

Kimberly Atkins Stohr:

Welcome back to #SistersInLaw. I'm Kimberly Atkins Stohr. We may be down one sister this week as Joyce Vance takes a much deserved vacation. But we all still are here with a lot to talk about. This week's topics include Supreme Court Justice Nell Gorsuch's actions signaling that a key First Amendment ruling may be revisited former President Trump's lawsuit against social media companies and the DOJ's focus on the January 6th rioters attacks on journalists. As always, we'll be answering some of your questions at the end of the show.

But first, Jill Wine-Banks and Barb McQuade, I want to talk about some news that happened this week. It seems that the attorneys who have represented the former president in the past are facing some consequences. Barb, what's going on?

Barb McQuade:

Well, we've seen Rudy Giuliani get his law license suspended not only in New York, but this week the District of Columbia added itself to the list. Also, Sidney Powell is facing a court hearing on Monday. There was an adjournment in the hearing that was supposed to be this week for sanctions for the lawsuit that she filed in Michigan, challenging the election results. The judge dismissed her lawsuit summarily, saying that it was frivolous and in fact, designed to undermine public confidence in the election outcome. So, she's facing sanctions. So, those two things are bubbling along.

Kimberly Atkins Stohr:

Does that surprise you, Jill, that these... It seemed like we had been talking about this for so long in that nobody, not Sidney Powell or Rudy Giuliani or Lin Wood or anyone would face any consequences for just complete lies that they were pushing.

Jill Wine-Banks:

It doesn't surprise me. It surprises me that it took so long. There are so many other lawyers who are potential candidates for suspension of licenses, including our former attorney general, Bill Barr. I think that lawyers should be warned. This sort of relates to one of our topics for today, which is the lawsuit that was filed against the social media companies, and whether the lawyers there have to think twice about whether they filed a frivolous lawsuit or whether it has some chance of prevailing. So, this is a good thing that the legal profession is starting to monitor itself. I hope that they will keep this up, and I look forward to the hearing on Monday for Sidney Powell's case as well.

I want to add one other thing, we are down because of Joyce not being here, but I'm wearing two special pins in her honor. I'm wearing some lobsters because she's enjoying Maine lobster right now, I know it. So, in a way, she's with us today through my joke pin.

Kimberly Atkins Stohr:

Yes. Joyce is always with us, and we do hope that she is having a fantastic time. So...

Barb McQuade:

That's so nice. I hope someone's watching the chickens.

Kimberly Atkins Stohr:

I'm sure the chickens are well taken care of. Their accommodations are nicer than my house, I'm sure. So, let's get to our first topic, which was a signal from Justice Gorsuch that one of the cornerstone, free speech cases at the Supreme Court has decided could be revisited. Barb tell us about that.

Barb McQuade:

Yeah. So, last week in dissenting opinions, Justices Clarence Thomas and Neil Gorsuch suggested that perhaps it is time to revisit the Supreme Court's landmark decision regarding libel law case, many people learn about in law school, New York Times versus Sullivan. In 1964, the Supreme Court decided that case, and they set a very high standard for libel lawsuits when it involves public officials and public figures. Donald Trump has, for many years, famously called for changes to our nation's libel laws to make it easier for public figures to sue members of the media. And now, as technology has made it easier for people to become public figures and for everybody to become a publisher, Justice Gorsuch is suggesting that maybe it is time to revisit the decision in New York Times versus Sullivan. So, first let's talk about New York Times versus Sullivan itself. Jill, can you tell us what is libel and what did the court hold in 1964, and why is that holding important to our concept of a free press in a democracy?

Jill Wine-Banks:

Okay, those are great questions, Barb. New York Times versus Sullivan is a landmark case that has stood the test of time to this point. It was decided the year I entered law school, and the lawyer who argued the case, the winning side, was my law professor. So, it's something that I've been aware of for more years than most of you have been alive for our listeners for sure. It is a question, in that case, of a public official, an elected official claiming that he was defamed libel, that he... that something false was said about him. The standard that the court said is that if you're a public official, and it's later been extended to public figures, that is famous people, not just average citizens, but people whose names are in the paper, not just elected officials. If you're a public official, it's not enough that a statement is false because that would make it impossible for the media to report on things, if they could be held liable for anything that they made a mistake on. It has to be basically malicious, deliberately false, knowingly false, or in reckless disregard for the truth.

So, something that, for example, the lawyers that we have just been talking about have said things that they know are false, that are in reckless disregard of their lack of truth. Those are the kind of things that you could be held liable for saying about a particular person under the New York Times-Sullivan. It's really important because in the days when it was decided and really until now, the mainstream media has to be able to cover things in New York Times versus Sullivan, it was the Civil Rights Movement. It was people saying that the sheriff in Alabama... sorry that Joyce isn't here to defend her state.

Barb McQuade:

She wouldn't in this situation.

Jill Wine-Banks:

That they had been doing... she would be... she would point out how many of the Supreme Court cases stem from Alabama. So, it was a question of their being able to report, and the fact that the state was trying to quash all the civil rights activity, and they did get something wrong, which actually, in that case, is believed to have helped the sheriff, not hurt him, so he couldn't prove damages. So, under a law in Alabama, he didn't have to. All he had to do was say that it was false and inaccurate. The Supreme Court said, "No, in order to protect the press to allow them to report on critical issues for the country, you

have to prove that they did it on purpose, that they lied and knew that the facts they were reporting were wrong."

Barb McQuade:

Yeah. So, of course, a libel suit occurs when someone says, "You defame me. You said something that's not true. It has caused harm to my reputation in the community, and I should get money damages to make me whole again." So, this First Amendment defense says that when you're a public figure or a public official, it's different. By the way, Jill, as you mentioned, the things that were false in this case were some pretty minor details. One, this is this full page ad that had been taken out by supporters of Martin Luther King and protester students in Alabama. Among the things that were alleged to have been false were that police officers formed a ring around students as they sang My Country Tis of Thee. In fact, the students were singing the national anthem, and the police officers did not form a ring around them, but were simply deployed nearby.

