

Joyce: Welcome back to #SistersInLaw with Jill Wine-Banks, Barb McQuade, Kimberly Atkins Stohr and me, Joyce Vance. It is almost May, and that means the #SistersInLaw Live Tour. I can't wait to see my sisters in person. We'll be in Chicago on May 2nd, which is only about a week away. Holy moly. We'll be in Detroit on May 9 and Boston on May 30. So go and grab yourself some tickets if you haven't already. You can find them at politicon.com/tour.

But before we get started with the show, I have something I need to discuss with my sisters. Y'all, I'm up in Washington today this weekend for the White House Correspondents' Dinner, which is very exciting, but I do not do black tie very often, and I don't do it particularly well if the truth has to be told. But this year, I've got to do it twice in a row because we won a Webby Award, so we'll all be together in New York to accept it next month. Is everybody excited?

Jill: I'm thrilled, but I want to know is everyone... Are you all going to really wear long dresses and sequins, because during COVID, I kind of gave away all of my black tie things, and I'm kind of excited. I wish that Kim was making us dresses because she's so good at it. But since she's not going to have time, I'm excited about going to look for a new dress, but I want to make sure that you're all doing the same thing, are you?

Kim: Well, the good news is we don't have to all do the same thing. The ceremony is in New York. It's at Cipriani's Downtown. And one thing that I loved about New York is that you can really do what you want. You can look your own personal best, whether it's black tie or not. That's one of the things I miss most about living there. But I have the benefit that I have a closet full of stuff that I've made over the years, and I've not worn any of my gowns to New York. So anything that I wear will be new. I'll be wearing something that has made a past appearance at a White House Correspondents' Dinner choice, but it'll be new to New York. What about you, Barb?

Joyce: There you go. And new to us. I can't wait to see you, Kim.

Barb: So let me say this. I'm very grateful to have won a Webby Award and very proud to have won a Webby Award, all of you.

Kim: Yes, we all are.

Barb: But the idea of wearing a gown to an event in New York, man, I don't have a closet full of gowns, unlike Kim and-

Joyce: But Barb, you can get one with pockets.

Barb: Oh, a gown. All right. Now, you're talking. I've got business suits and blazers. I'm hanging out on the weekend in my blue jeans and workout attire, and that's about it and nothing in between.

Kim: Well listen, Elizabeth Warren wears a blazer and pants to every event, including White House Correspondents' Dinner.

Barb: Who's that?

Kim: It's like that's her uniform. Elizabeth Warren.

Barb: Oh, that'd be good company.

Kim: If it's good enough for her, it's good-

Barb: Okay. Now, you're talking too. What's your idea, Jill?

Jill: I have a great idea for you, Barb.

Barb: Yeah.

Jill: I actually do have a tuxedo, and you can wear a tuxedo. And that has pockets both in the jacket and the pants.

Barb: I am a little intrigued by the pockets. I'm a little intrigued by the pockets, but-

Joyce: I might be borrowing that, Jill.

Jill: Okay. You're welcome to it, right?

Barb: I'll get poking around in the internet and see what I can come up with. You know what I'm reminded of? I'm going to have to... I saw it in the window, and I couldn't resist. You guys ever see that Carol Burnett episode where she spoofs Gone With The Wind, and she comes down with the gown, with the curtains in the [inaudible 00:03:50]?

Joyce: Yes.

Barb: I'm going to show up like that.

Joyce: Yes. Yes. That's hilarious.

Jill: You were the star of the show, Barb.

Kim: I really love the Calm app because not only does it help me relax and stay balanced. If you follow them on threads as I do, they're hilarious. It really gives me daily giggles.

Barb: Oh, really? I have to check that out.

Kim: They're very good.

Barb: I didn't know it. But you do sound very calm talking about it.

Kim: Right, because it's because of Calm. It can feel like plans and worries and to-do lists and the threat to our democracy is never ending. But if you ever feel like your brain is constantly racing on overdrive, Calm can give your mind a break from the noise. Calm softens anxiety symptoms in a moment and helps you handle day-to-day stressors. That's

why Calm is the number one app for sleep and meditation, giving you the power to calm your mind and change your life.

Joyce: Calm recognizes that everyone faces unique challenges in their daily lives, that mental health needs differ from person to person, and that time for meditation may vary. And, boy, do I feel all of that this week. Since self-practices are so deeply personal, Calm strives to provide content that caters to your preferences and needs.

Barb: Calm can help you dedicate just a few minutes each day to reduce stress, improve your focus, and increase your overall wellbeing. I'm trying to read this very slowly and calmly, guys. Can you tell?

Joyce: We can.

Barb: There's something for everyone. Their meditations cover reducing anxiety and stress, relaxation and focus, building healthy habits and taking care of your physical wellbeing. They even have sleep stories with hundreds of titles to choose from, including sleep meditations and calming music that will have you drifting off to dreamland quickly and naturally. We also love their expert-led talks on topics like overcoming stress and anxiety, handling grief, improving self-esteem, caring for relationships and more.

Jill: Well, of course, they work very well for sleep if you actually allow yourself time to sleep. But Calm app puts the tools you need to feel better in your back pocket. If you go to calm.com/sisters, you'll get a special offer of 40% off a Calm premium subscription with new content added every week, stress less, sleep more, and live better with Calm.

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

Barb: On Thursday, the Supreme Court heard oral argument in the Trump federal election interference case. They were, of course, hearing the appeal of lower court decisions rejecting Donald Trump's assertion that a president is absolutely immune from criminal prosecution.

Before I start with questions, I did want to just highlight my favorite tweet of the day. It came from Marcy Wheeler who said, "What if hypothetical for Justice Alito, what if a female president had an abortion in Idaho? Would you be immune from prosecution?" I thought that was good, but Joyce, I want to start with you. You were actually at the court, right? You were outside there in that space called the Senate Swamp between the Capitol and the Supreme Court. You were there. So set the scene for us. Anything interesting observations of color? Were there protesters? What was that like?

Joyce: It's always interesting to be at the Supreme Court for argument day. I'm a member of the Supreme Court Bar. I've been for a number of cases, including a couple while we were US attorneys bar. I was there for US versus Arizona, the immigration case, and also for one of the voting rights cases on the redistricting case later in that time period.

It's a different court today, quite frankly. There have always been protesters. It's a time-honored tradition at the court, but the tone was a little bit nastier this week. We had someone behind us. I was with Andrea Mitchell, as you said, across the street in the Senate Swamp doing some on-air commentary. We had a guy walking behind us just for hours yelling, "Fake news. You're fake news," and others somewhat more disturbing sort of politically motivated protests. So that was the tone outside of the court.

Barb: Yeah. And then how about your top line takeaway? We heard the arguments, and I want to get into detail. But just if there's one thing that maybe you would say summarizes what you think happened yesterday, what would that top line takeaway be?

Joyce: Yeah. So I know a lot of people were disturbed by the turn that the argument took, especially because no one anticipated that Trump could walk away with absolute immunity. That would be just a ridiculous result. I think sometimes we have to just hold in advance our anxiety following an argument and wait to see what the opinion holds. The opinion is not the argument. It seems clear this case will turn on Chief Justice Robert's position on the case. He was uncharacteristically quiet during the argument.

