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Joyce: Welcome back to #SistersInLaw with Jill Wine-Banks, Kimberly Atkins Stohr, Barb McQuade, and me, Joyce Vance. You need to check out our merch store before you do anything else today, go to politicon.com/merch. You can find our brand new t-shirts there. They put the sis in resistance, a timely political message. Go to politicon.com/merch and grab one before they sell out again. And now we'll be onto the show. This week we've got some really serious topics to discuss. First off, there's Trump's efforts to consolidate power in the hands of the presidency, i.e. his own hands. Then there are some developments at DOJ that are pretty disturbing. And finally we'll talk about an intriguing case before the Supreme Court next week, where a woman argues she was discriminated against at work because she wasn't gay.

We're all drinking from the fire hose these days, but before we get down to serious business, I need some advice from my sisters. We are getting a new puppy next week. It has been almost a decade since we had a new puppy, and I think I've forgotten what you're supposed to do. What do I need to do you all? What do I need to know? Kim, you've gotten Snickers so recently, what should we be thinking?

Kim: Yeah, Snickers is coming up on her two-year got you day though actually, so she's been a member of our family... Didn't that go back quick?

Joyce: That's crazy.

Kim: She's been a member of our family for a little bit. But I think you have this, Joyce, you are the VIP pet mom, and you feed your dogs cheeseburgers and stuff, which is why Snickers actually wants to live with you. But one thing I-

Joyce: We did have McDonald's for breakfast today, I will confess.

Kim: She's going to book herself a little doggy flight down to Alabama, I'm convinced of it. But one thing that I do with both of my dogs that I would recommend to anybody getting a dog is to name it a crowd-pleasing name. Yes, name it a name that you like and that is special to you. But one of my favorite things in the world, besides seeing people's faces when they see Snickers because she's so sweet and she wants to be everybody's friend, but when they ask what her name is and I say Snickers, the joy that people get from that. And the same with my last dog whose name was Boogie, just people love the awesome name. And so yes, it's up to you, but a crowd-pleasing name will be really fun for you every time you meet your new pup.

Joyce: That's such good advice. We have cats named Wingus and Dingus, and always a crowd pleaser. Jill, what do you have for me?

Jill: Well, I like Kim's advice, and don't get a name that sounds like Frisbee, because that's what people always think I'm saying. But I'm like you, my Brisbee, who's named after a city in Australia, because his father was Australian, Brisbane is his actual official name,

is almost 13, so it's a long time since I've had to deal with a puppy. But having a great trainer help us really made a difference in how well behaved he is. And our trainer, Tara is her name, is just amazing. And she also had a Dalmatian, so they fell in love the minute they saw each other, and they have been lifelong friends. I consider Rogue, Brisbee's girlfriend, and at one point we planned a wedding, so you might think about that.

Joyce: That's such a good idea. I've always been told that good dog trainers don't train the dog, they train the owners, and I'm fairly sure that my husband is untrainable, but that's a good idea, Jill.

Jill: Yes, and I agree with you that the first dog that we ever trained, I went to the trainer and Michael didn't. And of course he doesn't obey any of the rules that we were taught, but he did come with Brisbee. And well, he still feeds Brisbee from the table, that's a bad thing. And Brisbee sits there drooling waiting until he gets fed, I know, it's terrible.

Joyce: You don't feed Brisbee off of a fork at the dinner table, Bella is fork trained.

Jill: Oh my goodness, I am so jealous.

Barb: The real question is, does Michael heel?

Jill: Michael doesn't even make Brisbee heel, are you kidding me?

Joyce: Okay, Barb, you're the non dog owner in the room, but you have seen people with dogs. What tips do you have based on what you've seen other folks do?

Barb: Yeah, our family has not been blessed with any puppies, I'm sorry to say, because I do love them so much, and we have wonderful neighborhood dogs that I really enjoy spending time with. We even have a law school dog who is a service dog named Loot, and Loot is the sweetest, most beautiful dog.

Joyce: What a great idea.

Barb: But I do have one piece of advice for you, it's really more of a pet peeve. Let dogs be dogs. Don't dress them up in little human clothing, like a little tiara or a tutu or something. Oh, it's so undignified for the dog. Let the dog be a dog.

Kim: I feel attacked.

Barb: That's my advice.

Kim: I feel attacked.

Barb: Oh, I'm sorry.

Jill: One of the worst pictures I have with Brisbee, I put a bow tie on him, and he was so outraged. I cannot tell you how much he-

Barb: I'm here to defend Brisbee on that.

Jill: I know. And then we tried putting a graduation cap on from his doggy obedience training, and it was on for about half a second, and he was like, I'm not having any of this.

Joyce: Well, this is a second German Shepherd for us. And Bella, our German Shepherd is so big that you almost can't even find a winter jacket that fits her. I've got one, but it's a tight squeeze, so I don't think you have to worry too much about that, Barb. Although I am intrigued by the idea of a doggy tiara now.

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Every week we analyze the most important legal news of the week and put it in context to help you know what it all means. This week, I think looking at many of the disparate things that may be alarming you through the lens of the president's powers under Article II of the Constitution, as well as limits on the powers that are put on him because of the powers given away in Articles I and III, may help us understand much of what's happened in the first month of Trump 2.0, including some pending cases. Barb, let's start with what does Article II give to the president, and can he delegate any of that power to Musk?

Barb: So an excellent choice of topics, Jill. So Article I of course talks about the legislative branch and the powers of Congress. Article II is about the powers of the President, and then there's Article III which talks about the court. One of the things that Donald Trump is very fond of saying is that he can do anything because of Article II, to suggest that

somehow that gives him unlimited powers. But of course it doesn't, it is limited. It's got a bunch of little stuff about receiving ambassadors and things like that, but the gist of Article II is that the executive power shall be vested in a president of the United States. That's one. And of course, executive power means the power to execute the laws that are passed by Congress. So it's carrying out those laws.

Another one is that the president is the commander in chief of the Armed Forces. So certainly when it comes to military and deciding whether to send missiles and defend our country, that comes under the president's purview, although the power to declare war still remains with Congress. But most importantly, I think the one that tempers all of that is the clause that says the president shall take care that the laws be faithfully executed. And so that means he's supposed to see what Congress has passed and then he's supposed to do his best to honor those statutes.