So, I think the point there was even if some of these details are inaccurate, as long as it is substantially correct, the gist of the representation is correct, then that's going to be enough. You have to show, as you said this, actual malice that it's false and that they knew it was false, or they were reckless disregard for what was true. So, that's the law as it was. Now, let's think about where Justice Gorsuch may be coming from. Kim, what has changed since 1964 regarding technology that makes Justice Gorsuch think we should revisit it?

Kimberly Atkins Stohr:

So, certainly, the media landscape has changed in that time. Justice Gorsuch is 100% right about that. Just to say, he's not the first person to have questioned *New York Times v. Sullivan* as a standard. Justice Clarence Thomas has been doing it for years. But Neil Gorsuch is really making a specific point. He's saying, look, in an internet age, in a social media age, two things are wrong that makes this standard unworkable. One is the fact that someone can become a limited purpose, public figure very easily. So, under the standard by *Sullivan* and its progeny. If you are a public figure, either somebody who is famous everyone knows you share, or somebody who has thrust themselves into a public controversy. So, somebody who may not have been famous before, but came out and started... and just inserted themselves into a public controversy, then, you have a higher standard to show that you have been defamed. Well, Neil Gorsuch is just saying you have TikTok famous people who spring up in a matter of minutes and 10 minutes later, they're gone. So, should they have to prove a higher standard if they are defamed?

The other thing that has changed is disinformation. Social media disinformation can spread like wildfire. I'm like at the time that the *Sullivan* decision came down, the idea is that, okay, well, we want to limit these defamation claims but at the same time, if bad information gets out in the marketplace of ideas, good information can counteract that, and that can reduce the amount of damage that is done. When you're on social media and a rumor spreads about you, it's almost impossible to undo that damage because it spreads so quickly. Also, we don't have the same common set of facts with all the disinformation that's going on out there. So, he uses those facts to question whether this is still a workable standard or whether the court should go back in and take another look at it, or overturn the standard altogether.

Jill Wine-Banks:

I'd like to add one thing to what Kim said. Everything she said is correct. But I think we haven't quite made clear that for a nonpublic figure or a nonpublic official, there is a standard that says, "All you have

to prove is that it is false." That's it. If it's false, then you are defamed. If you're a public figure who can defend themselves and prove something, say, what is actually, in your opinion, true, you have to show that the falsity exists, and that the speaker knew that it was false or acted in reckless disregard. So, it's a higher standard of proof that is called upon if you are going to have a case of libel against a public figure.

Barb McQuade:

Yeah. It's a good clarification. Yeah. [crosstalk 00:12:58]

Jill Wine-Banks:

Well, on behalf of all the public figures.

Kimberly Atkins Stohr:

It's hard, it's hard. It's hard to meet that standard.

Barb McQuade:

Well, what I want to do get into now is, Kim, what I heard you talking about raising some of the good points that Justice Gorsuch has raised about how the landscape has changed in light of technology, especially, the disinformation. If something false about you is out there on social media, it's very difficult to unring that bell. But you wrote a column defending the current state of the law in New York Times versus Sullivan. Can you share with us your views on that?

Kimberly Atkins Stohr:

Yeah. It's a couple of things. One, I agree, obviously, that social media has completely changed the landscape, and there is a lot of disinformation out there. On that point, I share Justice Gorsuch's concern but for a couple of reasons. One, when we're talking about defamation suits, usually, the purveyors of this disinformation are anonymous, unknown folks who spread things on the internet, and we know how that can take off. So, it wouldn't really be something that can be solved by a defamation suit anyway, if you don't even know who your defendant might be. But more importantly, what I worry about is if we revisit this standard and lower it, it's really going to have a devastating effect on the ability of the press to vigorously cover public officials, particularly, smaller media organizations, online media organizations if the justification is given that news online spreads faster.

I think about... This wasn't a strict libel case, but the ability of people empowered to flex their muscles on the media, and I think about Peter Thiel, I think I'm saying his name right. The former PayPal co-founder, who funded a ton of lawsuits against Gawker because he was angry about a story that Gawker wrote about him. So, Gawker is facing all of these lawsuits, one brought by Hulk Hogan over a leaked sex tape, won a jury verdict. That put Gawker out of business. That was a sustained effort to attack a media organization that violates the spirit, if not the letter of the First Amendment to me.

Even New York Times v. Sullivan itself. The New York Times was facing millions of dollars worth of lawsuits, just like the one that this Alabama police commissioner brought. This police commissioner actually won a verdict of \$500,000 in that case before the Supreme Court reversed it. It was a campaign to silence the New York Times in the '60s for what it was writing about the civil rights era. So that's extremely dangerous. I worry that those kinds of efforts will be revived.

We heard Donald Trump in 2016, when he was on the campaign trail, talk about how he wanted to open up the libel laws so that he could sue the New York Times and The Washington Post because

they had too many protections. Well, this is the protection that we're talking about, in that seems really not just against the First Amendment but just against democracy.

Jill Wine-Banks:

Kim mentioned, and we're talking about Gorsuch as hinting that it's maybe time to relook at New York Times v. Sullivan. But in 2019, Justice Thomas made a similar suggestion. In 1993, the very wonderful, Justice Kagan wrote an article while she was teaching at the University of Chicago Law School, in which she also raised this issue. Gorsuch mentions her in his reference recently. So, that presents a really interesting perspective on what might happen if this issue comes up and makes it much more likely that it's not a conservative liberal justice issue, that it may just be a philosophical point of view, and her article is fascinating. I'll put a link in our show notes to that article.

