

Barb: Welcome back to #SistersInLaw with Joyce Vance, Jill Wine-Banks and me, Barb McQuade. Kimberly Atkins Stohr is away, but don't worry, she will be back soon. Now let's get onto the show. This week, we'll be discussing the suspension of Jimmy Kimmel and other attacks on the First Amendment, the charges in the murder of Charlie Kirk and Maurene Comey's lawsuit. But first, just before we get started, I always like to check in with my sisters. I felt like this week could have been called the Legend of Jill Wine-Banks Week because...

Jill: Well, every week could be called the Legend of Jill Wine-Banks Week.

Barb: That's true, but I saw her.

Jill: All right. Do you see me blushing?

Barb: And that's okay. You're the color of your wallpaper, Jill. You are as modest as you are brilliant. But the first reference I saw to her came up this week. Our friend, Elie Honig, has a book coming out called Investigating the President, which sounds fascinating and I'm looking forward to reading it. But of course, he features prominently the description of...

Jill: Jill Wine-Banks, yes.

Barb: ... of Jill Wine-Banks and her work as the Watergate girl on the Watergate investigation, sitting on the floor, piecing together documents after the FBI had put crime scene tape around the offices of the investigators of the Special Counsel. So, I can't wait to read about that, but that was not the only reference-

Jill: It was not.

Barb: ... to the legendary Jill Wine-Banks this week. Where else did you see your name pop up, Joyce?

Joyce: I believe Kimberly wrote a column, didn't she?

Barb: Oh.

Joyce: She did. She did.

Barb: Yeah, I have to wit...

Joyce: She absolutely did. Did you see it, Jill?

Jill: I did. She wrote to me saying, "Could she use my name?" And I said, "Well, of course you can. What is it about?" And it was a very private conversation we had when we were all backstage for one of our live shows, and the three of us were freezing and wanted a heater, and she's going, "A heater? Oh my God, I'm drenched." So, of course, we immediately realized what her problem was and she said she just couldn't get a doctor who was willing to help her. And I gave her the name of Lauren Streicher, who was a renowned OB-GYN and was head at the

time of Northwestern Center on Sex for Older Women. I forgot what exactly the title was and has a podcast. And I knew that she would find a doctor in Washington for Kimberly and Lauren did.

And the doctor that Lauren got for Kimberly was really helpful. And her article is fascinating. Everybody should read it. These issues have been taboo for so long, like it's embarrassing or somehow wrong to talk about it. And I think it's wonderful when women step up and help other women.

Barb: I'm a little uncomfortable with this conversation, but I think we should put a link to the article in our show notes.

Jill: Absolutely.

Joyce: Sounds good.

Jill: Absolutely.

Barb: Where everyone can read it in the privacy of their own home.

Jill: Right. Guys, let's say, it's about menopause, but also particularly about how black women are not given the same treatment and may suffer different symptoms than white women. And it's an important thing for everyone to know. So, I was very interested. Of course, it's well-written because it's by Kim, but yeah, let's put the link in the show notes. Everybody will enjoy it.

Joyce: Yeah, that'd be great. I think we should underscore that point. The disparate medical care that black women receive is something that we should all be aware of. And so, I think it's great that you are an advocate for Kim and great that Kim wrote the piece, and I hope all of our listeners will take the opportunity to read it.

Barb: Yeah. As a woman, much over 30 now, I appreciate the sex education and health education that I got as a school child, right? Sixth, seventh grade, you have these health classes. There's no class for the other end of the spectrum-

Jill: Exactly, right?

Barb: ... of life for older women. Nobody tells you about all the things that happen.

Jill: And it's embarrassing. Men are embarrassed if you talk about it in front of them, and I think we just need to normalize it so that people won't be upset by it anymore. Did either of your mothers ever discuss it with you? Because mine didn't. I mean, I didn't know what to expect and I didn't know how to deal with it. And it was an interesting experience, and all my friends were 10 years younger than I was, so they didn't know what to tell me either.

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Jill: Hey, Barb, not only does Chicago beat you in hot dogs, but it's 79 degrees here today.

Barb: Oh, wow. Well, it depends on the difference of beat, doesn't it?

Jill: It does. I'm so excited about the weather though. But I also am excited because I have some great news. Helix is extending their incredible Labor Day sale for our listeners. Go to helixsleep.com/sisters for Helix's Labor Day offer running through September 30th, and you'll get 25% off site-wide. It's exclusive for our listeners. SistersInLaw listeners get on it. That's [Helixsleep.com/sisters](https://helixsleep.com/sisters) for 25% off site-wide through September 30th. Make sure you enter our show's name after checkout so they know we sent you. Again, that's [Helixsleep.com/sisters](https://helixsleep.com/sisters), and the link is in our show notes.

When we were deciding what three topics we wanted to cover this week, I picked one that enraged me the most, which was the attack on our First Amendment rights that I think is now in full swing in the aftermath of the tragic murder of Charlie Kirk and the firing of Jimmy Kimmel. I thought it'd be easy to talk about this threat to democracy that would elucidate the exegesis of the situation. And I love that I got to say that on air, you'll have to Google what exegesis of the situation means. It was a favored phrase of Milton Handler, my antitrust professor. But I was wrong. It wasn't easy because I went to craft some questions for you, my sisters.

I was overwhelmed by how many First Amendment threats had materialized just this week, and I think the answers are obvious, but I see that they aren't for Trump and his supporters. So, first, before we talk about some of the examples of what's happening, let's talk about what the law is. What does the First Amendment allow and are there any limitations that it allows? Joyce, you want to start?

Joyce: Well, the First Amendment guarantees people the right of free speech vis-a-vis the government, right? It's got to be the government that's blocking your rights for the First Amendment to come into play. If it's your neighbor or your mom, that's an entirely different story. You can have the conversation with them, but what you can't do is assert a First Amendment right. Beyond that though, the First Amendment permits logical, narrow restrictions based on the time, manner, place of speech. The obvious one, the one we all know, is that you can't yell fire in a crowded theater. And so, over the years, the Supreme Court has developed doctrine that governs when those rights can be limited.