And while the three liberal justices clearly believed Donald Trump needs to be reined in and Presidents should have accountability lest the Oval Office become crime central in Justice Jackson's words, the conservative wing of the court, the conservative justices seemed far more concerned about this theoretical possibility of an unethical prosecutor who would be unchecked by layers of court processes. So it's going to come down to Barrett and Roberts. She seemed inclined to look for a compromise that would let trial go forward. I hope she can pull him into her lane.

Barb: Yeah. Kim, what were your takeaways? I was a little surprised, but pleased to hear what Justice Barrett had to say. What was your top kind of top line takeaway from the argument?

Kim: Well, yes. So I agree with you that Justice Barrett did not seem inclined to give the whole story to Trump in this. And in her questioning, she expressed more than a little critique of Donald Trump's arguments to say the least. But one thing that really concerned me, I thought the worst case scenario would be that the Supreme Court would take their time and run out the clock a bit before they remanded this case back down to the trial level maybe with some questions that Judge Chuck Kim would need to clarify through a hearing. And then it would get going, but it wouldn't get going in time for the election.

I now think that there is a worst case scenario, and I think what's coming back is the discussion we had previously about the weirdness of the question presented.

Barb: Yeah. Absolutely.

Kim: Our listeners will remember that. When there is a question presented, it's what the Supreme Court... The question that the Supreme Court decides they're going to answer. And in that, there was this weird alleged official acts, right?

Barb: Yeah.

Kim: When we pointed out, Jack Smith is not alleging that anything was an official act. He is alleging that things were crimes, right? So only Trump is alleging that these things are official acts and that they would somehow, based on no constitutional or legal framework, get immunity if their official acts and so much of the arguments, including some of the questions from Justice Barrett, even though they seem to clarify that crime is not an official act, was focused on this issue in a way that I think they can take their sweet time, A, in issuing an opinion at the end of the term, at the end of June about what might and what might not constitute an official act, and then remand it down to Chutkan.

And so that scares me because where are they going to draw these lines? And as you pointed out, we know clearly where four justices are. We know the three that were never in play, Alito Thomas and Gorsuch. Kavanaugh was shockingly to me in Trump's realm that I think he was expressing all this concern about, oh, but how can a president do their job if they're going to be by not climbing Justice Kavanaugh, by not climbing.

But it seems that Amy Coney Barrett was a little skeptical of this, and we don't know where Chief Justice John Roberts is. If he can be convinced that there's a line to be drawn somewhere, and that would be an unbelievable win for Donald Trump and an unbelievable loss for those who love democracy, in my opinion.

Joyce: And, Kim, can I just say, I guess this is therapy for all of us in some sense right now because it was such a weird argument, but were you stunned that Kavanaugh jumped in? He was the sponsor for this argument that you can't prosecute a president unless the statute explicitly says that you can prosecute a president. Gorsuch jumped in. He used one-

Kim: That was crazy.

Joyce: ... example of this obscure election statute that specifically says a president can be prosecuted to say, "Well, Congress clearly doesn't mean it in anything else." And that's de facto absolute immunity, right?

Kim: Yes.

Joyce: If every statute, if it has to say conspiracy, and you can prosecute the president, he has de facto immunity. That view is so frightening.

Kim: It's so frightening. And who knows how far he will go with that? And I think that's one of the reasons I posted on Threads like, "Why is Alito having a sermon right now," because he knows his view is so far further. Does he actually think, who is he doing this for? Does he think he can get more people on his side, ala Dobbs, for a much more broad reading of immunity? And do we all have to rely on Chief Justice John Roberts for the future of our democracy? I think that's a strange proposition. That's why I posted like, "This went worse than I was expecting."

Joyce: Yeah.

Kim: And people were like, "No, I think you're wrong." And I'm like, "All right, we'll see."

Joyce: Jill, what was your top line takeaway?

Jill: So it's always hard being after the last person to weigh in on this. But despite that, I do have at least three things I want to point out. And so I'm going to talk really fast because you asked for only one. One is the most incredible thing to me was Sauer, who is Trump's lawyer, admitting that there are private acts alleged and that they are not covered by immunity.

That seems like there's definitely a trial that can go forward, at least on those allegations. Then I was shocked by the comments from the conservative justices saying, "Well, we're writing a rule for the ages, a rule for the future." And that goes to what Kim said, and that's very disturbing because their job is to determine the facts and the law in a particular controversy that is before them, not to predict and write rules for governing.

So that was very, very bad. And then I was very pleased with Dreeben, who is the representative for the prosecution, arguing that accountability under the criminal law is the best way to keep things going. And that is the best answer to all these arguments about, "Oh, we're so worried about crazy prosecutors are going to go crazy."

First of all, I'm more concerned that a crazy president not held accountable will continue to destroy our democracy. And so I thought that Dreeben's comment about separations of powers and about holding someone accountable under the criminal laws was a really good point.

Barb: Yeah. I agree with all of that. And I think that where we go from here really is going to depend a lot on Chief Justice John Roberts, isn't it? I think we know where some of these justices stand, probably no surprise. Barrett seems like she's inclined to vote in some way with the special counsel, I thought. But Roberts was really interesting to me because on the one hand, he seemed very unhappy with the decision of the Court of Appeals below. He kept saying their decision is a tautology. It's a tautology. They say because the president has been prosecuted, he can be prosecuted. I actually had to look up tautology. I didn't know what that word meant.

Yeah, I'll confess. Yeah, I didn't know what it meant. It is true. I did not know what the word meant. I looked it up.

Kim: I did too.

Barb: I know. And I thought, "Thank God I'm not arguing because I would've [inaudible 00:17:23]."

Kim: No way.

Barb: "I'm sorry. What's a..."

Joyce: That is not true.

Kim: [inaudible 00:17:26]

Barb: So we kept saying it again. I know the concept because I was teaching to appellate my criminal procedure students recently. The plain error standard. A plain error is an error that is plain. I mean that is a tautology, right? Now, I have a word for it.

But his point seemed to be that he was unhappy with the DC Circuit Court of Appeals because rather than analyzing the facts of the case, they just said, "A president can be prosecuted because a president has been prosecuted," and he didn't like that. So that worries me that he seems to think that maybe this is an open question or a closed question. But then he also said what I thought was very interesting about how a president can be charged with bribery for doing an official act like appointing an ambassador.

And when John Sauer, the lawyer for Donald Trump, said something like, "Well, the appointment of the appointment of the ambassador can't be, only the bribery can," he said, "But that's like a one-legged stool. You got to be able to show the quid pro quo." And so, of course, you have to come back to official act. So I'm not quite sure where he comes down on this.

And so it doesn't seem like he's on the fast track though, which is I think, ultimately, we will find that this case is not protected by presidential immunity. I'm worried that we might just not find that out until 2026, if we get there.

Well, let me move on from there. Jill raised this point, Joyce. And let me ask you about this where Justice Kavanaugh, and I think it was Justice Gorsuch said more than once, "I'm not worried about this case. It's the future I'm worried about." And as Jill said, isn't the whole point of deciding a case or controversy, the idea that you decide only this case that is in front of you and you decided on the narrowest grounds possible because you can't predict what future cases might come down the road. And so you're supposed to decide it as narrowly as possible. What are they doing?

Joyce: Yeah. That's first principles, right? You only decide the controversy in front of you, not other theoretical issues. And the government argued this in their brief. They told the court that while there might be some small slice of immunity for some official conduct, it's important to understand the playing field.