Barb McQuade:

Yeah. I think, no doubt, the landscape has changed. Even if you agreed with New York Times versus Sullivan in 1964, you may have a different view of it today. But one point that Kim made that the court does discuss in the opinion is not just the consequences that a newspaper like Gawker or the New York Times could have and go out of business, but this self-censorship that might occur to avoid that scenario, that it might have a chilling effect. They say something like, the press no doubt will take an extra wide berth to avoid causing some sort of problem because they want to steer clear. So, you can imagine in this Trump era, how important it was that we have The New York Times and The Washington Post and other voices of media, pointing out issues with President Trump and others. And if he were able to silence them or cause them to self censor, we would have a less robust press.

Well, watch the space, keep an eye on this because I do think this is a really interesting issue. Certainly, an important principle in New York Times versus Sullivan, but a changing landscape that could provide basis for change.

Kimberly Atkins Stohr:

Hey, Jill, are you using Noom?

Jill Wine-Banks:

I have been using Noom for several months now, and it has made such a difference in my life. I am so much more in control of what I eat, and so much more mindful and enjoying what I eat, and eating healthier. It's a terrific app that I cannot recommend highly enough.

Kimberly Atkins Stohr:

What about you, Barb?

Barb McQuade:

Yeah, I've been using Noom for a couple of months. I've lost like 18 pounds.

Kimberly Atkins Stohr:

Wow!

Barb McQuade:

It's, I think, a function of COVID that I had 18 pounds to lose, and then some. Yeah, like Jill, I find that it just makes me just really think about what I'm eating. Aside from the weight, which I really think is just a number, it does cause me to think carefully about what I'm eating. Like I'm not eating any processed food, which I think is what makes a big difference, just fresh fruits and vegetables and lean meats and things like that really makes a difference. How about you, Kim?

Kimberly Atkins Stohr:

I am. One thing I like about it, a couple of things. One is that it doesn't take a lot of time. First, I thought, "Oh, this is going to be so much work." It really isn't. It's just a few minutes a day on the app that can make a big difference. I also really like how it integrates other things that I use. When I go running and use my running app, then that shows up on the app. If I am tracking what I eat on another app, that shows up, too. It's all very integrated in apps that I was already using. So it's really useful. It's not about what you eat, it's about how you eat. The Noom app is easy to use and a really powerful tool, which teaches you how to understand your cravings and build new habits to hit your goals.

Jill Wine-Banks:

Noom shows you how to pursue the goals you set for yourself and make sure you reach them, focusing on motivation and improvement, not diet drinks and airbrushed expectations. If you're like us, you're busy. So, I love that Noom only asked for 10 minutes a day and you can do it at any time of day or night. Over 80% of Noomers end up finishing the program and over 60% have stuck with their goals for at least one year. That means real results.

Barb McQuade:

So, start building better habits for healthier, long-term results. Sign up for your [trial@Noomr.com/sistersinlaw](mailto:trial@Noomr.com/sistersinlaw). That's [N-O-O-M.com/sistersinlaw](http://N-O-O-M.com/sistersinlaw) to sign up for your Noom trial. You can also look for their link in our show notes.

Kimberly Atkins Stohr:

So, our next topic is Donald Trump, speaking of, who filed several lawsuits against Twitter and other social media companies. He has an interesting argument there, Jill. Why don't you tell us about that?

Jill Wine-Banks:

I will. But first, you have to put it in context. Donald Trump incited a riot on January 6th, and the next day, Twitter barred him from their platform. So did Facebook, and Google, YouTube. This week, Trump sued all three, claiming that suspending or banning him violates his First Amendment rights and claiming that they are really government actors and they can't do that. He has included some additional plaintiffs or others who were also barred from those platforms for what he calls are similar or unexplained reasons, making this a class action. The American Conservative Union, which is the host of CPAC, is also joining. He's asked for compensatory and punitive damages in an amount to be determined. He's asked for reinstatement and the removal of all warnings about false statements in his postings. He's also asked for a declaration from the court that the Communications Decency Act is unconstitutional because it lets social media control what gets posted on their websites.

I know that it seems obvious to all of us that this is not a case covered by the First Amendment, which reads Congress shall make no law abridging the freedom of speech or of the press. It says nothing about private or public corporations restricting speech. Because all the defendants here are private

companies, they are not Congress and they're not a state, which is incorporated in the First Amendment by the 14th Amendment, let's look at what Trump's lawyers claim to make this a valid lawsuit. So, Barb, let's start with you and the multi-step approach taken by the former president's lawyers to justify, making this a First Amendment claim.

Barb McQuade:

Yeah. Multi-step is a good way to think about it, Jill. So, you have to read it a couple of times, but here is what appears to be saying. They are essentially arguing that Democrats in Congress have urged the social media companies like Twitter and Facebook to ban Donald Trump from their platforms, and they have threatened to remove some of the protection they get under the law if they don't. So, in response to this coercion, Twitter, and Facebook, and YouTube have censored Donald Trump and other conservative users of these services and that has transformed them into state actors for purposes of violating the First Amendment.

So, I think this is some pretty twisted logic. As you pointed out, Jill, the First Amendment protects individuals from overreach by the government, not from private companies, regardless of their motives. I think the first sign that this is not a serious legal document, this is not a serious lawsuit, this is a fundraising publicity stunt is that it references Democrat members of Congress. Even though, of course, the name of the party is the Democratic Party. That is some weird tick that right-wing extremists used to I think... They think somehow they're owning the Libs by mispronouncing the name of the party. I think it makes them sound like unserious people. I think it's going to annoy any judge who will also find it to be unserious. But it goes even beyond that, among the Democrat legislators that they cite for this coercion is, one, Michelle Obama. Now, last I checked, she was not a legislature, Democrat, or otherwise.

Jill Wine-Banks:

Well, when we look at some of the silly things that are in this lawsuit, and I'm sorry for talking this way, but it's hard for me to keep a straight face and not treat it this way. But, Kim, I want to say, have you talked about whether it is so totally frivolous, or is there some possibilities Supreme Court, this particular Supreme Court could see it differently? I want to call your attention, particularly, to some of the examples used in the complaint about things that he said that they didn't like, which is his pressing hydroxychloroquine as the cure for COVID, or questioning the integrity of the 2020 election. So, if you could talk about that, I think it might help our listeners.