And so when he runs roughshod over these acts of Congress, when he fails to give Congressional notice when he wants to terminate someone, or when he fails to provide the procedural protections to civil servants as enacted by acts of Congress, he has not taken care that the laws be faithfully executed. So I think really important to remember those parameters when he makes these pronouncements about long live the king and other things like that.

Jill: Great answer, Barb. Joyce, let's now look at Article I, which establishes Congress's powers and therefore limits the President's Title II powers. Can you talk about that?

Joyce: Yeah, I think the best way to understand Article I is in many ways through its limitation on presidential power. There are three key ways where Article I constrains the President. First off, of course, there's impeachment for misbehavior, that as we've learned all too well requires a willing Senate. Then there is a limit on the president's war powers, an important check on his ability to go to war without the approval of Congress. That too requires congressional engagement. Some presidents have played loose and fast with this restriction, but it is one of the hardest constraints in the Constitution.

And then finally, the Constitution assigns the power of the purse to Congress. Trump is currently trying to bulldoze through that one. And I will confess to having a little bit of optimism here, that the Supreme Court can actually still read the Constitution, and when it assigns the power of the purse to Congress, I think we'll see that survive. But these limits are part of the constitutional system of checks and balances that Trump is deliberately trying to upend. This isn't a president who is unintentionally stepping on Congress's toes, this is a full frontal assault where he's seeing what he can get away with, how he can erode Congress's power. So it's very important for us to understand what lives in Article I that's meant to prevent a president from doing what Trump is trying to do right now.

Jill: Absolutely, there are limits. And Kim, let's look at the Supreme Court, one of your most expertise areas, and look at how Articles I and II combine to impact the case that is pending. And we don't know when exactly it's going to be announced, but we think soon. And that's the case of the firing of Hampton Dellinger, who was the special counsel of a congressionally established independent agency, the U.S. Office of Special Counsel, designed to protect the merit system that is civil servants and whistleblowers. He's one of many fired federal employees, but it's now pending at the Supreme Court as to whether

the president has the power to fire him. And so talk about whether you think it's going to come out that the president can get away with this or can't get away with this, and whether this will impact his mass firings at other agencies.

Kim: Yeah, so that's a really good question, Jill. The answer is maybe, but probably not in terms of if it affects other people. And let me explain a little bit. So this case, as Jill said, Hampton Dellinger is a watchdog. I say is, because at the time of this recording, there is a temporary restraining order in place that restored him to his job. He was, as Jill said, fired by Donald Trump, because Donald Trump can't do what he's doing with watchdogs there. Or he confused him, maybe he got confused because the Office of Special Counsel, either way, he fired this dude, whether he thinks that he works for Jack Smith or not.

And so Hampton Dellinger challenged that in court and asked for a temporary restraining order to keep him in the office while his challenge is heard by courts, and a district court judge granted that TRO. So this is one reason why I think it may not apply to other cases. A TRO, and I think Jill said that we talked about this last week, my perimenopausal brain does not remember, so I'm just going to very quickly run through.

Jill: We did.

Kim: Sorry, I'm almost 52, this is what happens. TROs are very, very rarely used special orders when there is an imminent threat, irreparable damage is imminent according to a judicial finding. And the reason this is important is because when you get a temporary restraining order, unlike other preliminary injunctions, the other party, the opposite party is not even notified many times that the order is in place, let alone given a chance to argue or defend against it. And TROs generally are not appealable, so you can't appeal it and let another court lift it. So that is what he got. But he got it in a circumstance where you have a Supreme Court that has frequently expanded the power of the presidency and said, "Look, presidents have the right to fire people at the head of agencies."

So my fear is that the Supreme Court weighs in period, because if the Supreme Court, and at the time of this taping, they haven't yet. But if the Supreme Court weighs in, that sets up a precedent that says, "Oh yeah, courts can review TROs." And in circumstances where a TRO is really needed and necessary, I worry what that new precedent can do. So this is an iffy case I think he's likely to lose in the end. It depends on whether it's on the merits, whether the Supreme Court stays out of it since the TRO is in place and waits until the merits get to them. But if they step in now, I worry that it could actually have a blowback effect on other employees. Because some other cases did seek and were granted TROs as well, others were denied, we'll talk a little bit more about that later.

But also just because, listen, this case involves a statute that says that the person in this office can only be fired for cause, like if malfeasance or if they are neglectful, or they're derelict in their duty. Trump gave no reason at all for the firing. So he clearly violated this statute. I don't think the Supreme Court will really care about that if they think that the president should have this broad authority, so I don't think he ends up on the winning end here. I appreciate the fight, but I wonder if it was done in quite the right way. And I talk about this in my newsletter this week. So if you want to learn a little bit more, check that out.

Jill: And Barb or Joyce, do you want to weigh in on this and whether you think the Supreme Court is going to end up deciding that Dellinger can be fired, and whether it will issue a broad opinion that says anyone in the government can be fired?

Joyce: Well, look, this is setting up this whole issue of just how much power Trump has. He's starting in the place that the Supreme Court may be the most likely to treat him favorably with the president's authority to hire and fire. So I don't have a prediction, my crystal ball is not very good where this unpredictable Supreme Court lies. But this is one we need to watch carefully, because if Trump does win here, it will empower him to keep going.

Jill: Yes, for sure. And one of the problems is this is an independent agency created by Congress, it's not the same as a cabinet that's part of the executive branch. So I'm hoping that they will, at least in the case of Dellinger, say, "No, you can't fire him," but so far he's gotten away with firing a lot of people at other independent agencies. Barb, anything else that you want to add to this?

Barb: I would just say, this is really going to test this independent unitary executive theory that many conservatives have advocated. Chief Justice John Roberts has shown himself to be sympathetic to this view, Justice Brett Kavanaugh has shown himself to share this view. And that is, we talked about the vesting clause of Article II that vests the executive power in a president of the United States. And it has been written, I think by Justice Scalia, that vesting the executive power vests all of the executive power. And so that means the president is in charge of everything in the executive branch, and there is no such thing as an independent agency. Congress cannot take away power granted to the president by the Constitution under this theory, and so he gets to do whatever he wants to do within the executive branch. We'll see about that, but that's the theory.

