

#SISTERSINLAW – January 29, 2021: [IMPEACHMENT, INSURRECTION & JUDGES](#)

Barb McQuade ([00:14](#)):

Welcome to the very first episode of our brand new podcast, #SistersInLaw where we explain how the system actually works, take on the corrupt, and of course issue our own rulings on the latest developments in politics, law, and culture. I'm Barb McQuade and with my co-hosts, Jill Wine-Banks, Joyce Vance, and Kimberly Atkins, we are #SistersInLaw.

Jill Wine-Banks ([00:39](#)):

Like all my sisters in law, I'm an MSNBC legal analyst. I'm also the author of the Watergate Girl about being the only woman on the Watergate trial team and the first woman in many other jobs including general counsel of the Army where I dealt with some very challenging issues, the chief operating officer of the American Bar Association, the solicitor general, and deputy attorney general of Illinois.

Jill Wine-Banks ([01:05](#)):

So that you can ask questions for future episodes, I want you to know that I also had a great career doing international business development for Motorola and Maytag as well as starting a not-for-profit to help small businesses be better workplaces, and as the head of career and technical education for the Chicago Public Schools. I also was a member of a Pentagon commission investigating sexual assault in the military.

Joyce Vance ([01:32](#)):

I'm Joyce Vance. After six years in big law following graduation, I joined the US attorney's office for the northern district of Alabama basically on July 1st, 1991. 18 years later after working in the office's criminal and appellate divisions, I became President Obama's nominee for US attorney in Birmingham. I stayed there for the full eight years, resigned from DOJ on January 19, 2017, the evening before Donald Trump was inaugurated.

Joyce Vance ([02:03](#)):

Today, I teach at the University of Alabama School of Law. I'm a legal analyst for NBC and for MSNBC, and on the side, I engage in my passion project which is voting rights work. In addition to being passionate about the rule of law, I spend time devoted to our menagerie. My husband and I have four kids, three dogs, four cats, and a new addition during the pandemic, 10 chickens. I'm also a lifelong knitter. So if you hear needles clicking during the podcast, that's me.

Kimberly Atkins ([02:35](#)):

I'm Kimberly Atkins. Right now, I am senior opinion writer at the Boston Globe as well as an MSNBC contributor, but I'm a sister in law because I began my career in law. Growing up, I always thought I would be a lawyer especially since my mother told me that I was great at arguing. But after going to law school and practicing in Boston for a few years, I realized that it wasn't for me and I missed the time I spent in college writing for my college newspaper.

Kimberly Atkins ([03:01](#)):

So I switched to the news business working for the Boston Globe, the Boston Herald, WBUR, the Boston's NPR affiliate, and now I'm back at The Globe on the opinion page for the first time. And in

addition to my work in journalism, I also am a fashion designer on the side. I've been designing women's wear for about 10 years. So if you have questions about fashion, you can send those in too.

Barb McQuade ([03:28](#)):

And I'm Barb McQuade, I'm a professor from practice at the University of Michigan Law School, my alma mater. Before joining the law school I served as the US attorney for the Eastern District of Michigan after a career there as a federal prosecutor in Detroit. I'm a wife, I'm a mom, and I'm a sister. Let's get right into it, shall we sisters? This week, we'll be taking on the insurrection, the impeachment of Donald Trump, and President Biden's judicial appointments. So let's start with the insurrection, Joyce, what were your thoughts as you saw those events unfold on January 6th, and as we go forward?

Joyce Vance ([04:02](#)):

So I suspect that like all of us, I reacted on at least two different levels. I was watching the events on TV and I think we're a couple of weeks past. I think we're losing the mood of that day because it was a really incredible thing to watch events unfolding on national television that looked like they were taking place in another country, in a banana republic sort of a democracy, not in our country. So just as a citizen, I reacted very personally and very emotionally.

Joyce Vance ([04:37](#)):

But simultaneously as a lawyer as a former prosecutor, I was also processing the events on that level, thinking about whether or not that crimes were taking place, and contextualizing it as an insurrection, realizing that internal forces in our country were seeking in essence to overthrow our government because the ultimate goal of events on January 6th, really it starts with the big lie in Trump's efforts to undercut the election throughout.