Everybody agrees and Sauer concedes an oral argument that there's no immunity for purely private issues. We're talking about official acts of a president. And so they say that while there might be some slice of immunity for official conduct by a president, the government says, "Look, justices, you don't need to decide what the scope of that is here. All you need to do is say that for what Donald Trump did trying to steal an election, there's no immunity, and send the case back to Judge Chutkan to get ready for trial."

And this is a time-honored principle. Don't decide future cases, just the one in front of you. But Kim, I think you mentioned this stems back to the question that the court drafted the issue it wanted to hear. We've been concerned about that all along. And now, it seems clear that they've abandoned first principles.

Barb: Yeah. And it just makes me wonder why are they doing that? Is it for purposes of delay or is it what would motivate them?

Kim: Listen, I'm the columnist here, so I will surmise because I've already written this. I don't know. But is it because you have two justices in their 70s who very much would like to retire when a Republican is in office? Is it very much because we have two justices who like to see more conservatives appointed to the federal judiciary? Why are they doing any of the things that they're doing? And that also is a question that was a subject that was in my question about why Alito was going on and on and on in his soliloquy, knowing that he wasn't using oral arguments to help formulate his opinion. It's already set. But why? Who is he signaling? I don't trust this court any farther than I can throw it anymore.

Barb: Let me ask you, Kim, about, we've talked a little bit about these questions by Justice Amy Coney Barrett. Pretty interesting, she almost sounded like a lawyer at a deposition when she's kind of trying to pin down John Sauer about these specific acts alleged in the indictment. Would you concede that eliciting fake electors is a private act? Yes.

And she got them to agree with maybe three or four different acts. And then later, Justice Kagan took up the list like, "Let me pick up where Justice Barrett left off. Would you agree this is a private act? Would you agree that is a private act?" He did object to a few of them, but it almost seemed like maybe the two of them together were trying to, let's get concessions that these are all private acts and then we can just go to trial. And then regardless of what Gorsuch and Kavanaugh think about deciding the case for the ages, do whatever you want there. But we've got concessions that these are all... So what do you think? You expressed maybe some concern about that. What do you think?

Kim: No. So this is what I think is interesting about Amy Coney Barrett, because we don't know a ton about her. Really, all I knew is she was a vote in favor of Dobbs, but she didn't issue any concurrence, anything. You did not hear her voice in that.

And ever since then, I've been trying to figure her out, right? Both in this case and also in the case that we talked about last week, about the January 6th rioters and that charge of conspiracy to obstruct an official proceeding, she was acting asking very pointed questions last week. Her questions were like, "Well, what would it be based..." I'm paraphrasing. Okay. "Would it be an obstruction of an official proceeding?" I don't know if your last name rhymed with Rump and you tried to get phony electors to sign a piece of paper, their documents and blah blah, clearly making it clear that in her view, or she was at least trying to pin down that Donald Trump's charges were very different than the other January 6th defendants, distinguishing that.

I think that's what she was doing here too, that, "Okay, if we're going to play this official versus non-official act, let me just ask some questions about what's an official act and went through the list," hypothetically air quotes of exactly what is claimed in this case. And I think that that was smart.

I think that Keegan is a smart lady and she picked up on that because Keegan is always trying to look at where she can bridge some gap over to the conservative side. And she identified that, and she seized on it. So I think that that was an important, very important part of the argument.

Barb: Yeah. I thought that was really interesting too. Now, if they'd gotten him to concede to all of them like, "Are we done here? Is this it?" But then what Keegan got going and he

said... Maybe Sauer just caught on. He's like, "Nope, not that one. Not that one. Nope, not that one." Yeah. So there's some stuff left.

Jill, I'm curious. I've heard this speculation. I think it's a super interesting idea. Could Jack Smith pare down his indictment to exclude anything that might even be arguably an official act, even if it's only evidence of the crimes charge, which is of course conspiracy to fraud, the United States conspiracy to obstruct an official proceeding, obstruction of an official proceeding and violation of voting rights or conspiracy to violate voting rights. I mean, none of those are official acts, but there are specific acts in support of those theories that I think probably do constitute official acts, perhaps you might say, his efforts regarding the Justice Department to use them in an effort to legitimize what he was doing.

Do you think that Jack Smith could or should pare down the indictment and say, "Fine, I'm just going to abandon all of those things that are arguably official acts," and I'm going to focus on just the things that are clearly not and let's go baby, see at trial."

Jill: He certainly could. Whether he should is a different question. He may have to, depending on how the court rules. There is one advantage to this possibility that the court will seek delay by remanding for a hearing, because at the hearing, all of this evidence can be presented.

And so while it's not going to go to verdict, it's not going to lead to a conviction or an acquittal or a hung jury, it would at least let the voters of America know what exactly was done. And I know that Donald Trump does not want that evidence before the public, before November, sort of a lose for him if it is a remand, even though it's also we won't have a trial.

So yes. And going back to what we were talking about, Sauer did eventually catch on after he admitted, "Oh, yeah, that's a private act. That's definitely a private act." And I'm going, "What? Did I just hear that right?" And then the list went on, and he kept admitting when he got to the Department of Justice, it was like, "Well, it's the president's responsibility to oversee and talk to the Department of Justice." So that's an official act.

Of course, it's an official act for him to talk to them, not to ask them to commit crimes. So I don't see that. I could see that being remanded for Judge Chutkan to say, "Yeah. Okay. Let's have a hearing on this, whether this is official or private." But it would be an interesting way out of this to get all the things that were admitted in the oral argument were private to be, "Okay, we'll go ahead with that and then to use all this other evidence as part of proving the overall conspiracy, but not as a charged offense."

Barb: Yeah. No, I think it's kind of interesting. Well, Joyce, one of the arguments Sauer made is one that I have long thought is just ridiculous. And do you think anybody bought us the one about a president must be impeached and be convicted before he can be criminally prosecuted?

Justice Barrett, for one, seemed very skeptical. She asked why that's necessary. It's not in the text. This is all that textualist cherry-picking once again. If it's not in the text, then it's not a constitutional provision unless I want it to be. And she said, "Well, couldn't that

apply to everybody, including the nine of us sitting here?" And we know that's not the case. So do you think that argument has any merit and any life left after the oral argument?

Joyce: No. I don't think it does. And I think it'll be a clear loss for Trump. Like you say, it's counter-textual. I did not hear a single justice championing this flawed theory and oral argument. So I think it's dead.

Let me just add on one thing to what Jill just said because I think this prospect of a hearing is very interesting. I think Jack Smith has to be careful to not do anything before the court rules. That's unfortunate because it may mean sitting still for another couple of months. But he doesn't want to take action now and then have the Supreme Court rule in a way that either means he's bargained away, he's bargained with himself and given up some ground he didn't need to, or that the court just goes an unpredictable way. I think we really are in a holding pattern until they rule.

Barb: Another one that really got my goat. Kim, let me ask you about this. Justice Alito, former US attorney, almost always consistently rules in favor of the prosecution and against the defense. When Michael Dreeben, the lawyer for Jack Smith's team was talking about, "We don't have to worry about presidents always constantly indicting their predecessors because there are all these layers of protection. There's the public authority defense, there is advice of counsel based on the best lawyers in the world at the White House and the Attorney General, and there is due process. There's a grand jury that has to find probable cause."