Jill: Boy, Barb, you're really scaring me and I bet many of our listeners, but let me ask you a follow up question is what can the courts under their Title III powers do? How can they limit Trump? Are they likely to limit him? So far the lower courts have at least temporarily stopped him or slowed him down, what do you think?

Barb: Well, Article III says the courts are created, and in the very famous early case in our history, the Supreme Court in *Marbury v. Madison* said, "It is the rule of the courts to say what the law is." So Congress writes the laws, but of course in the real world, the facts don't always match up neatly with exactly what the law says. And so there's a lot of gray area in the law, and that's where the courts come in. So the courts can't just say, "What you're doing is illegal, Donald Trump, we strike it down." They have to wait for a case or controversy, that's the language, to come before them. So it requires somebody to file a lawsuit and challenge some executive act and say it is in violation of some federal statute, and that's what we're seeing. And as we've pointed out, there have been a number of court orders issuing these temporary restraining orders, and saying that it appears that the plaintiffs will succeed on the merits and that there will be this irreparable harm, but they're going to take a little more time now to work their way through these things.

This unitary executive theory, I think could ultimately go to the Supreme Court, and we may see the president expand his powers with regard to the executive branch, but we know it's not unlimited. There is a famous case that everybody studies in constitutional law called *Youngstown Steel*, it's from the Korean War era, where President Truman tried to seize steel plants in Youngstown, Ohio during the Korean War when workers

went on strike. And the worry was that in the interest of national security, we needed to be able to produce steel. And so he tried to seize the steel plants during the Korean War, and the court struck that down because it was in direct contravention to a federal statute, the Labor Management Relations Act.

And they said that when Congress has spoken in conflict with the president's action, the president's power is at its lowest ebb. So there's a lot of gray area where there's overlapping power between Congress and the president, but we know from that case it's not unlimited. I think the only question will be where the courts decide to draw the line. And I'm sure we'll see a lot of differences of opinion at the lower courts. Some of these will rise up to the Supreme Court, and that's where I think Trump is really trying to expand his power to the maximum with all of these test cases.

Jill: And speaking of test cases, Kim, you wrote a great piece in the Boston Globe that we'll put in the show notes about a case that surprised a lot of people, that Judge Chutkan, who has been a very strong and brilliant judge in the Jack Smith election interference case in D.C. Where everybody expected her to stop the challenged action, and she didn't. But you thought that she actually might be helping the plaintiffs by denying a TRO, which is, we've already discussed what a TRO is, but talk about that particular case and why you think it could help.

Kim: So this is a case, this is one of the big money cases, which is a challenge to Elon Musk, the authority of DOGE, and the actions that have been taken, including all the mass firings and the freezing of assets. If any of these cases represented a big slice of this whole shebang, it's this case, and it is in Judge Chutkan's courtroom. She is of course a veteran when it comes to legal challenges involving Trump world. And the challengers asked for a temporary restraining order. And look, I get it. Elon Musk is getting access to all kinds of American's data. It's extremely dangerous, and I know they want quick action. But Judge Chutkan turned down the request, she denied the request, and she went through very carefully through the standards that are required for a TRO. Like I said, they're very high because they're not reviewable and because they can be issued in absence of the opposing party.

And she said that the challengers did not make a showing, the high showing of immediate irreparable harm that is necessary to grant that. Now, what I think she's doing is being careful to protect a case that is in her courtroom. These parties can seek a temporary restraining order. Yes, that will take longer. Yes, that will require a hearings be held and both sides be heard. And it will allow Judge Chutkan to make a ruling and be careful with it. And knowing that it can be appealable, and try to make sure that she crosses all her T's and dots all her I's so the likelihood that the D.C. circuit on review will uphold her ruling before it goes to the Supreme Court, which is where it's headed, and not get tripped up in this TRO aspect the way that Dellinger might. I think that that was a smart move to protect this case.

I know people want action now. I know people want to be careful, but sometimes in the practice of law, I write about this in a lesson that I learned in law school in a moot court competition, I let a weak part of the case go in order to focus on the stronger parts that protected the case, and that helped me win. That's one of the early lessons that I had as a litigator. And I think that's what Chutkan is doing here, she's following every letter very closely to make sure that there is very little that can be picked apart about her ruling, and

that whatever she rules will stand and be upheld on the next level. So I actually think that was a very smart move. I know it was disappointing to folks, but I actually think it was the right call.

Jill: Yeah, it was disappointing because there is some danger in allowing this mass action.

Kim: Certainly, I might have said TRO when I met preliminary injunction, which allows for parties to be heard and it can be appealable. Not only can preliminary injunctions be appealable, they can be appealable on an interlocutory basis, which means before the end of the case, they can be appealable right away. So I think that's what she was basically saying, "Come back with a request for a preliminary injunction and I might hear you."

Joyce: Whether your look is fresh faced, full glam, or somewhere in between, you've probably seen Thrive Causemetics Viral Tubing Mascara all over your socials. It's the one in the turquoise tube and it's one of my personal favorites. Thrive has a lot of other amazing products that are made with high performance and trademark formulas, clean, skin-loving ingredients, and uncompromising standards. Each one is certified as 100% vegan and cruelty-free, so it's no wonder that their best sellers have thousands of five-star reviews.

Jill: I am in love with Thrive's mascara, and it's new packaging that is not just the color but has some glittery stars on it. But I've been a fan for years. I also love their skincare and their brilliant eye brighteners. It's a luxurious eyeshadow highlighter stick that brightens and opens your eyes to give you an instant eye lift. There's nothing better for a fresh, vibrant look. Thrive's foolproof formula makes it extremely easy to apply and blend any of the 27 shades, that's an amazing selection. And you can use as little or as much as you like. Just apply a light shade to the inner corner of your eyes to look well rested or use it all over your lid as an eyeshadow for a perfect daytime glow.

I apply one of my favorite colors on the lid and a slightly darker one in the crease for a very subtle blend. I recommend the Stella and a lot of the other colors too, but you can use also a metallic shade all over your eyelid and blend it with your finger for an easy smoky eye. Between us, that's my secret for making my eyes pop on camera.

Kim: Hey Jill, I have Stella on my lids right now, and I'm winking at you.

Jill: Oh, good. And it looks great, of course.