Kimberly Atkins Stohr:

So, yeah, the quick answer to the top, no. The Supreme is not going to be fooled. I don't think any court is going to be fooled by this. I mean, it almost... It seems inappropriate to talk about the fact that this Supreme Court is actually very protective of First Amendment rights. In general, this falls so far outside of actual First Amendment controversies that I don't... That's not why that they wouldn't consider this. No one would. Also, I think many of our listeners have known... you think about the case of the fact that you have free speech, but that doesn't extend to the right to say, "Yell fire, falsely yell fire in a crowded theater," right?

So, when you have the President of the United States claiming falsely that something is a cure in the middle of a pandemic, that is not a cure, that is a problem. I think the complaint only bolsters the fact that this isn't a claim because, of course, a private actor has the ability to act, to stop that person the same way that a movie theater usher could come down and say, "If you don't stop saying fire, you got to get out," right? It's a different... It's the same coin, just in a different circumstance. So no, I don't

actually think any of these things, and also some of these things, calling... using really racist language to describe the pandemic is something that incited violence against Asian-Americans across the country. This is serious stuff. There was a reason why these media companies acted. So, no, that does not make his case stronger, if anything, it is serving as a defense against this claim.

Jill Wine-Banks:

So, your comment makes me think about, isn't it almost obvious that the media, or in this case the websites, the defendants in this case have their own First Amendment rights that they are private companies, and that they can publish what they want to publish, and that they can protect their viewers, their members from false information.

Kimberly Atkins Stohr:

Yeah.

Jill Wine-Banks:

That this lawsuit ignores that.

Kimberly Atkins Stohr:

Well, I don't even think they need the First Amendment to get there. They're private companies. They set the rules when you sign up to use Facebook, or Twitter, or anything. You may not read them, but there are terms and agreements that you agreed to. Every now and again, those terms change, and you get a little notice saying, "Hey, by the way, if you use this, you agree that you are going to abide by our rules." It is more contractual than it even is constitutional. So, I think they have very strong standing to... They can do it for any reason or no reason. So, I think they have very strong standing here in terms of their defense.

Jill Wine-Banks:

By the way, one of the terms of conditions is that any lawsuit would be filed in the Northern District of California, not in the Southern District of Florida.

Kimberly Atkins Stohr:

Opsie.

Jill Wine-Banks:

So that right there, they have violated the terms of service. They can't sue where they have sued, which raises the question of: Are his lawyers likely to be in the same position that Rudy Giuliani and Sidney Powell are, where they could face sanctions or disbarment?

Kimberly Atkins Stohr:

I wouldn't have filed this claim if I was in... Listen, we all know there are times that your client maybe, honestly, may come to you and think that they have some sort of cause of action, and they may want you to sue. It is your job to tell them, "No, no, there is no claim here. I'm not going to file a complaint." That is certainly what these attorneys should have done.

Jill Wine-Banks:



So, one of the other parts of this suit is the argument against the Communications Decency Act as being unconstitutional. Barb, I'd love for you to talk about whether that law has any pros and cons that might be raised in this suit, [crosstalk 00:30:06].

Barb McQuade:

Yeah. So, not only does it appear that they filed this lawsuit in the wrong venue, but it also appears that they have failed to comply with federal civil procedure 5.1, which says, when you're challenging the constitutionality of a statute, you have to give notice to the Attorney General of the United States, so that he can intervene, and so that the Justice Department can defend the statute. Now, I don't know whether they have or plan to give that notice, but at the end of the day, if there's any legitimate challenge to a statute on constitutional grounds, the Justice Department gets an opportunity to defend it. But on the substance, I don't think there's anything unconstitutional about it.

Let's talk about Section 230 for a second. It is this part of the statute that does kind of two different things. One is providing immunity from liability for internet service providers. So, if Twitter.... If Jill Wine-Banks put something on her tweet and there's something about it that's wrong, or defamatory, or that violates the law in some way, you can sue Jill Wine-Banks, but you can't sue Twitter for that. They are just the service... They're just providing the feed, they're not verifying the content in any way. It also allows these internet service providers, social media companies to remove anything that they think violates their terms of service. So, if they say, "We don't want anything violent on here. We don't want anything pornographic on here. We don't want anything that's inciting violence, or racism, or whatever it is," they are allowed to take it down.

In fact, that statute is sometimes referred to as the 26 words that invented the internet because it was this freedom that allowed all of these internet companies to run wild and do what they did. If they had instead, just as we talked about in the last segment, these rigid rules where they had to be very careful about putting things up that could get them sued, it would not have allowed them the freedom to publish. So, those 26 words say no provider or a user of an interactive computer service, that's like a Twitter, for example, shall be treated as the publisher or speaker of any information provided by another content providers. So that could be you as the Twitter user.

So, those things don't, in any way, implicate constitutional rights their statutes. I think that maybe it's worthwhile as we see disinformation proliferating on the internet, maybe the time has come to revisit whether those are good, but those are policy questions that the legislature would have to decide. Those aren't matters of constitutional law. In fact, I think that Donald Trump should be careful of what he wishes for because if there were no Section 230, these social media companies would have to censor everything, there would be no more ability for people to say the election was stolen because Twitter and others would be worried about defamation and claims of false statements there. So we would, I think, be left without any political discourse, whatsoever, and probably nothing but cat videos. No offense to cats.

Jill Wine-Banks:

So I think, Barb, what you said in the very beginning is the end of this discussion, which is the real reason for filing the suit is not because it has a chance of succeeding, it's because it's a fundraising tool. It is something that, from the moment it was filed, has been used to raise money from Trump's supporters. Is there any other reason that you can think of that this was filed?