And then Justice Alito has the audacity to say, "Yes, but can't a grand jury indict a ham sandwich?" I was really flabbergasted by that. What was your reaction that a former prosecutor would say that? You hear that from time to time by people who disparage the criminal justice system. But Justice Alito, what on earth was that all about? As you said, who is he talking to? Who is he performing for?

Kim: Why are you asking me to explain Sam Alito? I have no explanation for him.

Barb: I don't know. I don't know.

Joyce: Can we just all drink a beer instead? I don't know how you understand what he's up to.

Kim: Based on his speeches and what he wrote, have you read Dobbs? He is like a holy crusader who acts only on his own rules. He also had the audacity to say that questions about whether the president can assassinate his political enemies, which is an important question to ask, was an insult to SEAL Team Six.

Barb: To SEAL Team Six.

Kim: What? I'm not going to try to explain that, man. He explains himself. Res ipsa loquitur.

Barb: Oh, I love it when you talk Latin. Nice.

Jill: Oh good one.

Barb: Again, we should define terms for our audience.

Kim: It speaks for itself.

Jill: [inaudible 00:30:46] right?

Barb: That's so good. I guess you're right. Justice Alito, *res ipsa loquitur*. Love it. Jill, let me ask you about this issue that Joyce mentioned earlier where Justice Kavanaugh and Justice Gorsuch started talking about the clear statement rule when it comes to the statutes at issue. Can you explain what that is, and why it might matter here, and what... This is an issue not even raised by any of the parties. And suddenly, they're talking about this. This was the moment when my head was about to explode. Can you explain what that is and why it might matter here?

Jill: I definitely can. [inaudible 00:31:24] It does. It does. No. But seriously, it is a rule for statutory construction, and you have to avoid having a construction that would cause problems. And in the context here, what they were talking about was this ridiculous idea that unless a criminal statute has a clause in it that says, and this applies to the president too, or this applies to the ex-president after he is out of office, that it doesn't apply to the president.

That seems to me completely ridiculous. They pointed to one law that for some reason says that it applies to the president. In addition to saying everything else. I can't imagine how it could apply here without it being completely over the top absurd and harmful to statutory construction. Of course, under our system of justice, no man, including the former president, is above the law. And he, like every other person, is subject to those laws. So to me, there's no clear statement issue here.

Barb: Yeah. It would just be ridiculous, that the president is not subject to any statute unless Congress previously said, "And by the way, this also applies to the president." That is so contrary to the idea as you just said, that the president is above the law.

Well, if I were writing the line, I would say one of them that was offered by Michael Dreeben, which is did the person act as an office holder or as an office seeker, I think that would be a really clear way to draw the line here. What do you guys think about that, or how would you draw the line between official act and unofficial act, or would you draw the line at all? Let's just go around. Joyce, how would you [inaudible 00:33:20]

Joyce: Yeah. This was something that I think highlights by the way, the skill of Michael Dreeben who argued for the special counsel's office, he immediately read the mood of the court, understood that they were stuck on this issue, and instead of insisting that they take his first choice view, he discussed this with them, I think, in a smart and an intelligent way.

I've always thought about the distinction as being official acts are President Trump and private acts are candidate Trump. That's the logical dividing line. But I heard the conservative justices, and especially Justice Alito express some real concern here that personal acts would swamp private acts.

And Dreeben pushed back very firmly saying, "For one thing, there's no immunity right now. There's nothing to take away. If there is immunity, it will be because you have created it." And then he made a conversation happen about core presidential powers, Article II powers, and anything that flows from those powers would be official apps.

But other things like sort of the stuff Trump was doing with his private lawyers coming up with a private scheme to steal the election, that would clearly be personal. And so that feeds into the whole conversation about whether or not Jack Smith would have enough to go forward on if all he could prosecute were personal act or was personal activity.

It looks like there is. I mean, it's not ideal. You don't want to give up anything, but he could do it, especially with this gloss Dreeben presented, which is that even if you can't prosecute on the basis of some official acts, you can still use those acts as evidence of Trump's state of mind and that Dreeben, I think, made the lynch pinpoint here that might pull the court back from the brink of doom when he said, "Listen, it's even worse that he was using his official powers. Even if we can't charge that, the fact that he abused the power of office to perpetrate this scheme is what you should really be worried about court, not some theoretical rogue prosecutor that you think might show up in a future case."

Barb: Right. Where's that worry in every other case?

Kim: Yeah.

Barb: Kim, how would you decide this case?

Kim: Just to play off of that, A, somehow 44 presidencies before Trump's were able to exist without this immunity that's so necessary to keep presidents from being chilled. None of them were chilled. They were fine. And, yeah, I would say that trying to overturn an election is not an official act.

Barb: Jill, how about you? How would you decide this?

Jill: I don't think I would draw a line between them, because I think no conduct of the president that constitutes a crime should be immune from prosecution. And I think to Kim's point, not only did 44 presidents before Trump and one since Trump, let's not forget that, survive without having immunity. And not only did, and I don't even know what number Nixon was, but Nixon knew there was no immunity.

That's why he took a pardon. He wouldn't have accepted a pardon admitting his guilt if he thought he was immune from prosecution. And Ford, his successor wouldn't have pardoned him if he didn't think he could be prosecuted. So I think this case is one that should be decided if everything at the Supreme Court were normal, that they would reject the total concept of criminal immunity.

Barb: All right. Well, the four of us were on the court. We'd have this all settled. And also interesting aside, Jill, interesting that you don't know what number Nixon was, but there's a reason for that. Until 41 and 43, we never talked about them in terms of numbers, I believe. And so-

Jill: Oh, good.

Barb: .. starting with 41 to distinguish the two-

Kim: So this [inaudible 00:37:19].

Barb: ... George W. Bushes, we started talking about the numbers. And so now, we know 44, 45, 43. So all of them before that kind of blend together somehow. I know the first. I can tell you who the first-

Kim: Somehow the Adamses were able to-

Jill: Oh, good for you.

Kim: figure it out without numbers.

Jill: Yeah.

Joyce: I have never used as much makeup as I've used the last few years with TV appearances. And Thrive Causemetics has been my lifeline. Thrive has a full line of show-stopping makeup to refresh your everyday look with clean skin-loving ingredients. Their foolproof products are easy for any skin level to apply and always take your self-care routine to the next level.

Barb: We love that cause is in the name for a reason. Thrive not only defines luxury beauty, but they give back to. Every purchase supports organizations that help communities thrive with causes like education, cancer research, and working to end homelessness, you'll feel great and look great with Thrive. So far, they've donated more than 150 million of products and funds. It's incredible. I'm so glad we're part of it.

Kim: I am really loving Thrive's brilliant eye brightener. You can use it in so many ways. I like to use it right under my brows, which gives it a nice little contour. You can also add it to the corners of your eyes, which make you look wide awake, which is especially helpful for my earlier morning television hits. It's really, really great and super easy to use. Whether you're preparing for a case, hosting friends for a little, get-together or enjoying the spring weather out and about, there's nothing better to give you a fresh, vibrant look. There are 16 buildable shades to choose from and play with. You can use as little or as much as you like and apply a light shade to the inner corner of the eye and then a more deep shade to the outside. I do that for my TV hits all the time.