Kim: Another thing we love is that Cause is in the name for a reason. Thrive not only defines luxury beauty with their clean, skin-loving ingredients and uncompromising standards, but they give back too. Every purchase supports organizations helping communities thrive. Thrive donates to eight major causes, including the fight against cancer and domestic abuse, veteran and education organizations, and more, so I'm so glad to be a part of it, and all of the Sisters are.

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Well, it's been quite a week at the Department of Justice. First we had more drama in the Eric Adams case. You may recall that last week the U.S. Attorney for the Southern District of New York resigned rather than file a motion to dismiss the indictment against the New York City mayor, Acting Deputy Attorney General Emil Bove, we've now learned how to pronounce his name, it's Bove, had directed her to file a motion to dismiss on grounds that the indictment had been both politically motivated and that it would distract the mayor from advancing President Trump's agenda to enforce violent crime and immigration laws.

Eventually Bove did find someone to file the motion, and on Tuesday the court held a hearing on that motion to dismiss the indictment. First, Joyce, can you explain to us the role of the court in dismissing a case, in deciding a dismissal motion under Rule 48 of the rules of criminal procedure?

Joyce: Yes, you know I'm always here for the technical criminal procedure questions.

Barb: Yes, I know it.

Joyce: I live for this stuff.

Barb: I know you do.

Joyce: So in the federal system, a motion is made pursuant to federal rule of Criminal Procedure 48, which is colloquially referred to as a [inaudible 00:31:23]. It's the mechanism prosecutors use to seek leave from court, which they must have to dismiss an indicted criminal case. So the standard a judge is supposed to use for deciding a motion like this is actually Judge Ho references it in his order, it's very clear, he wrote, "The exercise of it, the court's discretion, with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest." So he'll have to answer that question in order to rule.

Barb: Yeah, thanks, because there's this separation of powers that prosecutors get to decide which cases to bring and which charges to file. But they do have to get permission from the court before they can dismiss a case, and as you said, there is a role for the court here. So in light of that, Kim, the judge did hold a hearing on Tuesday, Judge Dale Ho, in the Southern District of New York, and Friday, he appointed an amicus, Paul Clement. Can you please explain to us what an amicus is and tell us about Paul Clement?

Kim: Yes. So this friend of the court appointment at the trial level is a little different than what we've talked about in the past about amicus briefs, an appeal case. Basically what this means is since neither Eric Adams nor the Justice Department is defending moving forward with this prosecution, what Judge Ho did was say, "Okay, we will have another party come in to argue that side, to argue that position." Not representing either side, but just basically presenting to the court the arguments in favor of moving forward with a prosecution and denying this motion to dismiss. And I think it was a stroke of genius that he chose Paul Clement, because Paul Clement is not only an esteemed and highly, highly experienced litigator, he's argued, I don't know how many cases before the Supreme Court, more than I could count just in the time that I covered it.

But he also was a member of the U.S. Solicitor General's Office under a Republican president. So you cannot say that he is politically motivated in an effort to save Eric Adams, not at all. But you know he's a good litigator and he will take this case seriously. He's mostly argued on behalf of more conservative causes, but on occasion he has argued in ways that might be ideologically surprising. So he can do this. I'm sure he and Dale Ho know each other pretty well because they've been on the other side of each other in litigation, frankly, quite often.

So I think that this was a brilliant move, an important one so that the record is clear. I think it's very unlikely that this prosecution goes forward no matter what happens. But I think that Judge Ho making sure that this is fully vetted before the court and therefore before the citizens of New York is a really, really smart move.

Barb: Yeah. So Jill, what can we expect to happen next? What's Paul Clement going to do here? What's the scope of his authority? What do you think is going to happen?

Jill: So first of all, let's put it in context and look at the fact that this is not the first time this has happened. There was, in the Michael Flynn case in D.C., a person assigned to represent the public interest. Personally, I find it sad that the Department of Justice no longer represents the public interest. But the judge said, "In order for me to decide whether to dismiss this case, I need to hear the argument against it. And no one's willing to do that." So he appointed someone who ended up issuing a report that was so scathing that it said that the dismissal was political and corrupt. And so what happened? He got pardoned, Flynn got pardoned by Trump so that nothing ever came of that, but at least the public was informed about what was going on.

So in this case, Clement could issue a report. He could in that report debunk some of the arguments the prosecution is making. And he could of course stress that this is something that even the interim U.S. attorney appointed by Donald Trump is unwilling to dismiss the case. And that not even the Department of Justice is claiming that the dismissal is based on law or facts, in fact, they openly said it was for political purposes, because they want Adams to help Donald Trump's agenda. So that's what you can expect in a report from him. And of course, it could be short-circuited again by Trump pardoning. That is something that's within his power.

The judge, by the way, can refuse to grant the dismissal. And the thing is, if it does, there's still going to not be a prosecution, because the judge cannot appoint someone to prosecute. And it's clear the Department of Justice won't do it. So if you can't have an independent prosecutor appointed, there's never going to be a case, and eventually the case will be dismissed for non-prosecution. So it's a hopeless kind of thing. Now, Judge Sirica did something a little different than just getting a report. He ordered a public hearing on an issue similar to this, and made the White House, who was the defendant basically, bring in witnesses to say that they hadn't deliberately erased tapes. And that was a way to make the public aware of what was going on, and it did definitely change it.

One other thing that could happen, but it's not what Judge Ho can do, is the DA in Brooklyn or Manhattan could look at whether there are charges under New York State law that could be brought against Eric Adams for the same crimes for which this case is being dismissed, because it's pretty clear there's strong evidence of crimes. And so that's

another thing when you ask what can we expect to happen? I don't know if I expect that to happen, but it's a possibility, so that's where we're at.

Barb: And I would also just add, I agree with you. I don't think that ultimately Judge Ho is going to say, "I'm denying this motion and therefore you have to prosecute it." But I think one thing that you raise, really important, is he could just require findings of fact, because there is an allegation that Emil Bove directed the assistant U.S. Attorney who was taking notes at a meeting to stop taking notes and actually confiscated his notes. And they say that it was at that meeting that this quid-pro-quo arrangement was discussed. Well, let's see the notes, maybe we can require that or a hearing about what happened in these meetings and the negotiations.

I also think one other power Judge Ho has is when he dismisses the case, he could dismiss it with prejudice. Because remember, one of the requests is that it be dismissed without prejudice, which is according to Danielle Sassoon, is an effort to maintain leverage over Eric Adams. So that if he should fail to live up to President Trump's expectations about what he should do, these charges could be reinstated at any time. And so if you're really dismissing this case, then let's dismiss it and not leave it hanging out there as a coercive tactic to hold over Mayor Adams head.