Joyce Vance ([05:11](#)):

But the morning of January 6th, they're gathered at the ellipse. Their speakers, including people from the congress, Alabama's representative Mo Brooks, lighting the crowd on fire. And then it's the president himself who directs them to the capitol. He tells them he's going with them. Not too unpredictably, he doesn't make the trip, but the crowd arrives at the capitol and their goal is to make sure that congress doesn't certify, Joe Biden's electoral win.

Joyce Vance ([05:42](#)):

That really cuts to the core of our democracy, this notion that we have a peaceful transfer of power. And it's, I think a shocking moment both as a lawyer and as just a regular citizen to think about the fact that the president of the United States was keen on preventing that peaceful transfer of power from taking place.

Barb McQuade ([06:04](#)):

Yeah. I had the same reaction. I was working in my home office and my husband came in and said, "Do you have any idea, what's going on right now?" I said, "What do you mean?" He said, "You got to see this." So I went into the other room with him and watch what was happening on TV. I agree with you, I was thinking of it in terms of the crimes like trespassing, and property damage, and all that. But it meant so much more because it was this effort to interfere with the peaceful transition of power. How about you, Kim, what thoughts did you have as you were watching that unfold?

Kimberly Atkins ([06:33](#)):

Yes. Well, I echo everything that you both said, but something else that came to mind to me was the Voting Rights Act, and the fact that it has been gutted since 2013. Just remember, that all of this started, Donald Trump's big lie started with an effort to stop the votes from counting. But not just counting, counting where? Counting in places like Detroit, Milwaukee, Philadelphia, and Atlanta, where because of the on-the-ground mobilization efforts of voting rights advocates, we saw record numbers of people including people of color vote despite the fact that it was a pandemic, despite the fact that the economy was absolutely crushing them, despite the fact that so many black and brown folks were the essential workers whom we all depended on through this pandemic.

Kimberly Atkins ([07:26](#)):

They voted. That's how strong this effort was. So it cuts right to the core of the ability to vote that you can have an insurrection of folks who are so angry that people exercise that right, that they went and tried to stop those votes from being counted by force through attacking the capital. And it was a buildup to that, right? We saw in Detroit where people had gathered outside, that center where people where the votes were being counted trying to stop the steel.

Kimberly Atkins ([07:57](#)):

And these were not Detroiters that were doing those chants. So to me, it just underscored what a key voting rights issue is and I really hope the Biden administration recognizes that and congress recognizes that and acts to fortify voting rights moving forward.

Barb McQuade ([08:15](#)):

And how about you, Jill? What do you think about accountability for that insurrection? Or I guess, I'm still not sure what we're going to call it in history. It may end up being one of those events that we just referred to by the date like 9/11 because it's so incomprehensible what happened that it's difficult to describe.

Jill Wine-Banks ([08:32](#)):

I think for me it was a question of thinking about the insurrectionists as domestic terrorists and what laws we needed to be able to deal with them, but it also meant thinking about what I considered the enablers. Not just the insider in chief who was then the president, and is now the former, but also the enablers like Marjorie Taylor Greene, Senator Hawley, Ted Cruz, all who spread the fake news about fraud in the election, all who voted against confirming the electoral college vote, and what could be done to stop the insurrection as it was going on. And also, what could be done to hold all those involved accountable.

Jill Wine-Banks ([09:24](#)):

I think we still need to really spend some time talking about what are the options not just for criminal prosecution of those involved, and not just the trial on the impeachment of the former president for his role in it, but whether expulsion is the right option for those who are in congress and participated, whether it's loss of committee assignments, those are things that we should spend some time talking about.

Barb McQuade ([09:55](#)):

Sure. I think one of the things that I see when I see this insurrection is somebody mentioned. It really does have this feel of domestic terrorism. I spent a good part of my career prosecuting terrorism offenses. And one of the things, the people you've named, Jill remind me of are the kind of radical inspirational figures like Anwar al-Awlaki inspired people to come commit acts of violence on behalf of Al-Qaeda. We had other charismatic figures who were riling people up to act on behalf of ISIS. And you see Donald Trump and Marjorie Taylor Green kind of doing the same kinds of things, getting people riled up to commit acts of violence.

Barb McQuade ([10:44](#)):

You notice they don't get their hands dirty by committing the acts of violence, but they incite others to do so. So I don't know whether there is a crime that will fit that conduct, but as you say there are other ways to hold people accountable. And why don't we turn to one of those ways, which is of course impeachment. President Trump has been impeached. We are awaiting the trial on that impeachment and Jill, that's certainly an area where you've got some expertise having worked on the Watergate impeachment. What are your thoughts about that as we go forward for the impeachment of Donald Trump?