Barb McQuade:

Well, it seems like... I agree that that seems like part of the motive. It's also part of Trump's persona of using grievance as a way to get attention. We had the indictment a week ago. We were talking about the indictment against the Trump organization and the CFO. This bumps that headline out of the newspapers, and instead we're talking about this topic. One of the things I think that's so key about this as a class action is another line that Trump loves to use, which is, "It may look like they're going after me, but they're not just going after me. When they go after me, they're really going after you." So I think this is all about building support among his base in this grievance. Once again, going after the media, in this instance, social media as an enemy of the people.

Kimberly Atkins Stohr:

I think that that's true. I honestly think that it's win-win for... First of all, I will say, I don't know that Trump doesn't believe this is true. We have seen for five years, he has very little, if any, grasp on the law or the Constitution, or how any of that works. So, maybe he thinks this is a non-frivolous suit, I don't know. But, on the one hand, he uses things that are in his favorite, like the fact that he was not indicted as part of that New York suit to say, "See, I was innocent. I'm exonerated," or both of his impeachments, "I was exonerated. See, it was a witch hunt." Then, when he files a suit like this and it's thrown out, he uses it as grievance and says, "See, the courts are against me because of the deep state." Either way, he can claim something that he can throw to his supporters and get them all riled up. So, he's really... There's no disincentive for him to do these kinds of things.

Barb McQuade:

Kim, have you heard about Amazon Pharmacy PillPack, how it saves you time and why others should try it?

Kimberly Atkins Stohr:

Yeah. I was thinking about how many things that we had to do online during the pandemic, and we learned that some of those things are really convenient to do even long after the pandemic will be over. I think PillPack is a perfect example of that. I never liked going to the pharmacy to pick things up. If it shows up at my house, or I'll forget, if it shows up at my house, that's so much better. What about you, Jill?

Jill Wine-Banks:

The same thing. It is particularly helpful for things that aren't necessarily available at your local pharmacy. Some of the specialty prescriptions that your doctor might give you, I've gotten some through PillPack that I couldn't even get at my local pharmacy. So, it's been very helpful. Particularly, of course, during COVID when I wasn't leaving the house, it was very terrific. It's so easy that why not keep it up.

Barb McQuade:

Well, Amazon's Pharmacy, PillPack, is easy to use, and it works with most insurance companies. You can order from home and save time and money.

Kimberly Atkins Stohr:

They even coordinate with your local doctor. So, all you have to do is wait for your prescription to come right to your door.

Barb McQuade:

You can choose between 30- and 90-day supplies. If you're a prime member, you can even get six months worth of prescription medication at any time. Not to mention savings and two-day delivery.

Kimberly Atkins Stohr:

Even without insurance, you can save on prescription medications, sometimes paying as little as \$1 a month, but it works with most insurance companies, too.

Jill Wine-Banks:

Amazon prime members can save on prescription medication when not using insurance with medication as low as \$1 a month, plus free two-day delivery. Learn more at [amazon.com/sisters](https://amazon.com/sisters). That's [amazon.com/sisters](https://amazon.com/sisters). Again, [amazon.com/sisters](https://amazon.com/sisters), or look for the link in our show notes.

Kimberly Atkins Stohr:

So, our third topic for the day is the DOJ's new focus on January 6th attackers who went after journalists on that day. So, several people who were at the January 6 attacks, and who were attacking journalists, whether it was destroying their equipment, or assaulting them, or committing other crimes against journalists, have been arrested. It seems a part of a new concerted effort of a new focus by the Department of Justice to prosecute people who attack the press on that day. Several people have been arrested. There could be more arrests. So, Barb, tell us what you make of the fact that the DOJ seems very focused in these prosecutions now on people who... specifically, on people who attack journalists on that day. Is it sending a signal beyond what is contained in these individual indictments that we've seen so far?

Barb McQuade:

I think, possibly. It's hard to know exactly what is motivating the decisions. But one of the things that prosecutors consider is, first, is there sufficient evidence, such that I can obtain and sustain a conviction in this case? So, even though probable cause is all you need to file charges, prosecutors know if you're filing, that means you're going to go before a jury, or ask for a guilty plea, in which case, you need to be able to prove the case beyond a reasonable doubt. So that's question one. But that's not the end of the inquiry. There's also a separate part, not just the can we charge part, but the should we charge part. Here's where I think the justice department needs to prioritize, as they're looking at potentially hundreds of cases. They've already charged more than 500, and thinking about how to prioritize these cases.

Although the charges are no different when the victim is a journalist than it would be if the victim or any other person walking down the hallways of the Capitol on January 6th, I do think that the motive of harming a member of the press makes it a more compelling case in the should charge category, and it could even be something that is requested at the time of sentencing to ask for even a more stringent sentence because not only were they physically attacking a person and physically damaging their property, some of the cases are about stomping on cameras and other equipment, and deliberately destroying it, deliberately going after people because they were members of the press. I think in light of the honor tradition in our country of protecting the press of Donald Trump's mantra that the press are the enemies of the people, and also the press' ability to capture that day what happened, I could imagine some escalation of this as a priority to focus on cases where the press... members of the press were targeted because of their status as members of the press.

Kimberly Atkins Stohr:

Yeah. Jill, this is part of a turning of a tide of sorts from the previous administration, which also often took action against journalists. Consider also that last month, the Department of Justice said that it would no longer secretly seize reporters' records, which is something that happened in this administration, and also, other past administrations as well. So, what do you make of this? Do you think this is a concerted shift, a decided change of approach by Merrick Garland's DOJ?

Jill Wine-Banks:

I think it is, but I think there's more to it than that. First of all, it counters four years of Donald Trump attacking the press and saying they're bad and [crosstalk 00:41:25] people and-

Kimberly Atkins Stohr:

The enemy of the people.