Well, let me move on to another topic occurring this week at the Justice Department. President Trump this week nominated the Interim U.S. Attorney in the District of Columbia, Ed Martin, to be the permanent U.S. attorney there. Joyce, let me ask you about Ed Martin. He has been serving as the interim U.S. Attorney since Trump took office in January, what do we know about his background?

Joyce: Well, Martin is from that bastion of liberalism Missouri, just kidding. He has close ties to Phyllis Schlafly's organizations, she was the ultra conservative founder of the far right Eagle Forum. That's where the eagle in his Twitter moniker comes from, Eagle Ed Martin. He's had a number of unsuccessful political runs of his own. He has been involved in Republican party politics, and his work for the Trump administration is very interesting. He had a real change in fortunes. Originally, Trump had announced his intention to nominate Martin for the relatively modest position of chief of staff at the Office of Management and Budget. That's an important position. That's one of the places where they're implementing Project 2025. But apparently Martin had other ideas.

And he surfaced, Trump appointed him in January as the interim U.S attorney in the District of Columbia. He's now managed to parlay that into an appointment for the permanent position. And what's so interesting about that is that he will be the first U.S. attorney in the District of Columbia in at least 50 years who has no experience as either a judge or a prosecutor. And you really see that I think, Barb, in some of the behavior that you want to talk about in this section.

Barb: Yeah, I think about the people who were U.S. attorneys with us in the Obama administration, Joyce, and all of us had been former AUSAs, former state court prosecutors, mostly quite apolitical. And to see someone like this come in is really just a stark change. Certainly President Trump is permitted to put his choices into these positions, but when you think about the demands of the job, you would want to have, I would think, someone in there who has done the job of being a prosecutor in the past if

you're going to lead an office of prosecutors, but perhaps President Trump does have his prerogative to choose the person that he wants.

Well, this week in that office, the U.S. Attorney's Office in the District of Columbia, Kim, we saw the chief of the criminal division resign rather than carry out an order given to her by Ed Martin, Criminal Chief Denise Cheung. What do we know about this incident?

Kim: Yeah. Well, first of all, as a Missourian by marriage, I have to say it's not everybody.

Barb: Defend the [inaudible 00:42:07].

Joyce: My mama was born in Missouri, she was born in St. Louis.

Barb: Are you going to claim Missouri is one of your home states too, Joyce?

Joyce: No, not me, but mama was born there and lived there when she was little.

Kim: Well, I'm totally claiming Missouri as one of my states because that's where the Stohr's in my Stohr name come from. So yes, the head of the criminal division in D.C., Denise Cheung, she did obey the demand from Martin to ask banks to claw back money that was given out as part of President Biden's climate grants. So there were billions of dollars in grants that were meant to aid climate, and what the U.S. Attorney's Office was trying to do was to stop those funds and even go farther to actually pull those funds out of banks where they were sitting. So she did send the letter requesting those banks to do that, but then when he ordered her to try to get an order requiring banks to claw back that money, she was like, "Yeah, you know what? No, that's not what my job is, and I am not going to do that."

So she is one person, clearly not a liberal by any means, although as you all pointed out, that's not supposed to matter in the U.S. Attorney's Office, but it was just beyond what she thought her job was. And so she stood up like a patriot and stepped down from her own office in that endeavor. And listen, I know people like to cheer when people resign, and when they do it on principle like this, I do think that people should be admired for that. But I also think it's important to mourn the fact that we had people of high moral standards and values and who believed in protecting the rule of law in that place. So every loss of that is a loss for us all, but it's better for them in instances like this to step down and refuse than to capitulate. So it's a tough situation, but I give her my respect.

Barb: Last Friday, all of the former U.S. attorneys, with rare exception from the Southern District of New York, actually sent a letter of support to Danielle Sassoon, the U.S. attorney who resigned, saying that they appreciated her standing up for the rule of law. And then of course, Jill and Joyce and I signed onto another letter of former Department of Justice lawyers who shared the same sentiments. So this resignation is a very honorable thing, and it's not a small deal. People who have these jobs love these jobs. They work hard to earn these jobs, and to become the criminal chief in a U.S. Attorney's Office like the District of Columbia is no small achievement. And it is incredible privilege and responsibility, so to give that up as a really big deal.

And Jill, I wanted to ask you about that idea of resignations, because you certainly saw what happened in Watergate during the Saturday Night Massacre when the attorney general and the deputy attorney general resigned. I've been getting asked this question a lot, like, "Well, why resign? Why not just stay and defy the order? Isn't that better than resigning? Why give them the satisfaction of resigning?" What's your view on resignations versus some other course of action?

Jill: It's such a good question, and I have two different opinions. One, and this goes back to Watergate where when Cox was fired, we debated whether we should all resign in protest. And Cox wisely said, "As long as you can do your job, don't give Nixon the satisfaction of leaving. You know the case, you know the evidence, and he will get what he wants if you leave." So we did not resign, and it turned out we had actually been sort of fired, we had been transferred back to the Department of Justice. But public pressure led to the reversal of that, and we were recreated as an independent office. And so it is a good thing we stayed.

I think things are way worse this time round, where people are being asked to do illegal things and not allowed to do their jobs. My advice is that everyone should stay as long as they can do their job, because otherwise they will be replaced by MAGA loyalists who will do whatever Donald Trump even hints he wants done. And we don't want that to happen. And then if you are asked and in the situation that Danielle Sasso was, you can publicly resign and let people know. And those things will mount up. We're now seeing public opinion of Donald Trump sinking. He is really in a negative position, because information is coming out about what his actions mean for individual people.

So I think staying in this case is an honorable thing, as long as you can keep doing your job and not have to cave in to do things you think are immoral, illegal, just wrong. And try to get things done the right as long as you possibly can. But then resignation and public disclosure may be the best option at some point.

Barb: Well, there's one other topic regarding U.S. Attorney Ed Martin that I want to raise, and it's something he's calling Operation Whirlwind. Apparently he sent an email around to his office announcing this Operation Whirlwind, which is an effort to investigate threats issued by public officials, and he's been sending out letters that seem highly unusual to me. Joyce, can you tell us about these letters, and whether you ever sent anything like this in your eight years as U.S. attorney?