Jill: So, let's move to some of the specific examples of what we think are violations of the First Amendment. And that would be, let's start with the indefinite suspension of the Jimmy Kimmel Show. I want to play for everyone the exact words that he spoke, because I want you to think about whether those sound like threats of imminent danger or violence, or defamation or anything vile. What Jimmy Kimmel said was.

Jimmy Kimmel: He had some new lows over the weekend with the MAGA gang desperately trying to characterize this kid who murdered Charlie Kirk as anything other than one of them, and doing everything they can to score political points from it.

Jill: So, Barb was anything that Kimmel said, the kind of thing that would allow a restriction on his speech?

Barb: So, I think one thing that's really important to emphasize is this point that Joyce has mentioned and you have mentioned, which is the difference between government action and private action. So, Kimmel was suspended by his employer, ABC and the Disney Corporation because they thought his comment was, I don't know, something that would be objectionable to the Trump administration apparently. We did see after the murder of Charlie Kirk, some of this really horrific commentary of people celebrating his death and his murder, which I found really horrendous and grisly. But as offensive as that may be, that is not a basis for censorship. Now, the government couldn't tell him that he can't say these things, but his employer may.

But to answer your question more directly, Jill, he didn't even say anything about the murder of Charlie Kirk. What he was arguing is that the Trump administration is exploiting this murder to try to divide conservative versus liberal, right? Talking about organized networks of leftists who are engaging in political violence versus conservatives who are simply exercising their First Amendment rights to free speech. How ironic is it that we are seeing restrictions on First Amendment speech in response to criticism for exercising someone's First Amendment rights?

So, I find this to be wrong, disturbing, and really concerning that the head of the FCC, Brendan Carr, suggested that, "Hey, we can do this the hard way or the easy way," suggesting that they would take Kimmel off the air and go after the broadcast license of ABC. So, ABC wasn't acting in a vacuum, they were acting out of fear that there would be corporate consequences from the Trump administration for what Jimmy Kimmel is saying online. And as far as

commentary goes, this is pretty tame, right? This is criticizing the Trump administration for its political spin, and you can agree or disagree with him, but the idea that he's being censored, silenced, I think should disturb all of us in a democracy.

Jill: Yeah, and I want to just clarify. Brendan Carr, who you refer to is the chairman of the Federal Communications Commission. So, his words can be viewed as government conduct. And when he says, we can do it the easy way or the hard way, it sounds like a mob boss who doesn't say directly what the threat is, but it's clear what the threat is. And you mentioned irony, and I would say it's really ironic because Kirk was someone who advocated for the First Amendment and free speech and said there is no hate speech. And of course, so did Brendan Carr before he became the chairman of the FCC, where he could use the restrictions on speech to please his boss.

And while the words may have been unacceptable to Donald Trump, who any dictator wants to get rid of comedians who are the forceful part of a resistance to bad conduct, but they were beloved by his audience. So, it is really wrong, and you're so right, Barb, to point out that there's a legal difference between direct government action and private employer action. So, both of you, do you think Carr's words were indirect government action that would make this something that violates the First Amendment?

Joyce: So, I think if this were a filed case that went to court, I think that there would be a very strong argument, particularly if a jury or a judge was able and they would be able in a lawsuit to review video and audio of the comments that Carr made and the context in which he made them right in the right-wing ecosphere. I think that a jury could very easily draw that inference. That's a factual question of interpretation. My interpretation is, it sure sounds like a threat to me. I mean, it looks like the mob boss saying, "Behave or else will come and kick you in the kneecaps." And it's just, I think, astonishing to hear the head of the FCC trying to weaponize the licensing process like this, something that's clearly illegitimate.

This is a guy who spent a lot of time during the Biden administration talking about liberals who were violating free speech rights. And the only difference between his claims back then, which I think were poorly founded quite frankly, because that was about disinformation. So, I'll leave that up to Barb, but I think the only difference is that this time his team is advocating for these sorts of infringements on rights, and so he's okay with it.

Jill: And isn't this a double standard because Carr was going after Kimmel, but he's never said anything about what I would consider true incitement to do violence. From Brian Kilmeade on Fox when he said, "All mentally ill homeless people should be put to death." What do you think? Is that a double standard that belies any possible legitimacy for the threat from the FCC chair?

Barb: Hmm, I don't know. I mean it's both or offensive, but I do think that the idea that I am intimidating and coercing people who speak out against the Trump administration, but not against other things, I think demonstrates the hypocrisy of it. I think the ultimate irony is that Charlie Kirk himself was very much an

advocate for free speech even when it was offensive. And so, the idea that they are favoring one side of the political debate is just as offensive as some of the complaints we've heard from conservatives for decades about the left dominating the news media or academia or other places. None of it is appropriate, right? We should be able to speak freely.

As Joyce said, there are some limits like when you engage in a threat or fraud or other kinds of things, but even hateful things are permissible under the First Amendment.

Jill: And so, speaking of hate speech or hateful speech, let's look at what Attorney General Bondi said this week and what it means about her knowledge of the law and how worried we should be about free speech and an attorney general who doesn't know the law. She enraged both Democrats and Republicans when she said that she was going to go after anyone who said anything against Charlie Kirk. How did you interpret her remarks and are you worried about this?

Joyce: So, look, Pam Bondi was the Attorney general of the state of Florida. She's now the Attorney General of the United States. Surely, she understands that there's a First Amendment and that hate speech is protected by it. If she doesn't, well, that's just next level Kristi Noem not understanding what habeas corpus was.

Jill: Good one. Yeah.

Joyce: My interpretation is that what happens here, and it just confirms what we already know. There's nothing shocking in this. It's just confirmatory. Pam Bondi is aping for an audience of one. She's doing whatever pleases Donald Trump, whether it's firing the US attorney in the Eastern District of Virginia because he can't manufacture evidence to engage in a revenge prosecution that Trump wants, but that isn't merited on the basis of the law and the facts, or whether it's this nonsense about going after people for hate speech. She is clearly not interested in the law, but far more interested in the politics.