Jill Wine-Banks ([11:16](#)):

For the second time, I think it will go down in history that he is the only president who's ever been impeached twice and deserved it richly both times. I think that the opening statements that will be made in the trial that is starting the week of February 8th will be very important. Not so much because I now have any hope that Republicans are going to be swayed by truth, by facts, but because I think their constituents may be and that might persuade them to vote guilty.

Jill Wine-Banks ([11:55](#)):

I think that a very compelling case can be easily put together because as has already been said, we all watch this happen live as did all of the constituents of everyone in congress, and we know what happened. We saw the months leading up to this of lies about fraud in the election, about the big steel and stopping the steel. We saw the speech on the mall where the former president Trump actually encouraged people to go to the capitol and stop the steel to interfere with the very important process of our democracy of confirming the ballots of the electoral college.

Jill Wine-Banks ([12:45](#)):

He invited his followers to go there. And now we have evidence that the night before that, there was a meeting at the Trump hotel involving Trump's son and his son's girlfriend, and many other people. We also have evidence that there is some funding that came from the Trump campaign to the organizers of this rally. I think when you put all that together and then combine it with the fact that the National Guard was prevented from going there to protect the congress, and that even during the rioting when the vice president's life was at stake, and I didn't mention in the introduction that I have a beloved pet who is now barking at all of us. Sorry about that, but he does run the house.

Jill Wine-Banks ([13:38](#)):

I think that the case will be so clearly seen. You play a few video tapes of what happened. You play the remarks and all of the things that were said, and I think that it's one of those things where if this is not grounds for impeachment then there's no point in having impeachment in our constitution at all. This is the clearest case.

Barb McQuade ([14:02](#)):

So there are some members of the senate who say that the constitution does not permit a trial of the president after he has left office. Joyce, you're an appellate lawyer. You were an appellate lawyer in your background, what do you think of that argument that if you look at the language of the constitution that the phrasing of it suggests that a president may be impeached, officers may be impeached, and the president was impeached while he was still serving? Now that he's out, is a trial still appropriate?

Joyce Vance ([14:38](#)):

So the appellate lawyer in me says there are an awful lot of Republican senators who don't want to have to go on record with a substantive vote on whether or not this president should be impeached, and they're looking for what lawyers would call a procedural out. If the senate doesn't have jurisdiction to try the impeachment, then their political problem goes away.

Joyce Vance ([15:02](#)):

But unfortunately for them, I think it's relatively clear particularly since the impeachment which is sort of the equivalent of an indictment in a criminal case, the impeachment happened in the house while Trump was still in office. There's no reason when you read the text of the constitution or when you look at the president from prior impeachment proceedings for the trial not to go forward. So I think that they're out of luck on that one, Barb.

Barb McQuade ([15:35](#)):

The question before the senate in a case like this is really kind of two things, right? They are both the jury and the judge. They have to decide number one, did he engage in the conduct that's alleged in the article of impeachment? But then they also have to decide whether this remedy of barring Donald Trump from ever seeking office again is an appropriate remedy? Do you think that that's an appropriate remedy or does that go too far in a democracy that values the right to vote? If voters want to change their minds in four years, should they have that right?

Kimberly Atkins ([16:11](#)):

I think that's the most important part of all of this because an impeachment is how you get there. I mean, I'm really just at a gut level. I'm very dismayed at the fact that Republicans do seem to be looking for any way that they possibly can to not vote to remove. Of course, the removal is not what has the teeth here because Donald Trump is already out of office, but to prevent him from running again.

Kimberly Atkins ([16:38](#)):

Tomorrow he can declare an election campaign for 2024 and he would have a federal election committee approved campaign finance account. He would be able to fundraise. He would be able to hold rallies. He would be able to give the same message, perhaps not on Twitter but through other means of media, and continue to spread the disinformation and the incitement that led to that insurrection.

Kimberly Atkins ([17:04](#)):

So that is the goal here, right? If we're talking about protecting democracy that is what everyone, including republicans like Mitch McConnell by all reporting wants Trump gone. Wishes that he weren't

even on the planet anymore. That's the way to ensure that that happens. So that's really the goal here and for Republicans to be looking for these procedural maneuvers or outs or having to google William Belknap to figure out why it's possible to remove somebody. I think he was trending at one point. It's like this is where we are. William Belknap is trending on Twitter.