Joyce: Yeah, so highly unusual is one way of putting it. For starters, DOJ does not publicize. In fact, as a prosecutor, you are prohibited from publicly commenting on the fact that you've opened a criminal investigation. So no, Barb, I did not send letters like this threatening people with prosecution, and I certainly did not leak them to the press so that I could get credit for sending them. This is Martin's lack of experience and his understanding of the rules and the ethics of being a prosecutor that we talked about earlier, showing up.

So here's the deal with the letters. They were threats to prosecute Chuck Schumer and also a California congressman over negative comments that they'd made about the Supreme Court and Elon Musk respectively. And it's just crazy to think that Ed Martin would think that there's an available prosecution here, because we've talked about the First Amendment before around political speech, and that comes into play here. That's

why Trump didn't get prosecuted for whipping up the crowd on the ellipse the morning of January 6th, and these comments are just nowhere near as inflammatory as those.

Congressman Garcia called, "You'll forgive me," he called Musk a dick on national television. He said that Democratic leaders needed to be more aggressive. And I think this is the quote, "What I think is really important and what the American public wants is for us to bring actual weapons to this bar fight." So apparently Martin decided to take that literally. Schumer spoke to an abortion rights protest outside of the Supreme Court, and he admonished Justices Gorsuch and Kavanaugh in comments that he walked back the next day. He said, "You have released the whirlwind and you will pay the price. You don't know what will hit you if you go forward with these awful decisions."

And I think he recognized by the next morning that what he had said could be taken as a more physical threat than as the political threat that he meant, and so he just said, "I shouldn't have said that. And the words were not the ones I intended to use, and they didn't come out the way I intended." Again, clearly we're talking about an exercise of political speech, but Martin wrote in his letters, "We take threats against public officials very seriously, I look forward to your cooperation with my letter of inquiry." And that's really just unbelievably laughable, this is Martin trolling the score points with his bosses.

Barb: Yeah, so strange. And the Schumer comment was in 2020, it's almost five years ago.

Joyce: It's so close to being old, and I don't want to get into the First Amendment standard, but I'll just say it has to be that you make comments that have the ability to incite immediate violence. Well, Schumer's comments are so old that the age of them simply belies any possibility of prosecution. And Chuck Schumer, to his credit, did not respond to Martin's first letter, and he got this angry letter back from Martin saying that he was personally disappointed by Schumer's failure to respond. So I'm going to just make the assumption that that made Chuck Schumer's week.

Barb: Yeah, you want to send me a subpoena, that's one thing. Your letter, I don't have any obligation to respond to your letter.

Joyce: Good Lord.

Barb: Well, Kim, speaking of the First Amendment, there is a risk, right, from a free speech perspective on letters like this. Do you think that these matters he's inquiring into for clarification are in any way criminal or amount to what is sometimes referred to as a true threat under the First Amendment?

Kim: No. No, this is a pure, intimidating, intimidation tactic that we see frankly utilized. It's straight out of the playbook of a fascist regime. I'm just going to say like it is. A true threat is something like fighting words. It's something, as Joyce said, that creates this immediate threat of harm or imminent lawlessness. You cannot even begin to say that this amounts to that. So this is just meant to bang his chest and try to intimidate people. But I just think it's so ham-handed and poor in the way that it's done, that it lays it bare. I would think, honestly, that he would've been smarter than that, but he wasn't. This just seems such a blatant violation of the First Amendment, even the Supreme Court would say so, I think.

Barb: Yeah, not only does it have perhaps a chilling effect on speech, but it's so amateurish. It's embarrassing.

Kim: Yes, I was going to say. It's like if you're going to try to do this, at least be slick. He's not slick at all.

Barb: Yeah, it's just, "Oh, stop. You're embarrassing me."

Kim: You don't even need to be a law student to figure out how bad that is.

Barb: Yeah. Well, Jill, when I was serving as U.S. Attorney, if I sent a letter like this, and frankly it just never occurred to me to do anything like this.

Kim: Of course not.

Joyce: Oh, come on. Didn't you want to do it a time or two?

Barb: Well, maybe, but I never did. Washington would've been all over me. I would've heard from the Deputy Attorney General's office, I would've heard from the Office of Professional Responsibility, I would've heard from the executive office for U.S. Attorneys. And so where are those components? Why aren't they reining in Eagle Ed Martin? But if those components are occupied by Trump loyalists and they're ignoring this or encouraging this, what recourse is there to rein in this kind of conduct by a U.S. attorney?

Jill: So first I want to say, every time you say Eagle, I cringe. Because remember, I've been fighting for the Equal Rights Amendment since the time of Phyllis Schlafly. She is single-handedly the reason why it isn't our 28th amendment already. Anyway, in terms of your question, realistically, there's not much that's going to happen. Because you have, first of all, a lot of people obeying in advance. And of course, this whole thing, there's no way that anybody could have thought that either of these comments were actual threats. And so if you can't even remotely argue that it's a real threat, it should never have gotten to this. The letter itself, ridiculous. If you have a problem, you present something to the grand jury. And you send out a subpoena, you try to do that, you don't do what Martin did. And the problem here is, yeah, impeachment.

Well, first of all, Ed Martin is not confirmed yet. So you could say, "Well, vote against him," but even that, is that realistic in this environment where Kash Patel gets through, where let's not go through the whole list, but you get my point. People are being confirmed who are completely unqualified, and so is Martin. Martin is an election denier. He's a January 6th person. There's no reason for him to be confirmed. So maybe there's some hope that that'll happen. Impeachment, well, if you can't impeach all the people who've been put up for impeachment, like Donald Trump, twice, I don't see any chance that this is going to lead to an impeachment. Congressional oversight, honestly, in this divided Congress, it's going to be a ridiculous thing. There is no way anymore that the right questions are asked or that there are consequences for lying. You have Kash Patel saying, "Oh, I had nothing to do with any of that." And then as soon as he's confirmed, you find out that he's exactly doing what he said he would not do, which is try to get at people on his enemies list.

So I just don't see any meaningful congressional oversight happening. Yet it might be good for people like us who will listen and watch the hearing, but it's not going to have any major impact. The impact is going to come from seeing what happens to how all these things impact individuals across America, not just in Washington, and not just people like us who are paying attention, but to everyone.