Jill: You can also use a metallic shade all over your eyelid and blend it with your finger for a very easy, smoky or bright eye look. It's my secret for making my eyes pop when I'm on camera. You have to try it. Also, don't forget to protect yourself from sun damage with Thrive Sunblock. It also goes on so smoothly, you can use it as a makeup primer.

I didn't do this when I was young, but I know better now, and I use it daily. So refresh your everyday look with Thrive Causemetics, luxury beauty that gives back. Right now, you can get an exclusive 10% off your first order at thrivecosmetics.com/sisters. That's

Thrive Causemetics, C-A-U-S-E-M-E-T-I-C-S.com/sisters for 10% off your first order. You can also find the link, you know where, in our show notes.

Kim: Well, as our listeners may know, for the last week, the trial of Donald Trump in New York has been rolling along. Recall that he is charged with falsifying business records in order to fraudulently kill unflattering stories before the 2016 election, a foul of campaign finance laws. And the key witness so far has been former National Enquirer publisher David Pecker.

Joyce, I want to start with you. What is your take on Pecker, the fact that he's the first witness and that the prosecution really chose him to begin telling this story about this so-called hush-money scheme that ran a criminal law according to prosecutors? And do you think that he has been the star witness they wanted him to be?

Joyce: I think he was a strong kickoff witness, which is what you need. Prosecutors talk a lot about primacy and recency, the fact that juries remember best what they hear first and what they hear last. And so Pecker was very successful at telling the story of a scheme that wasn't just catch and kill. It was catch-and-kill to elect Trump. He held up well. I think people were a little bit surprised to learn that he had to deal with the government, that he actually was cooperating, even though he-

Kim: Yeah. I was surprised.

Joyce: Yeah. That was a shocker, but no animosity towards Trump. Thought of him as a friend. I think that puts him in a very different place than Michael Cohen is in, obviously. And so you want a strong witness, a first witness who has an impact. Pecker was able to tell the story.

Very importantly, he roped Trump into the center of the conspiracy. He began to provide some corroboration for the grilling of Michael Cohen that's yet to come. And he stood up well on cross-examination. They tried to suggest that he had a faulty memory or that he had made some stuff up. When the prosecution came back for redirect, they went through it, boom, boom, boom. Pointed out places where the defense had maybe disingenuously suggested that his recollection was flawed. And now, they're off to the races on some smaller witnesses.

Kim: Yeah. I thought it was really important to have him because I think we've talked about this a little before, this case is a little complicated in that it alleges a crime on top of a crime to make it a felony, right? You have this falsification of a business record, but done for the criminal purpose of trying to keep unflattering information away from voters before an election.

But I think he was able to put those two things together in saying that Trump was worried about the election and then talking about those business records, right? Who's paying him? Is it Cohen? Is it Trump? And then learning that Trump is paying, but through Cohen, and laying that nice baseline, which I thought might be helpful to a jury. Jill, what about Pecker's testimony stood out to you the most, and how good of a job do you think that Trump's defense attorneys did in trying to poke holes in Pecker's story?

Jill: Kim, I agree with Joyce that Pecker was a very good foundational witness. And I see this as the prosecution building a house, and they built the framework. And you're right, they laid out two elements here, both business-wise and in terms of what was the motive? The motive, oh gee, he never mentioned his family to me. He wasn't trying to protect them.

Yes, we talked about the campaign and how it would affect the campaign. So I think the framework has been set, and there was some preemptive bolstering of future witness, Michael Cohen, because he talked about things. And to the extent that he was cross examined, for example, about, "Well, you told the federal government about this meeting, and you didn't mention." Hope Hicks was there.

Well, when Hope Hicks testifies and says, "I was there," big deal that he might've said something, and he handled it very well saying, "Hey, these aren't my notes. I don't know who wrote them down, and they could be wrong." I remember exactly what I'm saying to you now, and I'm telling the truth now. So I think he did a good job. I think the cross-examination fell flat, and maybe even hurt them. And I think the judge wasn't too happy with it either. So I think that so far, the prosecution has scored a lot of points, and the defense has not done so well.

Kim: Yeah. Barb, do you think that there were any drawbacks for the prosecution in calling Pecker first and in his testimony? Listen, he works for the National Enquirer. We've all seen those magazines in the grocery store-

Jill: Love them.

Kim: ... checkout lane, but he was talking about catching and killing these stories and helping out his friends. Could that be a drawback if the jurors just don't seem to like this guy?

Barb: Yeah. I think it's an interesting idea. I do agree with Joyce that as a prosecutor, you always want to start strong with a witness that you think is going to hold up well in cross-examination. You don't want the whole thing to fall apart before it's barely started.

And so I think he was strong, but I do agree with you that everything he talked about is icky. And I think if I were a juror, I would find him kind of slimy, but that doesn't mean they don't believe him. And so I think he was an important witness because of his alliance with Donald Trump. They're friends and they still like each other. And it was important, I think, because not only was he an important witness, but you can't always tell a story as a prosecutor chronologically. But I like it when you can because you can only go witness by witness.

You don't really get to tell the whole story. But I think when you take witnesses out of order to achieve the primacy recency point that Joyce makes, I think it risks juror confusion. But here, you've got somebody who is there at the inception and that August 2015 meeting when Trump decides he's going to run for president, and they come up with this plan like, "Oh, there's a lot of bad stuff out there. We are going to have to catch and kill that stuff."

And then we're also going to put out some false stories about Trump's rivals, and we're also going to write some fawning things about Trump. This is all part of the same

strategy. So I think it was good for that reason. But, yeah, I didn't like him. He's talking about stuff that I think by the time you get to this point as a prosecutor, you've talked to him so many times. Maybe, you've become inured to the idea of what it is he's talking about. But for jurors hearing about the idea that you're paying hush money and all of this sorted stuff, it came out about Arnold Schwarzenegger and Tiger Woods and Rahm Emanuel were also involved in some hush money payments, that is not something normal people do. And so it sounds, I think, sorted and seedy. So I think at the end of the day, the jury doesn't like him, but they believe him.

Joyce: Hey, Barb, can I ask you a question though?

Barb: Go ahead, Joyce.

Joyce: My question, Barb, is this, haven't you ever... I know you have. We've talked about it before. They have to do this with Cohen. I think that they do it with Pecker too. They say, "If you didn't like the subject matter of this case and the way these witnesses behaved, we didn't pick them. Donald Trump did." These were his friends, don't you think? Yeah. And then I don't care if the jury likes Pecker or not.

Barb: Yeah. Absolutely. Oh yeah, absolutely. We didn't pick... Yeah. Oh yeah, exactly. I didn't pick this person. Donald Trump did by choosing to associate with him. Oh, yeah, I think that's right.

Jill: So I was going to say that, but I also want to say that reporting is that the jury is mesmerized by him and that they're taking a lot of notes and that they're really paying attention to him. So it's true. The prosecution didn't pick him. Donald Trump was in business with him. So the jurors have to be thinking, "Oh, this is the kind of person that he's friends with." This is a person who likes him. This is the person he does business with. I think that it will rebound against him as much as they will go, "Well, he's not so nice." The National Enquirer is a sleazy, slimy thing.

On the other hand, he seemed credible. He seemed to hold up. He didn't get flustered. And so I think the jury is going to accept what he says and what a sad world we're in where a porn star and a sleazy publisher seem more credible than the former President of the United States.