Jill Wine-Banks:

... encouraging... the enemy of the people, and encouraging his supporters at rallies to attack the press, which was creating, I think, a serious threat to how we get information. But I also think, I mean, just practically speaking, that this is almost the next logical step. The only people who were there for this were members of Congress and their staff, the Capitol police, journalists, and the insurrectionists. So, the first focus seemed to be on members of Congress and the police who were protecting them. Now, the people left who might have gotten hurt or whose property was taken would be the journalists because they were there. Ordinary citizens weren't there. So, I think it is also that it was the next logical step. But I do think there's a message here along with the announcement that we won't be going after their private records and phone calls as part of looking at leaks that the Department of Justice is saying the press deserves protection. I think that's really very, very important.

Kimberly Atkins Stohr:

Yeah. I would agree with you. I would say as a journalist, I have covered a lot of dangerous situations, crime scenes, and protests, where tear gas and rubber bullets were flying and all of these things. I took a new job during the Trump administration, and at one point, we were going through HR. They said, "You know what? If there are certain things that you don't want to cover because you think that they would be too dangerous, you have a right to say so and say 'I don't want to cover that thing.'" I only listed one thing, and that was a Trump rally because of the fact that Donald Trump specifically orders his supporters to attack the press. Not only as a member of the press, but as a black woman, I thought that the risk of that would be much greater than whatever benefit I would have from covering that event. So that just lets you know the level of I would cover a protest with rubber bullets before I would cover a Trump rally.

Jill Wine-Banks:

Forbes had a very good article, and again, I'll put the link on our show notes, that talked about 328 press freedom violations, just between May 26th and June 6th. There's a video that accompanies it that is horrifying from January 6th. I think it's something that everyone should watch while we're talking about how dangerous it is to cover a Trump rally.

Kimberly Atkins Stohr:

Yeah. So, Barb, these charges that are being made against the folks who attack the press, they're a little different than the charges that are made by people who stormed the Capitol and broke into the building. Will they be hard to stick because the charges are... that the actual claims against them are different?

Barb McQuade:

No, I don't think so. I think these charges are going to be very solid. They've been using a Statute 18, United States Code 1752. The portion they're using is the one that makes it a crime to knowingly engage in any act of physical violence against any person or property in any restricted building or grounds. So, it doesn't have to be... The victim doesn't have to be a government employee. It doesn't even have to be property that's owned by the government. Any person or property. So, the fact that they were on a restricted grounds engaged in this... There's no special status or special protection that these members of the press get, just like any other person who might have been a victim. They stand in the same stead. But as we said earlier, it could very well be that this becomes a factor for sentencing, that their goal was to damage and harm the press in this country, or to make it impossible for them to memorialize what happened that day.

I think that's a compelling argument. I think if I were a judge, I would find that to be persuasive that that makes this harm greater than it would be to an ordinary person because of what they're trying to do. When President Trump talks about the press as enemy of the people and then we see the numbers that Jill has pointed out in the Forbes article, those words have some effect when the President of the United States says these things. It gives not just license or permission to others, but almost a command to other people to believe that these are enemies of the people, that these are people who are harmful, and that we should harm them in some way. It's such twisted logic. So, I think that these lawsuits or these criminal charges are very important for that reason of making sure that the public understands that the press is a valued institution in our country.

Kimberly Atkins Stohr:

Yeah. I think that's absolutely right. So, Jill, on a separate but related note, we know that President Trump is facing a number of civil lawsuits that claim that he incited a riot on January 6th. Well, in his defense, he is claiming that the First Amendment shields him from those lawsuits. But a friend of the court brief was filed in that case, that was pretty interesting. Tell us about that.

Jill Wine-Banks:

Yes, that was a very impressive group of people, including Laurence Tribe; and Dean Minow; a former dean at Harvard; and I believe Erwin Chemerinsky. One of the filed claims-

Kimberly Atkins Stohr:

Floyd Abrams.

Barb McQuade:

Does he know anything about the First Amendment?

Jill Wine-Banks:

Floyd Abrams, yes. Floyd Abrams who was your-

Barb McQuade:

I think so.

Jill Wine-Banks:

Yeah. He's a leading First Amendment person, isn't he? I believe he was your professor, wasn't he, Kim?

Kimberly Atkins Stohr:

He was. He was my professor.

Jill Wine-Banks:

So, showing the difference in our age, I have Herbert Wechsler and you had Floyd Abrams. Anyway, they are experts in this and said, "Whoa, not true. You do not have a First Amendment right to create an insurrection." It's going back to what we talked about the fire in the theater. The usher can say, "You can leave if you are going to stop saying there's a fire because you will cause a stampede and cause harm." So, again, I don't think there's any chance that he's going to have a First Amendment Defense to these private lawsuits claiming harm from the January 6th insurrection. Their brief is excellent and completely compelling to me and should prevail. I think that he is guilty of... as charged in these cases and should have to pay the damages.

Kim, have you heard about Girlfriend Collective?

Kimberly Atkins Stohr:

I really have. I did yoga over the holiday weekend. One thing that happens when you do yoga, often, at least, for me, is that your concentration is broken because you're worried your pants are riding down or something's pinching in your shirt. But I tried the Girlfriend Collective athletic top and leggings, and I did yoga and I didn't think about what I was wearing once. It was so comfortable and it felt like second skin. I really loved it. How about you, Jill?

Jill Wine-Banks:

I tried the skort, which is a... looks like a skirt, a little short, athletic skirt, but it has bike pants under it, like, fabulous. It is the most comfortable. It's terrific for playing golf, it's terrific just for walking, and it looks really good. So if I end up going into a grocery store, I don't feel like I'm wearing my workout clothes, but it's really comfortable. I highly recommend the skort.

Kimberly Atkins Stohr:

How about you, Barb?