Barb: Well, Jill, there's not just us, but there is our army of listeners. And so I hope all of us will reach out to our members of Congress and share our views, because we do have power.

Jill: This is the Watergate girl, Jill Wine-Banks, and I'm also the host of Just the Facts on the Politicon YouTube channel, and I hope you'll join me there every week where we talk about what are the facts and how do we communicate them properly. It's my dream as a journalist to be able to get the facts out, so please join me every week.

Kim: It may be hard to believe, but there is legal news outside of Trump world. Next week, the Supreme Court will take up one in a flurry of so-called reverse discrimination claims. I really hate that term because it implies that there is a correct way to discriminate, and it isn't supposed to impact white, cisgender, or straight people. But Marlean Ames, who worked in the Youth Correction System in the state of Ohio, says she was discriminated against in the reverse way because she's a straight woman and got demoted in a way that she claims wouldn't have happened if she were a lesbian. She had a supervisor who was gay and who gave a job that she thought she deserved to a gay man. Clearly, the gay Illuminati is out for her. So Jill, her lawsuit was thrown out, but the Supreme Court can revive it. What's the issue they will be considering during the arguments on Wednesday?

Jill: So it's such a great thing to be able to talk about something that isn't Donald Trump, so thank you for finding this [inaudible 00:58:40].

Kim: Well, it's Trump-ish, but we'll get to that.

Jill: Thank you. Well, it definitely is Trump-ish, and yeah, we'll talk about the relationships. There is a factual dispute which has not been heard, because the issue now really is how much evidence a majority plaintiff, that is a plaintiff who is not a minority, must present to make a case a prima facie case. And her argument is that she as a majority member has to present more evidence than someone who is a minority plaintiff, and that's the issue that they will be hearing.

The thing is that she has to show basically that there is a background circumstance that shows that her employer is one of the very few in the whole world that would discriminate against a majority member. And I don't think she's going to be able to do that, which is why she needs a lower standard. And the reason she won't is because the people who had the decision power were both straight men, they were not members of the gay community that she says is discriminating against her.

Kim: So Barb, the circuits are split as to what standard to apply to claims of discrimination that are made by members of majority groups as opposed to people in what we call protected classes, people who have suffered discrimination more historically. So is this why you think that the Supreme Court even granted this case and heard it, or do you think they

might have an outcome in mind that they want to deliver in this case, like the way they ruled it back, the ability to make race-based voting rights claims or the way they struck down affirmative action in college? What do you think is happening here?

Barb: Yeah. Well, I think they're teeing this up. One of the things that's important for our listeners to remember is that the Supreme Court chooses its cases. Now, unlike lower courts where they have to take everything that comes their way, they're not picking, it's just like the case landed in their lap and they're going to decide it. The Supreme Court picks and chooses which cases it's going to hear. So they're not picking this case just to say we're leaving the standard alone or sending it back, they are choosing this case because they want to make it clear what the standard is. So what are they likely to make that standard? Well, think about Chief Justice Roberts and the trend of this court has been all about making it more difficult for underrepresented groups to make out claims and to achieve justice under the law.

So I'm reminded of the phrase, remember Chief Justice Roberts has said he doesn't like tautologies, but then he also has said, "If you want to stop discriminating, the best way to stop discrimination is to stop discriminating." I think what he is going to say here is that everybody should be subject to the same standard, and we shouldn't make it more difficult to prove these so-called reverse discrimination cases than it is to prove a discrimination case. And so we're going to treat everybody equally from now on, the end. And of course, I think that's not going to lead to more equality, but perhaps less.

Kim: So, Joyce, I said this wasn't a Trump topic, but it kind of is, right? Because in the federal executive branch's policies so far in these last weeks, there is a certain theme of white supremacy that runs through it. Do you think getting the Supreme Court to essentially eliminate the protected classes standards is part and parcel of that? Do you see this as a piece of a bigger movement?

Joyce: Yeah, I think I do, and I think that you've identified exactly the reason for bringing this case. Look, this is a really silly case when you look at the facts and when you think about what her claims are, and the fact that it's made it all the way to the United States Supreme Court suggests that there's something else here at work. So the case really does scare me for exactly the reasons that you suggest. And we're seeing all of these efforts in courts to pretend, and in executive orders too, to your point about this really being a Trump question, to pretend that discrimination never happens, at least not for marginalized groups. And also the argument that's implicit in a case like this is to laugh at the protections that exist for marginalized groups, people who experienced discrimination, and to try to make light of it.

So Jill had flagged for us another case along this same vein earlier this week, and I think it's really telling here, it's a real highlight in my week. This is this hearing over the military's move to end the use of the pronoun 'they', or permitting people to choose a pronoun other than the one assigned to them at birth if they choose to. And the lawyer for the government is making the argument in that case, they're in court in a hearing, and the lawyer is arguing that if people can select a different pronoun from the one that they were born bearing, that somehow this affects military readiness across our armed forces.

And the judge just isn't having any of it. And she calls the argument ridiculous, she says it doesn't impact military readiness. And this is I think the money shot, she says, "Any

common sense rational human being understands that it doesn't." I think that's the same reaction that I have to the plaintiff's claims in this case, that she didn't get a job because she wasn't gay. And I hope that a majority of the Supreme Court will channel that fabulous energy from the transgender hearing.

Kim: Yeah, I hope they do too. Well, I'll just say we'll keep following this case.

Joyce: Not optimistic?

Kim: No.

Jill: Kim, can I just add something?

Kim: Yeah.

Jill: Because I think to follow up on something Barb said and something Joyce said, I think that the court may rule that it has to be the same standard because that was in fact what the Biden administration argued when the case was first brought. It was the former solicitor general filed a brief in favor of her saying that the standard should be the same for majority and minority. And the truth is she's going to lose on the merits regardless of what the standard is, and so it in the end may not matter. And then in terms of what Joyce was saying, when I was general counsel of the Army, they were arguing that if we let women into the units, unit cohesion would be destroyed and they couldn't have a good fighting force.

And we're back to that again. I thought we had overcome this nonsense, and this is nonsense when you talk about pronouns. Who cares if someone says they instead of he or she, if that's what they want to be called, I'm happy with that. I personally don't think it's a great political issue and it hurt the Democrats, but I think morally it is the correct thing as we call people what they want to be called.