Jill: Yeah, I never thought I would say this, but Tucker Carlson said something that I actually agreed with. He criticized her saying that hate speech is not a crime. It's a lie when she says that hate speech is a crime. And actually, Bondi did end up retracting and backtracking on what she said and said that justice would only go after speech that led to violence. And that of course is consistent with the First Amendment, but Trump wasn't going to be outdone by his own attorney general. And he then went after reporters. He threatened ABC's Jonathan Carroll, when he was asked a question by Carroll. He said, "We will probably go after people like you because you treat me so unfairly." It's hate.

And he did the same thing with an Australian reporter named John Lyons by saying... This was so juvenile that, I mean, you have to laugh at this. He said, "I'm going to tell your Prime Minister when he visits that you're terrible and you're putting Australia in a bad light." And I mean, what's going on here?

Barb: I think it is, again, an effort to use his position, a very powerful position to try to intimidate people. I mean, there is nothing wrong. In fact, it is the essence of the First Amendment for journalists to criticize a leader, to point out inconsistencies, to challenge their thinking. And so, when he says that, we'll go after people like you because you treat me so unfairly, it's hate. I mean, there is nothing illegal about what's going on there. And so, the suggestion that the Justice Department is going to bring some sort of criminal or even civil charges against somebody for writing things, the President disagrees with that is the essence of authoritarianism.

And I have to think that other than diehard MAGA supporters, people who care about the First Amendment, conservatives, Federalist Society members are going to be just as troubled by this as anybody on the left. We've heard this week, people like Ted Cruz.

Jill: Ted Cruz. Yeah, yeah.

Barb: And criticizing Pam Bondi for engaging in this kind of rhetoric. So, I think that what's interesting is people are willing to tolerate an authoritarian when they perceive that he's on their side, but the second they go to the other side, it's problematic. I think what we really need to educate people about, and I'm sure our listeners appreciate this, is regardless of whose side they're on, that's not what matters. It's all about the process. That is what our legal system is about. And so, when we've got anybody who is trying to censor journalists from reporting anything that's favorable or unfavorable to one party or another, it's all bad.

It is all a violation of the First Amendment, and it makes us all less able to scrutinize and criticize and act upon our leaders in power.

Jill: Absolutely. And Trump wasn't done with that because he also went on to basically say the FCC was going to go after anybody who allowed words on their stations that exhibited hate. And he went on to say that 97% of everything that goes on is no conservative viewpoints. It's all those liberal awful people who hate me. And then JD Vance weighed in. He urged all Americans to report to employers, anyone who posts something about Kirk that isn't flattering and press is reporting that employers are firing employees on that basis.

They point to NASDAQ, Perkins Coie which shocked me, Home Depot, Ball State University Metro Atlanta, Wisconsin for teachers. And Joyce, in your state, there's reports that there have been people are organizing a way to mine social media to find statements about the killing and demand that state employees be fired or face other disciplinary action because of their speech. Have you seen any of that in your state?

Joyce: Well, I've read the reports. I haven't seen any of it personally, but obviously the Vice President's comments are really out of bounds. I mean, I always try to reject the comparison to Nazi Germany, but here, it's hard to push away that image of children being cultivated to inform on their parents. I mean, is this neighbors turning in neighbors and over something that... I mean, I'm not an expert on Charlie Kirk, right? I mean, I didn't follow him. I was intrigued to see after he

was killed that he followed me on Twitter. And I don't take away from what we've heard about him in the news that he would've advocated for that going after people with different viewpoints.

He was killed in an effort to try to reach out to people who maybe didn't share his viewpoint and to engage them in conversation. And so, this notion of retaliating against people and damaging them and their families just because we don't agree with them, I think that's something that we just need to firmly stomp out, right? That's just unbelievably anti-American. The idea though that the Vice President is advocating for it, that really threw me for a loop.

Jill: And let's not forget that we still don't really have a motive in mind. There's no proof of that yet. But I want to end on a more positive note because I'm worried that we may be past the point of no return and that your analogy to what happened in Nazi Germany may not be far from the truth. And I want to be talked off the ledge, and I know I can speak for Kimberly who wants to be talked off the ledge. What are Democrats doing? What are supporters of free speech like the ACLU and the Foundation for Individual Rights and Expression doing, or what can they do? What is Congress doing and how are the Republicans in Congress pushing back? What's going on? Is there some hope for us?

Joyce: Yeah, I mean, I think so first of all, I should say the title of my book is Giving Up Is Unforgivable: A Manual for Keeping a Democracy, which is very much my viewpoint. I think something that Trump does in this, as in all things, is he tries to convey the image that he's all powerful, that he's already won. You should just give up because he is going to do whatever he wants to do. And we know that that's not the case. We know that where there's significant pushback, he simply steps down. I mean, is he in Chicago? No, he's not in Chicago because Chicago pushed back when they were threatened with National Guard and the military.

This I think is another instance like that, and we're always looking for things that we can do to make it better. Well, let me tell you, if you see one of these situations where there is an illegitimate attack on someone because of their speech, call your local chapter of the ACLU. The ACLU is great about litigating these First Amendments. I feel certain that along with other groups, they will jump on the notion of pushing back legally where it's appropriate. So, help them out by making sure that they're aware of what you're seeing in your community if there are problems.

Barb: Here, here, I think lawsuits are the way to challenge these things because I think judges, if they are interpreting the law correctly, are not going to care what your viewpoint is. What they're going to care about is your right to free speech.

Jill: And we should point out that in terms of pushing back the New York Times did and the suit, the \$15 billion suit has been dismissed as being a ridiculous filing and more on that, I'm sure as we take on another issue next week.