Barb McQuade:

Yeah. I, too, have obtained the Girlfriend Collective skort. I like to play tennis, but for the longest time I've resisted the look of wearing a skirt when you play tennis because I feared it would make me look like I'm a player, and then there would be an expectation that I would play well enough to be [crosstalk 00:50:13]. So, I've always wear shorts. But the sport is the perfect garment because it is the combination of shorts and skirt, so. So, yeah, I'm a big fan.

Kimberly Atkins Stohr:

Girlfriend Collective is sustainable, ethically made active wear, with their inclusive sizing from extra extra small to six XL. Their incredible bras, leggings, shorts and skorts, tanks tees and swimsuits. They are the perfect choice.

Jill Wine-Banks:

Whether you're working out, running errands, or doing nothing at all, Girlfriend Collective has functional fabrics, colors, and styles for any activity. All their clothes and shipping is 100% recyclable.

Barb McQuade:

Well, and here's the best feature if you ask me. Their best-selling leggings come with pockets. Bravo.

Kimberly Atkins Stohr:

Yes.

Barb McQuade:

They have different levels of support, so you can find the perfect fit. My favorite thing about Girlfriend Collective is their garment take back program, ReGirlfriend, they call it. When you change styles or sizes, you can return pieces for upcycling into new girlfriend gear.

Kimberly Atkins Stohr:

Join us in joining the collective today. For listeners of the show, Girlfriend Collective is offering \$25 off your purchase of \$100 or more when you go to [girlfriend.com/sisters](http://girlfriend.com/sisters). That's 25 bucks off of \$100 or more when you go to [girlfriend.com/sisters](http://girlfriend.com/sisters). Again, [girlfriend.com/sisters](http://girlfriend.com/sisters), or look for the link in our show notes.

As always, we've received some great listener questions this week. If you have a question for us, please email us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet us using [#sistersinlaw](https://twitter.com/sistersinlaw). If we don't get to your question during the show, keep an eye out on your Twitter feeds throughout the week, where we will answer as many of your questions as we can. So, our first question is from Jen says, "Can you please explain the terms with and without prejudice?" That's a great question. What do you think, Jill?

Jill Wine-Banks:

I'd love to answer that because it's really relevant this week with the Cosby case. The Cosby conviction was thrown out with prejudice. What that means is that the prosecutor cannot refile the charges. He cannot cure the defect. It's gone. It's done. It's over. If it is dismissed without prejudice, it means that the error can be cured and the case can be filed again.

Kimberly Atkins Stohr:

All right. So, our next question is from Gail in San Diego. She asks, "Do the judges read all the majority and dissenting arguments before they are released?" I think she means opinions before they are released. In other words, is there a debate? How does the court work? So, the answer to that is yes. I can speak, especially when it comes to the Supreme Court. So, what happens is after a case is argued, that Friday the justices get together. They used to meet in their chamber and get together. The least senior justice would have to answer the door or get the coffee and stuff. It's this whole process. But in COVID times, I'm sure they did this via Zoom. But they would get together and they would vote. They would cast their vote as to how they are ruling in this case. Then the chief justice, if he is in the majority

or the most senior justice in the majority, if he's not, will assign the case to someone. They write an opinion. That opinion is circulated. Someone on the lower side is assigned to... I think anyone really can write a dissent. Those cases are... Those opinions are circulated as well. So, the answer to your question is yes.

Sometimes what can happen, and has happened on key cases, things like the Affordable Care Act decision, for example, is that people can read an opinion and change their mind. They can be brought on, either in terms of the reasoning. So say, for example, there is a majority opinion that five justices agree upon, but one of them writes a concurrence and the other say, "You know what? I like that reasoning better," they can join that concurrence. That concurrence will become the majority opinion. Very rarely, but it's possible that a dissent can be circulated and a couple of justices can say, "You know what? Now that you've really convinced me, I've changed my mind. I want to join that dissent." That dissent becomes a majority decision, and it can change things. So, yes, this absolutely happens. It is circulated. I don't think often. There's that dramatic of change at the end, but it is possible.

Barb McQuade:

Kim, I think it's the case, is it not? I heard Elena Kagan say this once when she was speaking, that the justices on the court don't circulate their opinions by email, they do it in hard copy. They circulate them around. Is that right?

Kimberly Atkins Stohr:

Yeah. They do it the old-fashioned way.

Barb McQuade:

I guess that reduces the [crosstalk 00:55:18].

Kimberly Atkins Stohr:

They do it unless something has changed in the pandemic. But yes, it is done hard copy. You think about it, the Supreme Court does not leak. The other two branches of government leak a lot, but it is very rarely we get any information about the Supreme Court that goes... and so behind the scenes of what happens there. So, maybe that's one of the reasons.

All right. Our third question is from Jenna. It is, "Do any of you ever watch Law & Order on television? If so, do you find yourself yelling at the TV, 'That's not how it works?'" So listen, Jenna. It's a curse. Being a lawyer and watching any sort of legal drama. Now, as a longtime fan of Law & Order, it happens pretty rarely there. But I'm not a criminal attorney, so I'll let the other sisters talk to that. But I can't watch a movie. I was thinking about The Pelican Brief. Remember that movie with Denzel Washington and Julia Roberts? At one point, she marches into some office and says, "I need to see this documents," and they're like, "No." She goes, "Have you heard of the Freedom of Information Act?" All of a sudden she's running out of the office with the document. No, you file a Freedom of Information Act requests. You wait years sometimes to get a response that says, "We have nothing that is responsive to your request." It never works like that. So, it can ruin the fun.

Barb McQuade:

Kim, but the movies are supposed to be the willful suspension of disbelief. Do you watch the Wizard of Oz, too, and say, "Oh, I'm sure, like Dorothy could just click her heels and go back to Kansas?"



Kimberly Atkins Stohr:

But it's harder when it's about process. People are going to believe this, right? They're going to think, "I'll just say the Freedom of Information Act," and poof, you get a document. I want people-

Jill Wine-Banks:

So, I would answer the question as a definite yes, I frequently yell at the TV. But my worst experience was I was a consultant to a movie called Fatal Attraction with Glenn Close and Michael Douglas.