Barb: I did love the idea of the peek behind the curtain, and that perhaps does account for why the jury was so mesmerized by him. And I agree, that has been the reporting.

Jill: Yeah.

Barb: We have all been at the checkout line where we have seen those stories about Princess Di has space alien baby and all that. What was writing this stuff? And he called it checkbook journalism. And so it was really interesting to get a peek behind the scenes that what we thought all along is true, which is none of this stuff is true whatsoever.

Kim: So aside from the trial, we also had some major news out of Arizona this week, a state criminal investigation into efforts to overturn the results of the 2020 election. A grand jury has charged 11 Arizona Republicans and seven of Donald Trump's top aides in the

scheme to use phony electors to certify the 2020 election. Though the names of the Trump aides are redacted, the details in the indictment make clear that we are talking about Rudy Giuliani. We're talking about John Eastman.

We're talking about Mark Meadows, Jenna Ellis, and Christina Bob, Boris Epshteyn, and Michael Roman, people that we've all talked about on this podcast before. Joyce, I want to start with you. I want to get each of your reactions to these indictments and how they may play both in terms of the prosecutions against fake electors in places like Georgia and Michigan. What do you think, Joyce?

Joyce: Yeah. I think this is a righteous prosecution, right? This is the attorney general in Arizona saying, "These people tried to steal the votes of Arizonans." And my obligation is to protect their rights. She gave what I thought was a surprisingly moving press conference from an attorney general.

There appears to be little politics and only good prosecution in play in this case. And I talked with one of Barb's and my former colleagues in Arizona not knowing anything about the lawyers involved. And his reaction was, "Well, the lead prosecutor on this case is a solid kind of guy. You know that if he signed off on the prosecution, it'll be strong." The evidence will be there.

Kim: Jill, what do you think?

Jill: I think it's obviously a very good case. It's very interesting because of the seven aides who are named, that makes it even more important. On the other hand, it's not surprising. Other states, including Barb's home and yours, Michigan, have indicted other fake electors. So it is something that her predecessor, whose name is infamous because of the Brnovich case refused to take any action, but she's doing the right thing, and I think she has done a good job. I thought her press conference was good and that this is going to be another successful prosecution.

Kim: Barb.

Barb: Yeah. I think there's value in having these cases going in every state where there was an issue. There are other states as well, Wisconsin-

Kim: Pennsylvania.

Barb: ... Nevada and Pennsylvania have yet to join the party. And these crimes were committed in all of these states. And so I think that the more of these prosecutions we see, the more pressure it puts on these defendants to seek some sort of global resolution and cooperate against everybody else. So I think all of these prosecutors are complementing the cause of justice.

So you know what I love to frame? I love to frame posters from national parks that I have visited with my family. We've got the Tetons. We've got Yellowstone. We've got Yosemite, and we've got Glacier. I'm almost running out of wall space from all of the national parks. But mostly, I like to frame things that look great in a frame, and that's where Framebridge comes in.

Kim: You can even frame less conventional items like sports memorabilia. Barb, that might be something that's up your alley. The license plate from your first car, what a good idea or wedding invitations, maybe I'll add to my wedding collection. The options are almost unlimited. So think outside the box and inside the frame.

Framebridge came in really handy from my pandemic wedding because I was like, "Oh, right. There are pictures coming." But it was so easy. We were just able to send our proofs right to Framebridge, and we now have some really gorgeous shots from our wedding that I really love.

And there's nothing better than feeling your unique energy of art and style all throughout your home. And that's why we're such big fans of Framebridge. Not only can they frame just about anything from pictures of your kids playing sports to your wedding. But the process is super easy and affordable.

Just upload a digital photo for them to print or mail them your item using their free, secured, prepaid packaging. Then Framebridge custom frames your piece in their studio using the highest quality materials and ships it to your door in days for free. You can easily order online at framebridge.com. But one thing I also love too is visiting one of their stores. There's one right here in DC that we've been to. And there are stores in more than 20 cities across the country where experts are standing by to help.

Jill: The one in Chicago is really wonderful, and I love that you mentioned the style because no one has more style than you do, Kim. You are amazing. But it's also fun to work with one of the design experts to choose the perfect frame from Framebridge's curated selection. Even better, the upfront pricing is fair and transparent based simply on the size of your item.

What have you all used Framebridge's for? I know Kim has used it for her wedding, and Barb has used it to commemorate visits to national parks. I've used it for pictures of my girlfriend trips and some pictures of my husband and me. What about you, Joyce?

Joyce: I copied Barb and used some Framebridge to frame some of our National Park posters, and they really do look great. So like always, I'm indebted to my sisters. Framebridge is great for gifts, and happiness is guaranteed. That means if you're not 100% happy with your piece, they'll make it right. See why Framebridge has been trusted to frame over two million pieces. You'll love your home's new look. So visit framebridge.com or a local Framebridge store and get started. You can custom frame just about anything. That's framebridge.com. You can also find the link in our show notes.

Jill: This week, we saw a second lively and sort of contentious argument in the Supreme Court. This one dealt with federalism and the power of the federal government to preempt state criminal laws, particularly about abortion. The district court and the Ninth Circuit barred the enforcement of Idaho's law that would've interfered with the delivery of emergency services in cases where a life or health of a pregnant person was involved.

The Supreme Court allowed the enforcement pending the decision, which is not expected until this summer. And so it's really important because real life consequences are happening while the decision is pending. Women who are really challenged in a health

way rather than a death way, are being transferred out of state to have abortions to save their health.

So Kim, let's just set the stage here. EMTALA, the Emergency Medical Treatment & Labor Act, what's its purpose, and how does it conflict with Arizona State law?

Kim: Yeah. So it's really interesting. Just as an aside, one of the shows that I watch for total stress relief is Call the Midwife, which I absolutely love. I'm not up to current, but I'm up to where they're in the 1950s. And I was watching an episode this week of a woman who had diabetes. And she was pregnant, and the doctor was saying that she really needed to have a termination to save her health, but it was illegal.

And I'm like, "Oh my God, this is supposed to be taking me off of what's going on in the world," and it's setting me right in where that's reality right now for people in America in 2024. So EMTALA was passed in the '70s in the Reagan administration. And what it was meant to do was provide that any hospital that gets federal funding through Medicare must provide emergency care to anyone who shows up at an emergency room needing that care.

It doesn't matter if they're not insured, doesn't matter what their race is, doesn't matter what their citizenship is, doesn't matter, doesn't matter. You get federal funds. You treat people to stabilize them at the very least, to say if there is something that presents as a medical emergency, they need to at least be stabilized by care.

You can't leave them out in the street. Well, what has been happening in Idaho, which has not the most destructive abortion ban, but an abortion ban restrictive enough that some women who had some sort of complication that threatened their health, so that's the question here. How far can you go under this Idaho law to save the health of the mother? When their health was threatened, some of them were getting med-vac'd out of the state, taking them to Salt Lake City and other places for emergency treatment, things like ectopic pregnancies, which at first was deemed to be covered by the Idaho's abortion ban.

There was later a clarification, a ruling that it was no... I think amendment to the law that you can now get emergency care for ectopic pregnancies, but it's uncertain. But this isn't just happening in Idaho, places like North Carolina, in Texas and Florida, where either doctors aren't sure about the law or the law is a ban.