Joyce: As summer ends, let's all head into fall looking and feeling our best without piling it on. That's why we want to tell you about Thrive. Thrive Cosmetics is your go-to for a simple, clean, and radiant fall fashion look. Picture it, minimal

effort, maximum impact, plus every product is 100% vegan, cruelty-free and made with clean skin-loving ingredients that work with your skin, not against it.

Jill: So, I am a longtime lover of Thrive. I have been using their mascara forever, and my newest love is the Brilliant Eye Brighteners, their waterproof eyeshadow, highlighter sticks made to brighten and open your eyes, giving you a radiant eye look for the moments you want to look your best. Thrive's foolproof formula makes it extremely easy to apply and blend any the 34 shades. And I hate to tell you how many of those I have because I love playing with color. You can use as little or as much as you'd like to create the look you want, just apply it to the inner corners of your eye for a rested and effortless look. Sometimes, I use a darker color as a liner and as a darkening the crease of the eye.

They're all great and it's so much fun to blend them. You can use the eyeshadow for the perfect daytime glow, and you can also try applying a metallic shade all over your eyelid and blending it with your finger for an easy smoky eye that pops.

Barb: Wow, that sounds painful. I make that joke every time you...

Jill: You do.

Barb: But it's fine.

Jill: I know.

Barb: The idea of Jill's smoky eyes popping. It's so exciting. Well, we love it that cause is in the name for a reason. Thrive not only defines luxury beauty with clean skin, loving ingredients and uncompromising standards, but they give back too. Every time you use your favorite Thrive Causmetics products, you're doing more than enhancing your glow. You're helping others shine too. With more than \$150 million in product and cash donations to 600 plus giving partners, your purchase directly fuels real impact. Imagine making a difference in things like education, the fight against cancer, stopping domestic abuse and more with every purchase. That is beauty with purpose, not unlike my friend Joyce Vance here.

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Barb: This week brought charges against a man named Tyler Robinson for the murder of Charlie Kirk. I don't like to use the names of people who are alleged murderers, mass shooters, et cetera. So, I'm going to try to use the term the defendant throughout this conversation, but that's my preference. Of course, Kirk was shot and killed during a speaking event on the campus of Utah Valley University last week. And so, we wanted to talk about the charges here, what has been charged, what's not been charged, and our thoughts about them. So, Jill,

what was the defendant charged with in this indictment that came down this week?

Jill: So, there are seven charges against him, and one of them is a murder charge that includes the death penalty, but he's also charged with discharging a bullet that could endanger other people. An aggravating factor being that children were present and watched homicide, and that's a crime in Utah and obstruction of justice. Those are the charges all under Utah law. And there are some very specific details laid out in the indictment.

Barb: Yeah, so it's a state court case as Jill said. Utah is a state with the death penalty. And Joyce, what is it that makes this case death eligible? I know in our prior conversations you suggested that some of this might be a little bit shaky on legal grounds. Can you share your thoughts about that?

Joyce: Well, under Utah law, once prosecutors file a notice that they intend to seek the death penalty, then any case that is "an aggravated murder" under Utah law becomes death eligible. And the statute has an extremely long list of different kinds of circumstances that can qualify for aggravated murder. A lot of them you would expect, murder for hire, murder to avoid capture by the police, murder of a child during a rape, all pretty unremarkable territory for states that have a death penalty. In this case, prosecutors have alleged that the aggravating circumstance that Kirk's murderer committed was that he knowingly created a great risk of death to another individual other than Charlie Kirk and the defendant.

And look, that may well work here. I mean, the problem is this, there will be a legal challenge from the defendant's lawyer based on the fact this would essentially mean that all murders committed by a gun or capital murder because there's almost always a risk of a stray bullet. And so, it's not an unsound theory. It may well work, it certainly fits the facts of the case, but capital murder cases always involve lots of litigation over the nitty-gritty details like whether or not statutes are constitutionally permissible. And so, I think that we will see a great deal of litigation before there is ultimately an execution on the sentence if the government in Utah gets a conviction.

Barb: Yeah, certainly in death penalty cases, it extends the case because of all of this pretrial litigation. There's another one too, Joyce, and one of the other factors is that there's a political motivation. Do you think that there's any problem with proving that up?

Joyce: Yeah, so I think that that will probably drop out of the case at some point, whether because a judge says so or for other reasons. Look, for instance, the federal hate crime statute is a great example. It explicitly includes political motivation from hate crime. Can the Utah legislature see it differently? Yeah, sure they can try. But again, I think that this is a relatively untested provision of the law and something that prosecutors really like to when they're bringing a capital case for exactly the reason that you mentioned, because they know there's going to be extensive litigation.

And I mean, sometimes these cases don't go to trial for a really long time and your evidence does not get any better the longer it sits around. So, it might be better to stick to the straight up the middle theories that courts have signed off on in the past, rather than plowing fresh ground.

Barb: Yeah. So, this committing a crime in the presence of a child may be easiest to prove, but as you say, maybe that there's some legal problems there, because it could be true in every case. I guess we'll have to see how that shakes out. Jill, you mentioned that this indictment also includes obstruction of justice. What's the basis for that charge? And you mentioned that the indictment includes some of the evidence. We have also now seen some of the text messages that the defendant exchanged with his roommate contemporaneously in the aftermath of this.

And I'm wondering about your thoughts about that, to what extent it supports this obstruction charge and also the extent to which it supports this concept known as consciousness of guilt.

Jill: So, it's such an interesting area because my first reaction when I heard obstruction of justice was, well, every defendant flees, but this was much more. The specific facts are he changed clothes and hid the clothes that he wore during the shooting, that he wrapped the gun, the rifle in a towel and hid it. And then that he told his roommate to destroy the texts. And if the police asked him any questions to not cooperate, to get a lawyer and to say nothing. Those are pretty obvious obstructions of justice. And I would love to have the time to read the text messages because it's really chilling. But to save time, I think we will just put them in our show notes for everyone else to read.