Joyce Vance ([17:43](#)):

That's insane.

Kimberly Atkins ([17:45](#)):

I think that it's just really a sad commentary on our democracy. It seems that some Republicans anyway have made a decision that they are going to back Donald Trump no matter what happens and no matter what stands in the way including democracy itself. And that's just really sad to me.

Jill Wine-Banks ([18:04](#)):

I'd like to add two things to what was just said because during Watergate, there was bipartisan support and facts mattered. There was universal agreement that the president had said certain things including, let's use the CIA to stop the FBI from investigating, and that that was something that no president could be allowed to do. We aren't in the same situation now. We're living in basically silos of fact where there are groups who believe what we heard and there are groups who don't believe that.

Jill Wine-Banks ([18:41](#)):

But I also want to point out there is another way to remove him from ever serving again, and that is the 14th amendment, which basically says that no person who took an oath like presidents take, and who then violates that by committing an act of insurrection can ever serve again. So there is maybe a way that a censure with that as a penalty could be agreed to by a bipartisan group or that a conviction could lead to that automatically applying. And I hope that that will be something that people keep in mind because I do think the danger of having a second presidency by Donald Trump would be something that could really destroy for a very long time, our democracy.

Barb McQuade ([19:34](#)):

Yeah. You know what gets my goat, this cry for unity that we really need to let this go. We can't look back at the past. We need to move forward. Much like Gerald Ford said, our long national nightmare is over and pardoned Richard Nixon. Regardless of how you feel about the Nixon pardon, I feel like this one is one that is so damaging to our institutions of government and our democracy. The attack here was on the way we select the president and the actual vote count itself and casting doubt into our democracy such a serious thing that I think that unity be damned if that's the case, right?

Barb McQuade ([20:18](#)):

You think about all cases that you prosecute, I talked to my criminal law students about why do we have a criminal justice system? And although there is this concept of retribution and punishment, to me it's much more about looking forward. It's about deterrence for this person and others from doing this kind of crime again, and it's about promoting respect for the rule of law.

Barb McQuade ([20:38](#)):

If we have laws, we have to enforce them if we expect people to abide by them. So even if this should cause disruption of unity and harmony by those who support President Trump, then I say so be it, right? We have to make sure that we safeguard our institutions of government, and the only way we can do that is that when someone commits such a heinous violation of the law, and so tramples upon our constitution that there has to be some sort of consequence for it.

Barb McQuade ([21:09](#)):

And as you said, Jill, there are a number of ways you can do it. It could be impeachment, it could be censure if there is evidence and I don't know whether there is or is not. There could be some criminal charge. But I don't think that unity of the country is a reason not to explore any of those consequences. I don't know.

Jill Wine-Banks ([21:26](#)):

Barbara, let me just answer because as someone who was prevented from indicting Richard Nixon because of the pardon, I have very strong feelings. I thought it was wrong at the time. I have since had conversations with Gerald Ford's son and the lawyer, Benton Becker who delivered the offer of pardon to Richard Nixon. And I felt some sympathy and thought, well, maybe for him it was right. He did resign from office. He left in obvious humiliation and suffered more consequences than Donald Trump has ever suffered, but I think the crimes of Donald Trump, the wrongdoing, the impeachable offenses are so much more serious.

Jill Wine-Banks ([22:11](#)):

But mostly, I feel that if we had indicted Richard Nixon, Donald Trump might have learned a lesson and we might not be in the horrible situation that we're in now, and that it is definitely necessary. I also do not think that healing will come from ignoring. I think healing will come from accountability.

Kimberly Atkins ([22:33](#)):

I think you're exactly right, Jill. I mean, I don't see how you can have unity without accountability. I mean I use as an example the Black Lives Matter protests, right? These are people who are protesting for justice in the criminal justice system. These are people who have seen time and time again police officers walk away after killing unarmed black people. And that's why you have seen these protests persist over the years and gain popularity, gain strength, gain a following. And you will continue to see them again.

Kimberly Atkins ([23:10](#)):

We will see those protests in 2021 and 2022 until we get a system that shows that justice means something. And if Donald Trump can get away without any consequence for literally inciting an attack on the core of our democracy, then the impeachment power ceases to make any sense, but also the American people how can they have full trust that our democracy is strong enough to withstand anything, if it was attacked and there was no consequence.

