to our live shows there next month, explain yourself and then go directly to [politicon.com/tour](http://politicon.com/tour), and do it now. Buy your tickets now, do it. All the cool kids will be there.

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Joyce: The other thing that lifts me out of a funk is Jill's glasses, which I want.

Kim: Aren't they fabulous?

Joyce: Will you send me a link to where you got those? I want some of those.

Jill: I had to tear one of them out because I wear... I forgot what it's called. One eye is corrected for far, one is for near. And I'm having trouble seeing it today. This has no glass in it because-

Joyce: Wait a minute. You're wearing the monocles of glasses?

Kim: Oh my God.

Joyce: One lens?

Kim: That's fantastic.

Joyce: I love it. They're so good-looking, Jill.

Kim: So, it's perfect. Oh my God. It literally is a monocle.