It's right after the shooting, the alleged killer texts his roommate that he should look under the keyboard and the roommate did and found a note that said, "I had the opportunity to take out Charlie Kirk and I'm going to take it." And it goes from there.

Joyce: Yeah, pretty incriminating.

Jill: So, guys read the text messages where it pretty much lays out everything, including as I've said, the obstruction about that he left the rifle wrapped in a towel and he was trying to go back to get it, so that they wouldn't find it. And then ends with if the police ask you questions, ask for a lawyer and stay silent, that's obstruction of justice. So, there you have it.

Barb: Yeah, I think those are really illuminating. I also think they tend to support, but not overwhelmingly that there's a political motive here, which is one of the aggravating factors.

Jill: Yes.

Barb: This is something like this I had the chance to take out Charlie Kirk and he says something like some people can't be negotiated with, but I don't know if it's

enough. It's interesting. Oh, and Jill, let me also compliment you. I noticed that you corrected yourself when you said the shooter and you said alleged shooter.

Jill: Yes.

Barb: We have a lot of aspiring public defenders here at our law school, and one of their favorite T-shirts is a shirt that just says allegedly. One of my favorite Far Side cartoons is one where a lawyer is standing up and there's a shark sitting at defense table, and the lawyer says, "Objection, your Honor. Alleged killer shark."

Jill: So, Barbara, I want to go back to because you did ask about consciousness of guilt and I didn't answer that. And yeah, this certainly shows consciousness of guilt, and it also includes an exchange where the roommate who is shocked by this says, how long have you been planning this? And the answer is, "A bit over a week, I believe. I can't get close to it, but there is a squad car right nearby, and so I'm going to stay hidden. I'm not going to go get the rifle." So, there's a lot of evidence that he knew what he did. And there is evidence of a motive based on his belief that Kirk did not agree with some of the alleged shooter's viewpoints on political issues.

Joyce: I think that's right. If they can authenticate all of this stuff, this case, probably there will be some form of a guilty plea resolution if the state doesn't insist on the death penalty. And it seems to me that that's really the only thing that they can argue that this was not his. Yeah.

Barb: Yeah. The evidence, at least based on our uncross-examined viewpoint, does sound strong. Joyce, I'm wondering if you can help explain to our listeners this concept of aggravating and mitigating factors that we've been talking about. I know you teach criminal law, and there's a really interesting history in death penalty jurisprudence from the 1970s, and maybe some of our listeners remember this, maybe some are too young to remember this, but there were a couple of big cases in the 1970s, one called Furman that actually invalidated every death penalty statute in the country, because they thought they were too arbitrary that some juries are going to be very easily persuaded that death should be appropriate and others, not so much.

States responded, and then another case came along called Greg that put a stamp of approval on the new protocol. It seems like we are seeing the legacy of those cases today, and I wonder if you could just explain how that worked and this idea of aggravating versus mitigating factors.

Joyce: Yeah, so the way this plays out in practice is that death penalty trials involve a bifurcated process that separates the case into two very distinct phases. The first is a guilt phase, and the second is a sentencing phase. And during the guilt phase, a jury determines whether the defendant is guilty of the crime, and it's only if there's a guilty verdict that the trial moves to the sentencing phase where evidence is presented that will help the jury decide whether or not to impose capital punishment. Obviously, the jury can decide not to impose capital punishment. They could, for instance, recommend life in prison. And so, this is where aggravating and mitigating factors come into play.

Aggravating factors often involve the circumstances, the heinousness of the crime. Mitigating factors might involve childhood or other issues. And then of course there's mental illness, which is an entirely separate inquiry. It's not the fact of mental illness, but it's whether or not the defendant had the capacity to appreciate what he was doing or whether there might be an insanity defense at play. So, all of these issues are involved. The insanity defense happens in the guilt phase, and it's only when there's a conviction that we move on to sentencing. So, I guess that there's a possibility in this case. We just simply don't know enough about the defendant at this point, but we could see that effort to raise an insanity defense.

Utah follows, by the way, the federal law that was set down in Furman and Gregg, and it does not appear that there's any room for a judicial override. The statute seems to say that the judge shall if the jury orders it enter capital punishment. One last wrinkle in all of this process for everybody to be aware of as we watch this play out, if the defendant likes his chances better with the judge than with the possibility of a jury. And that happens sometimes in these very notorious crimes where public sentiment is high, a defendant can waive their right to a jury trial.

So, it's possible that we could see either a bench trial entirely or if there's a conviction and we get to the capitol sentencing proceedings, we could also see that happen in front of a judge, not a jury. All things to look for.

Barb: Yeah, super interesting I think. I don't know about you two, but one of my earliest childhood memories is the execution of Gary Gilmore. You guys remember that? I was this little child...

Jill: I'm a little child older than you. I remember that. That was in Utah also.

Barb: It was, yeah. And that was the first time as a child, I was exposed to the death penalty and I remember it was by firing squad. And I remember being quite shocked that the government killed people like that outside of the context of war. I remember in talking with my mom, I saw it on the news or something, they had the news on and they were talking about this thing because the Supreme Court had suspended the death penalty for a little while after the Furman case. And then many states revised their death penalty statutes to comply with the guidance about you got to have these aggravating and mitigating factors. And then the Gregg case approved, I think it was George's new death penalty statute.

So, many other states followed suit and the first death penalty execution following those cases when the death penalty was restored was the Gary Gilmore case. And it still etched in my memory as creepy. I don't know if you guys remember that, but that was Utah.

Jill: I had very much that same reaction. The notion that it was by firing squad really stuck with me. And I saw when this case was going to be indicted as a capital case, and my first thought was, "Good Lord, I hope they still don't execute with firing squad."

Barb: Although frankly, if I were going to go, I don't know, maybe firing squad is better than some of these other methods.

Jill: They're all horrible. I mean, I'll just air my views. I think the death penalty is horribly inefficient for prosecutorial resources because it takes so long, but also I think it's abhorrent. I don't think we should be on the same list with countries like North Korea and Saudi Arabia. Yeah.