People have been giving birth in cars to babies outside of emergency rooms that later died. People have been miscarrying in emergency room lobbies. It's a really big problem. And the Biden administration is asserting no, no. Under EMTALA, if there's an emergency situation where care is needed, even if that care is abortion care, these hospitals that get federal funding must provide it regardless of what state law says, because federal law trumps.

Jill: So Joyce, the attorney arguing on behalf of the law for Idaho, argued that the language of EMTALA does not require doctors to provide abortions that violate state law. And he was asked about are there examples of conflict between state criminal laws being preempted by federal law?

And so I want to talk about are there any other cases where federal law has preempted a state criminal law? And then I want you to go on with what the answers from our solicitor general, the United States, Solicitor General Prelogar, how she answered and fought against this.

Joyce: Yes. So listen, fun fact, Turner is not from Idaho, but Elizabeth Prelogar, the solicitor general is in fact an Idaho native. So she's arguing about something that she knows the details of. One of the big points here is that the Idaho law, in essence, changes the standard of care, which is supposed to be uniform across the country.

So doctors don't know when a patient is about to die. That's not taught in law school. And that means they can no longer tell when they can perform an abortion. And that brings this law in direct conflict with EMTALA, which requires, as Kim laid out, that a patient be stabilized before they're forced to leave or transferred to another facility for care.

And so that very clearly in the view of the solicitor general has always created a conflict of law. But I think it's really important to acknowledge when this case was filed, the government understood that it was a real crap shoot with this Supreme Court, that there was a possibility that the court would not buy, would not stick with supremacy clause law. As Barb says, they love to cherry-pick their textualism. And so despite the fact that there's plainly a conflict, I think this is a risky case.

Jill: And Barb, I want to follow up on something Joyce just talked about, which is it's not clear when someone's about to die, but it is a lot clearer when their health is in jeopardy. So what did Idaho argue about whether the state would prosecute doctors who perform abortions under EMTALA? And is it enough to make a doctor feel comfortable to proceed if he, in his own reasonable judgment, feels it's necessary for the health of a patient?

Barb: Yeah. This is really where the crux of the issue is, I think, Jill. The statute of course in Idaho says, "Abortions are permitted to save the life of the mother." And Joshua Turner even conceded that doctors could perform an abortion even if there was not medical certainty that a patient would die before they could perform an abortion without being criminally prosecuted.

But then in questioning from Justice Jackson and Justice Kagan, they really pointed out the challenges that could happen if a person is in a state of, they refer to it as medical distress, that without an abortion, it could lead to the loss of organs, the loss of fertility, a need for lifelong treatment like dialysis or something else.

And under those circumstances, he just said, "Yes, that would be a very difficult situation." He wouldn't really answer the question which says, "No, a doctor cannot be sure they would not be prosecuted under those circumstances, and that this will have a chilling effect."

And look, if you're a doctor in Idaho and you want to perform good patient care, but you just cannot risk going to prison because some overzealous prosecutor in the state says, "That wasn't necessary to save the life of the mother. And losing vital organs, that's not good enough." And you're prosecuting. You lose your license and you're going to prison.

So it is going to have a chilling effect. And the way this line is drawn, I just for the life of me cannot understand why Idaho wants this to be the policy of their state.

Jill: Yeah. And this is definitely the real life consequences right now while the Supreme Court is allowing the enforcement of this. It's really, really bad for Idahoans. And so, Kim, there was another interesting part of the argument that was brought up, which was the argument that the life of the unborn child must also be protected according to Alito. Is this a warning that fetal personhood is on the minds of the Supreme Court, and what would that mean?

Kim: [inaudible 01:05:31] Alito questions? I don't know who-

Barb: We want you to channel him. Come on. What's he thinking?

Joyce: We want to keep you out on the language [inaudible 01:05:40]

Barb: Make it makes sense.

Kim: There is one with EMTALA that refers to the unborn child. And Alito said incredulously, "We have gone 90 minutes into this argument, and nobody has mentioned unborn child." Well, what that means in EMTALA by any reasonable person who reads it means that if a woman presents in an emergency and say she is bleeding, and her life may not be in immediate emergency danger, but she might be in danger of having a miscarriage if this bleeding can't be stopped or if she's injured or something, and she doesn't get care, that EMTALA, yes, indeed covers emergency care to stabilize her so that she does not miscarry. That's what it means. Alito's trying to turn this around to make it seem like maybe EMTALA bars abortions. No, it does not. It really doesn't. It never has. That's just Alito seeing things through his crazy mirror. That's all I can say.

Jill: Okay. And, Joyce, there's another issue, which is the Idaho Supreme Court narrowed the Idaho six-week abortion ban. And so there was some argument that, well, there may not actually be a conflict between Idaho Law and EMTALA anymore. What do you think?

Joyce: Yeah. I think I would stick to the same answer I gave you on the earlier conflict question. None of this changes the conflict between federal law, EMTALA and the abortion ban. There's so much in this law that creates a supremacy clause problem that narrowing it in this way doesn't help because you still have the issue about when can you provide an abortion? When is a woman's life at risk? There are even questions on the rape and incest questions.

And it goes back to this issue of doctors lacking certainty that they can provide abortion without being prosecuted, which means no matter how they try to cure it, this law in Idaho remains fundamentally in conflict with federal law.

Jill: I was just watching something about an orca that got trapped in Canada and has now been freed, and they're trying to reunite her with her family. And it just reminded me of all the environmental damage that we're doing to the world. And it's not just plastic. It's everything. It's all of the stuff that we throw away, including our food scraps.

And sometimes adding sustainable practices into our routines can be hard, but I know a way to make it simple. Lomi is a simple climate solution for turning your organic waste into nutrient-rich Lomi earth. It helps feed the soil and makes you a better person for helping to save the earth. And with Mother's Day coming soon, Lomi makes a fantastic gift for moms everywhere and for Mother Earth.

Kim: Yeah. Lomi has come in so handy in these last few weeks as we've been planting our spring flowers and plants. If you haven't heard, Lomi is the world's first kitchen appliance designed to turn your home into a climate solution by transforming your food scraps into nutrient-rich plant food. Lomi lowers your carbon footprint while keeping the planet greener and your home cleaner.

Joyce: Lomi is perfect for the spring planting season too. You can put food scraps, plant clippings, and even leftovers from the back of your fridge back into your garden. Lomi Earth is great for my garden. It is looking fantastic this year and helping me grow more nutritious food at home.

Our yard is looking better than ever. And now that I have so much less waste, it feels like there aren't nearly as many walks that need to be taken to the garbage cans. Your kitchen will look great too. Thanks to Lomi's modern and sleek design. We love knowing that we're doing our part for the planet and cutting our carbon footprint with just the push of a button on our Lomi's.

Barb: Lomi's new app even lets you track your environmental impact, earn points for every cycle, and redeem them for freebies from Lomi and other great brands. Get rewarded for doing good, and don't miss out on your chance to get the best gift for yourself and Mother Earth.

Order your Lomi today. Head to lomi.com/SIL, and use the promo code SIL to get \$50 off your Lomi. That's \$50 off when you head to L-O-M-I.com/SIL and use promo code SIL at checkout. You can find the link in our show notes. And thank you, Lomi, for sponsoring this episode.