Kimberly Atkins Stohr:

Oh, yeah. I have heard of this movie.

Jill Wine-Banks:

Oh, it's a fabulous movie. You should see it if you haven't. Great acting.

Kimberly Atkins Stohr:

Wow.

Jill Wine-Banks:

But you will also be offended by the clothes that Glenn Close wears because they do not look like a professional lawyer, and you will be astounded that she goes to the judge's home and has an ex parte conversation with him. I said, "You cannot do that." They said, "Well, we need to have this conversation occurred." I said, "Well, don't ever talk to her husband or her friend. She can't talk to the judge," but they left it in the script anyway.

Kimberly Atkins Stohr:

Oh, my goodness.

Jill Wine-Banks:

So, yes, I was very upset about how that was not a correct portrayal.

Kimberly Atkins Stohr:

I have to go back and look at the... I was going to say I have to go back and look at the legal, ethical rules about boiling rabbits, but go ahead, Barb.

Barb McQuade:

The stuff that-

Jill Wine-Banks:

My husband left the movie theater when that happened because he is such an animal protectionist that he was beyond upset. He literally walked out of the film.

Barb McQuade:

The stuff that always gets me is the portrayal of the FBI and the CIA and all of these government agencies as with the state-of-the-art technology. Their computers can provide these facial recognition images instantly at their fingertips. In fact, if you go into an FBI office, it's a great cubicle and they're outdated computers, tin cans connected by string. They're doing their best, but often lacks some of the state-of-the-art technology. One film that did get it right, I thought, and I remember enjoying this moment was when... was it... Who was in The Firm? Was it Tom Cruise in The Firm? Remember that movie? The legal thriller.

Kimberly Atkins Stohr:

Yes. Yes, it was Tom Cruise, yes.

Jill Wine-Banks:

Yeah.

Barb McQuade:

There's a scene where Tom Cruise is trying to steal some documents, and he's sweating, and he's nervous because the mob is going to catch him. So, he's trying to... He puts this document on top of the copier, and he's trying to quietly copy it and he hits print, and it starts beeping at him and says, "Please enter a client code." That was so accurate because a law firm will never allow you to copy a single piece of paper without making sure that they are charging the client for it.

Kimberly Atkins Stohr:

Oh, [crosstalk 00:59:28] that. Oh, that's hilarious and 100% true. 100% true. Oh, that's great.

All right. Well, thank you so much for listening to #SistersInLaw with Barb McQuade, Jill Wine-Banks, and me, Kimberly Atkins Stohr. We hope that Joyce Vance is having a great time. Don't forget to send in your questions by email to [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet them for next week's show, using #SistersInLaw. This week's sponsors, who we are so grateful for because they make this happen, are Noom, PillPack, and Girlfriend Collective. You can find their links in the show notes. Please support them because they allow us to bring this to you without a paywall. Keep up with us every week, follow #SistersInLaw on Apple podcast, Spotify, or wherever you listen in. Please give us a five-star review. We love to read your comments. See you next week with another episode, #SistersInLaw.

Barb McQuade:

Wait, I want to hear more about Jill's time as a consultant on Fatal Attraction.

Kimberly Atkins Stohr:

Yes.

Barb McQuade:

Jill, was it Glenn Close? So, Jill, did you get to meet Glenn Close?

Kimberly Atkins Stohr:

And Michael Douglas?

Barb McQuade:

Yeah.

Jill Wine-Banks:

I didn't get to meet either of them. It was one of those weird things where I had a choice between having my name in the credits or getting paid. Because I was a partner at a law firm, three guesses what the law firm said, "You get paid." So, I don't even get a credit. Yeah.

Kimberly Atkins Stohr:

Oh! I thought they would say, "We want the"... they would want the fame.

Jill Wine-Banks:

No. They wanted the money. So, I got paid for it.

Kimberly Atkins Stohr:

Oh! It seemed now everybody knows that you did... You know what? You should do, you should go on IMDB and just put yourself in there.

Jill Wine-Banks:

Is that legal to do?

Kimberly Atkins Stohr:

Yes.

Barb McQuade:

I'm going to start doing that for other movies.

Jill Wine-Banks:

Oh, really? That's so funny.

Barb McQuade:

I'm going to put my name in The Godfather and other great movies. Technical consultant.

Kimberly Atkins Stohr:

It will say Jill Wine-Banks uncredited.

Jill Wine-Banks:

Right. Right. Yeah, it was a lot of fun though because you get to read the early script, and you get to make all these suggestions. As I say, the two that I really was upset about was how they described what she was wearing. I was like "No. No lawyer would dress that way in court." The part about visiting the judge at home was like, "You can't do that. No one would have... The judge will throw you out."

Kimberly Atkins Stohr:

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Well, I have to say, as somebody who practiced law in the '90s in Boston, at the time where Ally McBeal, remember that show was on the air, and she would wear these micro miniskirts?

Jill Wine-Banks:

Yes, of course, yes.

Kimberly Atkins Stohr:

There were judges that I was told like, "You don't walk in there without a full, long skirt suit, and hose, and closed-toe... I mean, Ally McBeal was walking in, in these little slide... flip flops shoes and these tiny little... I'm like, "What Boston is she"... she's walking... it's just Boston, a city on Mars because this is not... without any litigator would be going to court. So, I get... Not judging on how women should be chosen by their appearance, but I was just saying it was unrealistic as somebody who was literally-

Jill Wine-Banks:

It certainly was.

Kimberly Atkins Stohr:

... doing her job at the time that show was on the air.

Jill Wine-Banks:

Of course, now everybody can wear pants. But when I started practicing law, you could not walk into a federal court in pants if you work in there.

Barb McQuade:

Wait, so you went into court without pants?

Jill Wine-Banks:

You had to... Only could wear a skirt. Had to wear a skirt.