Barb: I'm with you.

Jill: And you should be a state like Illinois that has abolished the death penalty.

Barb: Yeah, same in Michigan. Well, let me just finish with one last question that I'm interested in both of your reaction in many of these high profile cases in recent years, we've seen state charges and federal charges. There's not a federal general murder charge. There's not a federal domestic terrorism charge. Do you expect we will see any federal charges in this case? Jill, what do you think? And then Joyce, I'm interested in your thoughts too.

Jill: Yeah, I'll be very interested in what Joyce has to say, but I would say that it seems unlikely because for a federal murder, there are certain requirements, it would have to be on federal land. This was not. It would have to target a federal official like a judge or any elected official. That isn't true. There has to be a connection to terrorism or hate crimes, or occur during other federal offenses like a bank robbery or a kidnapping. But the evidence of terrorism and hate crimes in the federal rules requires that it be committed as an act of bias against a person's race, religion, or other protected characteristics.

Now, I am seeing some pushing toward this being based on Kirk's religion and his religious views, but honestly, I'm not persuaded that that's going to be a major thing. And because as Joyce mentioned, this looks like a guilty plea to me. If all the evidence is put into before a jury and authenticated as being, for example, just the texts being the texts. If the DNA evidence of his DNA being on the trigger and on the towel that wrapped, I just don't see any defense that could possibly get him off. So, I don't think that there'll be a need for a federal charge, and I don't think there's a really solid basis for one

Barb: Allegedly. Joyce, what do you think?

Joyce: Yeah, so I aired this view last week. If this were any other case, I would say there won't be federal charges. There's no federal interest that would remain unvindicated following a state capital conviction. But this is not any other case. We know that there's a high level of interest in it. And like I said last week, I don't think that this case fits under the hate crime rubric. I think that there's much better evidence that the motivation here was political than religious by all accounts. I mean, it's always important to say we don't know everything about this defendant yet, but it looks like he came from a religious family and was religious and that his concerns here had to do with political issues.

So, I think tough to convince a jury as the government would have to proof beyond a reasonable doubt, right? And it just seems to me that this is a case where the FBI and the other law enforcement agencies should support our state and local partners and help them obtain a prosecution, a conviction on the state murder charges, which is what this case sure looks like, a classic state murder case.

Jill: Hey guys, I have an admission. I still own the pots and pans that I was given when I got married for the first time in 1965. Okay, comes along.

Joyce: Wow.

Jill: We got some new pots and pans and I am so in love with them. I can't believe it. The old pans still work, but these look great and work even better. And the fall's here now and the kitchen is such a welcome and warm gathering place for friends and loved ones. So, whether it's Sunday roasts, cozy dinner parties, or just being with my husband all alone in the kitchen now is when the real cooking begins. And so, I'm really proud to display my hex clad cookware. It's a hybrid cookware that blends stunning design with pro-level performance, with a patented nonstick surface and stainless steel durability.

HexClad makes it easy to go from searing a pork tenderloin to simmering a tasty butternut squash soup without skipping a beat, or hours of scrubbing.

Joyce: I love using HexClad as an excuse to lean into slower meals where we can savor every slice. That's why their Japanese Damascus steel knives are truly special and worthy of becoming your new go-to. Imagine it, paper-thin apple slices for a pie, precise dicing for stews or gliding through crusty bread without tearing it all to pieces. If you're like me and you love to cook, you know how important these details are, and these knives are amazing. I'm getting hungry just thinking about it.

Barb: I want some of my sharp knives. That sounds great. I'll sign up.

Joyce: I mean it's a big deal, right?

Barb: It is. My bread sometimes gets shredded. I need these knives, even Gordon Ramsay swears by HexClad. So, whether it's knives, pots, or pans, you can rest easy knowing HexClad can handle it all. Plus HexClad's easy cleaning means it can help take the stress out of packed lunches and family dinners in the back-to-school season, so you can focus on the people around you. Best of all, every HexClad product is backed by a lifetime warranty. So, you're not just investing in better tools, you're building a kitchen ready for anything. For a limited time, our listeners can get 10% off their HexClad orders with our exclusive link.

Man, I'm going in right now and getting me some knives. Just head to HexClad.com/sisters and discover how HexClad can elevate every gathering. Remember, fall is the season for cozy gatherings and home cooked meals, so why not treat yourself to the best cookware and knives to make it all a breeze.

Again, for a limited time only, our listeners get 10% off your order with our exclusive link. Just head to Hexclad.com/sisters support our show and upgrade your fall kitchen at H-E-X-C-L-A-D.com/sisters. Make sure to let them know we sent you cheers to stylish and stress-free fall hosting with HexClad. The link is in our show notes.

Joyce: Maurene Comey, if the name sounds familiar, it's because she's the daughter of former FBI director Jim Comey. She was a prosecutor in the Southern District of New York until she was fired via email just months after receiving an outstanding rating. That's the highest evaluation a DOJ prosecutor can receive. By the way, Comey was the prosecutor in the Jeffrey Epstein case. She also prosecuted Ghislaine Maxwell. She prosecuted Diddy and she handled dozens of lesser known cases that made her community safer and brought justice and accountability in the wake of crime. So, Jill, let's just start with the firing. Why was Comey fired and what did the email she received say?

Jill: If you're asking me why she was fired, in my opinion, I can tell you, but I can also tell you that no reason was actually given. She received an email with an attachment and the attachment said Article II of the United States Constitution and the laws of the United States as the basis for her firing. Now, Article II is the president's powers and the President does not have the power to fire people. He didn't appoint civil service employees of the Department of Justice. So, I'm prepared to accept the allegations in her complaint that she was fired, because she is the daughter of a critic of the President, her father, James Comey. And that it is because he believes she shares his political views, but really no reason was given.

And when she pursued it with her boss in the US Attorney's office, he basically said, "I can only tell you it came from Washington. I can't say anything else." So, no reason was given.