Kim: Hey there, I'm Kimberly Atkins Stohr. With the new administration, a lot will be changing, and it's a lot for us to learn about. If you want to learn about the 14th Amendment and what that means for things like birthright citizenship, please listen to my podcast, Justice by Design, the link is in the show notes. And this week and every week, we are breaking down solutions and answering questions that you may have about how the world works in 2025 and beyond. You can find it wherever you get your podcasts and it's linked in the show notes.

Joyce: Well, now it's time for our favorite part of the show where we get to answer listener questions. This has been a bumper week for questions, there's a lot going on. And we always enjoy seeing your questions. They're thoughtful. They make us think more deeply about these issues. So I hope you'll keep sending them. If you've got questions for us, please email us at sistersinlaw@politicon.com, or you can tag us on social media using #SistersInLaw.

If we don't get to your questions during the show, keep an eye on our feeds throughout the week, because we all try to answer as many of your questions as we can on social media. This week, our first question comes for you, Kim. It's from Anna-Marie in

Vermont, and she asks, "Is there a mechanism to get the Supreme Court to reverse its decision on presidential immunity?" I am all ears.

Kim: Yeah, that's a great question. The short answer is no. The Supreme Court, yes, we did say that the Supreme Court will take up a case on an issue that it is dying to rule on, but generally speaking, A, the Supreme Court can't just sua sponte, on its own, reverse one of its decisions. There has to be a case in controversy before it, and they have to decide to take up that case and rule on it. That's point A, the standard answer to this question, and point B, now, the Supreme Court just issued this opinion, and all the reporting around it was that there was a strong six-person majority in favor of this opinion. This was not like some other cases in the past where they had to negotiate their way to a compromise at the end. This is what the Supreme Court believes. So there is zero to no chance that any reversal on that is eminent, not with this particular court.

Joyce: Well, that was a cheery answer. Thanks, Kim.

Kim: Sorry.

Jill: Can I add something cheerier? Which is there is a possibility that as specific actions are brought before the court, that they will define what is a core responsibility and what is an official act in a way that will make it clear that they didn't mean that he could just be a king and ignore the law?

Kim: But also Jill, they could expand what official acts are too. Anything more that they say on this, I think it's going to be bad, so I really would love for them to stay out at this point.

Joyce: Here's the pragmatic point too, which is that they only answer those questions and refine the opinion if there are more indictments of Donald Trump that come in front of them, which is not happening for the next four years. I always thought, given how this opinion was written, that they might do just what Jill suggested and tighten up the definition of what was an official act if Trump had lost the election. But now that he's won, I think you're dead on the money, Kim, this is a dead letter.

We've got a question from Julia. And Jill, I'm wondering if you might take this one on with your experience with the ABA. She asks, "Is it possible for Bar Associations to start disbarment proceedings against Emil Bove and Pam Bondi for their actions in the Eric Adams quid-pro-quo deals?"

Jill: So I'm going to suggest that there may be other possible people to look at for disbarment. But first, let me clarify, the ABA does not get involved in disbarment proceedings, that's a State Bar issue. And in order for the State Bar to get involved, it would have to be something in court. So for example, Emil Bove, if he lied in his testimony on what his reasons for asking for the dismissal of the Adams case is, well, that could get him in trouble for that and could lead to, as it did with Rudy Giuliani, that he lied in court documents. So he got disbarred.

Pam Bondi so far hasn't filed anything in court. She may be lying to Congress, she may be lying to the public, but she hasn't done anything that would likely lead to a deal. Her role in the Eric Adams case is interestingly silent. Bove is the one who's carrying the

water on this, and whether or not a quid-pro-quo, he's saying, "Yeah, that's fine. There's nothing wrong with that. I'm entitled to do that. That's what the power of the president is, and I'm just his representative." So I'm not very optimistic on anything happening against him.

Joyce: So Barb, there's a great question for you from a listener with a fabulous name, her name is Joyce, and she asks, "Is it possible for a cabinet appointee to be ousted once confirmed by the Senate, and what would this require?" I can think of some people I wouldn't be sad if that happened to. What's the response?

Barb: Yes, they can be ousted. They would use the impeachment process, the same as a president. So they would be impeached by the house. And in fact, we have seen cabinet officials impeached before. You may remember that just last term, Ali Mayorkas, the Secretary of the Department of Homeland Security was impeached. But after they're impeached by the House, it's the same process. They then have to be convicted by the Senate. So there's the rub. And at the moment we've got, I don't know that we've seen impeachable offenses, but we've certainly got cabinet officials who let's just say I'm concerned about, to quote the words of Susan Collins, "I'm concerned." I'm concerned.

Joyce: You're going to have to get out your pearls and clutch them now.

Barb: If they were to do something that amounts to a high crime or misdemeanor, then the House could impeach and the Senate could convict, and one would hope that members of Congress would put country over party if circumstances required.

Joyce: Well, that's all we've got time for today. Thanks for listening to #SistersInLaw with Jill Wine-Banks, Kimberly Atkins Stohr, Barb McQuade, and me, Joyce Vance. Follow #SistersInLaw wherever you listen, and please give us a five star review, it really helps others find the show. Show some love to our sponsors for this week, Factor, Helix, and Thrive Causemetics. Their links are in, you know it, the show notes, please support them because they make this podcast possible. See you next week with another episode #SistersInLaw.

Jill: I'll send you a picture of Brisbee with a bow tie.

Joyce: I want to see that. Kim, do you make clothes for Snickers ever or do you just get stuff?

Kim: I don't. I don't, she really does hate clothes. Boogie would tolerate it, but she really does not like-

Barb: Does any [inaudible 01:14:10]-

Kim: I put on the coats because-

Barb: Do you use boots?

Joyce: It doesn't get cold enough here, but you all, Bella is really proud. If you put a jacket on Bella to go outside and tell her she's a good dog, she digs it. So I've been thinking about making her a sweater.

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Kim: Oh, you should make her a sweater.

Joyce: Yeah, I think I'm going to do that.

Barb: You're obviously not heeding my advice.

Joyce: Sorry, Barb.

Barb: You do need a coat to keep her warm, that's okay to keep her warm.

Joyce: I'll make her a cashmere sweater and it'll be very, very sophisticated.