Joyce: So now, we've reached our favorite part of the show where we get to answer our listeners' questions. Boy, have y'all had a lot of questions this week? It's been quite a news week. If you've got questions for us, please email us at sistersinlaw@politicon.com or tag us at [@sistersinlaw](https://www.threads.net/@sistersinlaw) on Threads or Tweet using [#sistersinlaw](https://twitter.com/sistersinlaw).

If we don't get to your question during the show, keep an eye on our Threads feed throughout the week where we'll answer as many of your questions as we can. Our first question is from Kit in Nevada. And Kim, this one I think is just right for you. Who is involved in the process to file a brief? Who puts it all together and does final revising and editing? Are there group meetings to craft them? You've done a lot of work in private practice in this area. Tell us about briefing.

Kim: Yeah. And you've written your share of briefs too, Joyce. So generally speaking, there is an art to writing a brief. You want to be as, in my opinion, as brief, literally as the-

Joyce: Chronological.

Kim: ... word says.

Joyce: Very nice, nice use of that.

Kim: Exactly. There we go. And also persuasive as you can be, but do it in the shortest time possible. That's because you usually are working under strict time limits. You also don't want to run up a massive bill for your client.

In fact, in the Trump case, I forget which... I don't know if it was for a brief or a motion. But in one of his cases, I believe it was the Chutkan case, attorney's fees were slashed because one of the attorneys had logged 150 hours to write a brief or something, and the judge was like, "That's ridiculous." Time is money when you're writing a brief.

So generally, in my practice, what we did was I would write the brief primarily sometimes in larger practices than I had. You might also have law clerks who are doing things like researching cases and helping to supply some of that, the style, making sure the brief is in the right style. But generally one person will write it, and then they'll circulate it among other attorneys just to make sure that the arguments are right.

In my law firm, we did appeals for cases that we tried. Often, appellate attorneys are completely different. So they have to spend some time with the record looking at the record and talking to the attorneys who tried the case below to get an understanding of what the arguments are.

And then you draft it. You make sure that it's in the right style. Back in my day, you had to get it tabulated, physically printed up. These days, you have digital filing, which makes that a lot easier. But that, in a nutshell, it may differ according to the size of the firm or what public office or solicitor general's office that it's being done in. But generally speaking, that's the process of how it comes together.

Joyce: It's such an important process. As lawyers, we take it for granted. And I love when our listeners send us these questions asking us to sort of demystify the process.

Kim: Yeah.

Joyce: So thank you for that one. Next question from Sandra in East Brunswick, New Jersey, and she asks, "Would it be possible for witnesses in the election interference trial to say, 'I don't remember' when asked questions on the stand that could contradict Trump's denials? How do prosecutors get around this?" Jill, do you want to take that one on?

Jill: I do. I love the question, and I love it, especially because during Watergate, one of the allegations of the obstruction of justice was instructions to witnesses to say, "I don't remember. I don't recall," even when they did.

So if you are saying, "I don't remember, I don't recall," when you do, in fact, it's perjury. Now, how do you prove it's perjury? That's because you have a variety of techniques as a prosecutor or as a defense lawyer, if it happens in reverse to prove that the person previously said something that showed that he did know, or because he told five other people that you call to the stand to prove that he did or she did.

And so I think prosecutors get it around it the same way they do about any other lie told by a witness. So it's wrong to say, "I don't remember," unless you really don't remember. But if you don't remember, if you honestly don't, that is the honest answer. And you have to say that. And a lot of witnesses get themselves in trouble by trying to fill in the gap in their memory, and then they say the wrong thing. So that's bad too.

Joyce: Barb, Judy in White Plains, New York asks, and this is such an important topic this week, something that's gotten lost in all of the Trump news, "Can Harvey Weinstein be tried again after his New York conviction was overturned? Can you remind us who he is, and talk about the conviction being reversed?"

Barb: Yes. So when this news came out this week, I think that's what prompted Kim to text all of us. My head is exploding, right? Wasn't this one? And there's so much news coming. We're like, "Oh my gosh, what are we going to talk about this?"

So I'm glad we got this question. Harvey Weinstein, of course, is the big Hollywood mogul who was probably one of the biggest names to be taken down during the Me Too Movement. He was prosecuted in California, and that conviction stands. He was also prosecuted in New York for sexually assaulting women, I think including Ashley Judd in the New York case.

And his conviction was overturned, not because of any finding about his guilt or innocence, that is completely undisturbed. But what they found, which happens sometimes on appeal, is that they believe that errors were made in his trial, in that the judge allowed in evidence, evidence of other sexual assaults that were not part of the charged conduct.

They have a name for it in New York under a case name. But in the federal system, we would call this a 404B evidence issue where evidence of other bad acts is admissible, not to show a person's propensity to commit them, but to show what their MO is, that they always do it this way. He always put on a white robe, and then he walked into the room, and then he dropped the robe or whatever it is he did that that evidence can come in to show that this is this pattern and to prove his absence of mistake, motive, and other things like that.

So I suspect as Alvin Bragg has said, they will try him again. And I think they will convict him again. It's just that this time around, they won't be able to bring in the evidence of those things that the Appeals Court said it was erroneous to bring in. This is kind of a discretionary standard.

The court of appeals thought the trial judge abused his discretion in allowing it in. The standard is whether something is substantially more prejudicial than it is probative. And so it's a bit of a judgment call. The judge at trial let it in on appeal. They said, "No." So I suspect they'll try it again, and I fully expect that he'll be convicted again.

Kim: And remember, he's also convicted in California.

Jill: Right. And they're going to transfer him from New York.

Joyce: I was so happy to see that.

Jill: They're going to transfer him from his jail, his prison in New York to a prison in California, because that is where he's still convicted. But I just want to add one quick reference to the fact that there is evidence of other bad acts that Judge Merchan said could come in the New York case if Donald Trump testifies to impeach him.

Barb: Against Donald Trump.

Jill: Yes, against Donald Trump, to impeach his credibility as a witness.

Joyce: Thank you for listening to #SistersInLaw with Jill Wine-Banks, Kimberly Atkins Stohr, Barb McQuade, and me, Joyce Vance. Our live shows are almost here, and we cannot wait May 2nd in Chicago, May 9 in Detroit, May 30 in Boston. Everyone should go to politicon.com/tour now to get tickets, even if you don't live in one of those cities. Take a road trip with your friends.

And please show some love to this week's sponsors, Calm, Thrive Causemetics, Framebridge, and Lomi. You can find their links in the show notes. Please support them because they really do make this podcast possible. Please follow #SistersInLaw on Apple Podcasts, or wherever you listen. And please give us a five-star review. It really does help others find the show. See you next week with a new episode, a live episode, #SistersInLaw.

Kim: You guys, when we get to Chicago on our live tour, can I not get the worst dressing room this time, I mean, honestly.

Barb: Dressing room, you got a dressing room? I didn't get a dressing room.

Kim: Oh, you didn't know that?

Barb: Dressing room.

Kim: Okay, nevermind.

Jill: No.

Barb: They told me-

Jill: I don't think any of us knew about the dressing room.

Barb: ... come ready stage ready.

Joyce: Dressing room.

Kim: You didn't have the bowl of just green M&M's-

Barb: Or the white shade carpetting?

This transcript was exported on Apr 29, 2024 - view latest version [here](#).

Kim: All right. Never mind.

Jill: I'm volunteering to do your hair and makeup, Kim, so that you can be the best look that you ever were.

Kim: I love you. I could use the help. Thank you, Jill.