Joyce: Yeah. So, Barb, look, we've both handled the hiring and firing of AUSAs of Assistant United States attorneys. Does that make sense to you that it came from Washington and that it's about Article II of the Constitution?

Barb: No, Joyce, that's what we call a leading question, isn't it?

Joyce: It was a pretty leading, wasn't it?

Barb: Well, I know...

Joyce: I should have been a defense lawyer.

Barb: Well, I know deserve answer is not. No, it's not how it's done. I did have the sad task of firing some people from time to time. But before you do that most often, you must first put them on a performance improvement plan. If there is something lacking in their performance, you have to tell them that we want to counsel you in improving your work. We'd like you to go to this kind of training, maybe for example, or we would like to try to intervene with this problem that

you've been having. First you go through that, and that's because employees are entitled to merit protections under the Civil Service Act.

So, that includes 30 days notice before you're fired, you get time to get time to respond. You're entitled to a written decision that explains the specific reasons that this action is being taken against you. You wrote in detail about this in one of your civil discourse columns this week, this concept of progressive discipline. So, if the person fails to address their problems in this performance improvement plan, then maybe they do get suspended. Maybe they do get some sort of disciplinary measures enacted, but firing is for cause. After you've explored these things, after the person has either refused or been unable to correct these problems, instead Maurene Comey just out of the blue gets this thing that says, you're gone under Article II.

Article II of the Constitution, of course, is the one that vests the executive power in the president. And I think one of the things we're seeing from President Trump is an effort to take this unitary executive theory that all executive power resides in the President and any restrictions on his decisions are therefore unconstitutional. I think that he wants to test this in the Supreme Court in hopes that he will get them to sign off on this behavior that he gets to just act like the CEO of a company with at-will employees. You're fired. You're fired. Anybody who looks at me the wrong way is fired. And that's not how it works.

In the United States, we've since 1873 have had civil service protections to protect our civil service from political whim to provide for expertise and independence so that you can only be fired for just cause if there is something lacking in your performance, not because the new president doesn't like something that you've done for political reasons.

Joyce: So, I think you are dead on the money. This is Donald Trump hoping that the Supreme Court will throw him another bone because this is one of those cases, it already has that target on it that it looks like it's headed towards the Supreme Court, or at least it's headed with a cert petition for them to decide whether to hear it at some point. And we've now gotten the cart ahead of the horse, but Jill Comey has sued. You mentioned early, Barb and I have discussed who does she name as the defendants in her complaint and what are the claims that she's making against them?

Jill: It's a really interesting complaint. But before I answer that, I just want to add to what Barb said, which is there's another reason that we go through this progressive process, and it applies in corporations and private businesses. It's because hiring and firing is very expensive. You train people, you bring them on, and if you fire them, you have to replace them. And that means recruiting and everything else. And so, there's very good business reasons to not just willy-nilly fire someone for no cause. But in terms of her complaint, one of the people named is the one the email came from who had, by the way, just recently before that commended her for her great performance.

So, I mean, it's really weird, but of course she names the Attorney General, the Department of Justice, the executive office of the president, and the director of

the office, the Office of Personnel Management and the Executive Office of United States Attorneys. And it alleges that her termination was unlawful and unconstitutional and retaliatory due to her father being former FBI director James Comey.

Joyce: So, Barb, what kind of relief is Ms. Comey asking for? This is a civil case, not a criminal one. So, I'll just issue that general reminder, right? At the end of the day, in a civil case, everybody goes home, nobody goes to prison. Usually, plaintiffs are seeking financial compensation from defendants for wrongs committed against them. There can be other kinds of relief. So, what does Comey want the court to order here?

Barb: Well, this is not one of those cases where she's seeking a big sum of money, not like Donald Trump who sued the New York Times this week for defamation seeking \$15 billion, billion with a B. Could his reputation be worth \$15 billion such that he could have suffered some harm worth that amount? But I digress. Instead, what she wants is what's known as a declaratory judgment, that is a court order that declares some party do something. So, what she wants is a declaration by this court declaring that her firing was in violation of the law and ordering her reinstated. Though if she were here, I would say, "Honey, be careful what you wish for.

Because if you go back to DOJ, I'm not sure it's going to be the same DOJ you thought you worked for before." But that's what she wants. She wants to restore her position to her job and a declaration, a decision from the court that her firing was unlawful. And the value of that, of course, is that can serve as precedent in other cases, that the president does not have this power to violate all these federal statutes and just fire you Under Article II. In the alternative, she asks for a writ of mandamus. It's the same thing. She wants to be reinstated and also to be compensated for her loss, so back pay. Mandamus is an order by a court to some government official to do something.

And so, that would be an order to the Justice Department to hire her back and reinstate her back pay. So, it's really just a different legal theory for getting the same outcome. And so, I hereby wish her the best because I think she's on very solid legal ground. I think this is pure retaliation. We saw the Laura Loomer social media post talking about the fact that she's Jim Comey's daughter, and I think it takes a lot of courage to file a lawsuit like this because you know it is going to bring all the trolls in MAGA land out to attack her, and she is standing... She could get a fantastic job anywhere she wants to. She could make a 7-figure salary in a New York law firm in a minute.

But I think by taking on this battle, she has the ability potentially to clarify what the law is in this area and push back on this idea that Donald Trump can sue anybody or fire anybody he wants in the federal government.

Joyce: Yeah, I mean, I think it's very powerful. She's asking the courts to tell Donald Trump no, and she's asking them to tell Trump no on her behalf. As you say, there's a lot of interesting detail in this complaint. It really is quite a story that gets told, including the fact that far-right influencer, Laura Loomer apparently

played a role in this, and she did it openly on Twitter, running a campaign against Comey and saying she should be fired and taking credit for it after it happened. Jill, there's a lot of detail in the complaint. Is there anything that jumps out at you that you think our listeners should know as this is moving forward?

Jill: Absolutely. There are actually a lot of things that jump out. One is that she is the perfect defendant, I'm sorry, the perfect plaintiff. She was Harvard Law Review. She worked for Debevoise in New York. So, to Bob's point, if she could get a 7-figure salary right now. I'm sure they'd be glad to have her back. She clerked and she handled really high-profile cases while she was in the US attorney's office. So, she really has an unblemished background to bring the suit. You've both mentioned Laura Loomer, and I think one of the things that jumps out at me in the complaint is the, first of all, Laura Loomer is quoted and she calls Attorney General Pam Bondi, Blondi, B-L-O-N-D-I which I had never seen that before, and I was amused by that.

But it also basically shows Loomer saying we got to get rid of her and taking credit for her being gone and being fired. So, that stood out. And I think the sloppiness of the termination, we've talked about the fact that it was an email with an attachment referring to Article II and not even alleging a cause, except if you are right Joyce, that this was a deliberate way to raise the issue of unitary executive. It was sloppy. They could have done something better. And then the last thing that stood out was how she said, "I would've gone to the Merit System Protection Board, but they don't have a quorum. They can't do anything."

And that's because of course of illegal firings, and it shows how complete Trump's takeover of the government is, and that may be the scariest thing in here.

Joyce: I mean, she's really giving the court that considers this case a lot of interesting stuff to chew into. So, I think it'll be interesting to watch. Barb, do you think this case is important beyond Comey's personal situation? I mean, we're talking about unitary executive theory here. How do you think it's going to play out?

Barb: Yeah, I think it's really important because we've seen Trump fire people who are on independent boards. We've seen him fire inspectors general. We also saw FBI director Chris Wray resign, but only because Trump said he was going to fire him even though he had a 10-year term, which is designed to exceed the term of anyone, president, even a 2-term president. And so, I think it's really important here, because this really tees up for the court, this question as to whether the president can fire anybody, even in violation of a federal statute passed by Congress. And I think she's about the best plaintiff.

I could think of somebody who has done her job exceptionally well and whose reasons for termination appear to be purely political.

Joyce: Will civil cases move slowly? There will undoubtedly be motions to dismiss. I'll be interested to see who Trump's lawyers will be. But discovery, if this case gets to discovery, it could be utterly fascinating. So, we'll be keeping our eyes on this one with y'all.

Barb: Well, now comes the part of the show that we really enjoy the most. That is the part where we answer your questions. You guys, keep us on our toes. If you have a question for us, please email us at sistersinlaw@politicon.com or tag us on social media using #SistersInLaw. If we don't get to your question during the show, keep an eye on our feeds throughout the week. We'll answer as many questions there as we can. Our first question comes to us from Parkin in Ridgeway, South Carolina. Parkin asks, "Can a presidential pardon end Federal Rule 11 or other federal court imposed sanctions on attorneys?" That's an interesting question, Joyce, what do you think about that?

Joyce: It really is a great question. So, the pardon power applies to criminal convictions. They can be pardoned or they can be converted so that the defendant gets out of prison, the conviction holds, but the sentence is commuted and the defendant is able to leave prison. That's what the presidential power under the Constitution extends to. I do not believe that a president can do anything about, say, a district judge's order holding someone in violation of Rule 11 or anything else. So, I think that this question hints at perhaps some interesting developments in courts to come.

Barb: Yeah, pretty interesting. Not quite clear in the Constitution. Our next question comes to us from Anne. This question says, "Is it customary or legal or allowable to publicly announce a suspect's name and reveal some of the evidence against him?" Jill, what do you think about that?

Jill: So, that's an really interesting question and my first reaction is, of course not. But then when you pause and you think about it, sometimes when you're searching for someone and you have reason to believe it is a particular person, you might say to the public, we need help in finding suspect A. And usually, you would not announce any evidence that you've accumulated because that could muddy the waters at a trial and it also could confuse things in ways that would not be helpful. I think in this case, there was some comments by Kash Patel that went beyond this kind of commentary and included his opinion of guilt, and that is, of course, wrong.

In general, we don't release names or anything else of a suspect unless and until they are indicted. It is usually kept secret, but I think there could be exceptions when you are in an active manhunt for someone, you might reveal a photograph as was done in Luigi Mangione's case and in this case.

Barb: All right, very good. Our last question comes to us from Felicia who asks, "Can passports be revoked? And if so, how?" Well, what's interesting about this, Felicia, is if you are a natural-born US citizen and you have a passport, no one can take away your citizenship. And that includes your ability to use your passport and to travel anywhere you're allowed in the world and to come back into the United States. And so, these comments by President Trump about revoking the citizenship of Rosie O'Donnell who has fled to Ireland or something, he just can't do that. That may be some intimidation tactic or fear tactic, but he can't do it.

Now, if you are a naturalized US citizen, a president can't just take it away because he doesn't like you or doesn't like what you had to say. But if a person procured their citizenship by fraud, they can be stripped of their citizenship. The idea is if you would not have received citizenship in the first place, if we had known the truth and you lied about something in your background, then your citizenship can be taken away. I've had cases where among the remedies in the case was the stripping of naturalized citizenship of a defendant. We had defendants who lied about past involvement in terrorist activities or membership in terrorist organizations obtained citizenship.

And only years later, after they were in the United States, this was discovered and as part of the judgment in that case, their citizenship and their passport was taken from them. So, it's a pretty narrow sliver of people for whom this is a possibility, but it is a possibility in that instance. Thank you for listening to #SistersInLaw with Joyce Vance, Jill Wine-Banks and me, Barb McQuade. Kim will be back soon. Follow hashtag sisters-in-law wherever you listen, and please give us a 5-star review. It really helps others find the show. Please show some love to this week's Helix, Thrive Causmetics and HexClad. The links are in the show notes.

Please support them because they make this podcast possible. See you next week with another episode, HexClad.

Jill: Okay, Barb. Good one.

Joyce: Oh. You did me in.

Barb: She's beauty, plus purpose and a little bit of a laughing fit.