Joyce Vance ([23:44](#)):

Kim, I can't agree with that point strongly enough. I really fear that with this mood of, "Oh, we need to come together which is frankly mostly being put forward by people who were either involved or stood by silently while Trump promulgated the big lie that we're going to miss the opportunity to do

something important here. Barb, talked about the importance of the criminal justice system in looking forward, and I agree so strongly that deterrence to future presidents matters here. But even more importantly, we've lived through four years with a president who engaged in all sorts of really bad conduct.

Joyce Vance ([24:24](#)):

Some of it perhaps criminal, some of it just merely heinous, and there's never been accountability. And the American people's confidence in our system of government has suffered as a result of that. And this is really the last moment where we can have accountability. If congress is more interested in just sticking a band-aid on the wound than in cutting out the cancer and trying to heal it, we'll have long-term repercussions.

Joyce Vance ([24:51](#)):

For one thing, we now have a full-blown white supremacist domestic terror problem on our hands. We have to deal with that in a forthright manner. We just can't pretend it doesn't exist. But this president, if he's not this former president thankfully, if he's not permanently barred from holding office, really poses a risk to the future of the country. And I'll underlined just one last time something that we've all said, Trump's efforts here, it wasn't some sort of Nixon-esque crime.

Joyce Vance ([25:21](#)):

What he wanted to do was hold on to power after he lost an election. In other words, he wanted to undercut all of our right to vote. We can't just let that go. We can't move forward. If there's not accountability, there can't be any healing of any sort really.

Barb McQuade ([25:39](#)):

Well, why don't we move on now to a new topic and talk about the judiciary. Kim, I know you just wrote a piece about a not so subtle invitation to Justice Breyer. What are your thoughts there?

Kimberly Atkins ([25:53](#)):

I have to say as I was watching the inauguration and I saw Chief Justice John Roberts giving the oath of office to President Biden, one of the first thoughts in my head was, "Well, now. Justice Breyer can retire, right?" I mean, we can get started after four years where Donald Trump and really Mitch McConnell totally transformed the entire judiciary from the Supreme Court on down. Let's give Joe Biden a chance as much of an opportunity as he can get to leave his mark on the judiciary and he can start at the Supreme Court.

Kimberly Atkins ([26:30](#)):

So of course, if Justice Breyer chooses to retire, it will not change the 6-3 very conservative bent of the court right now. But Joe Biden pledged that he would nominate a black woman to the court, and this is a court that has failed to keep up with looking like the face of America, and that would be an important move. He could also make the court a lot younger. I mean Amy Coney Barrett just turned 49 this week. That's the conservative mark that has been left on this court.

Kimberly Atkins ([27:02](#)):



Let Joe Biden nominate somebody who is a person of color, who is a woman, who is young and who could give a new fresh left-leaning perspective to counteract the very right-leaning perspective. Not right-wing, but right-leaning perspective that the court has right now. And there are a lot of federal vacancies. This would be a good boost to the Biden administration I think. So I would not tell Stephen Breyer what to do. I have been told that he may read my publication since he does live in the Boston area, but we'll see what happens.

Jill Wine-Banks ([27:39](#)):

Kim, I want to just say Stephen Breyer was in the Watergate prosecution office, so I've known him for a very long time along with his brother who is a federal judge in San Francisco. Of course, I'd like to see him stay as long as possible, but I was very persuaded by your argument that we need to make sure during this four-year term that we don't lose the opportunity to make sure that we get a young person on the court who could last, no matter what happens in four years.

Jill Wine-Banks ([28:15](#)):

So I'm torn on this issue of what we need to do and am also thinking of all the things that we need to do in court reform. There's a Republican bill that's already been proposed to permanently limit the Supreme Court to nine, to prevent any enlargement of the court as has been suggested as part of the reform of the court. So I think we have to be careful. And most of all, we need to tell the Democrats that they must take seriously appointments to the court and use it in the same way the Republicans have to make sure that the views of the majority of Americans because democrats are still the majority are reflected in how decisions are made. And that's not just the Supreme Court. It's the courts of appeal as well as the district courts.

Joyce Vance ([29:08](#)):

I really agree with that, Jill. So I went back. I actually looked at the court's website right before we got started to see how many vacancies there are. And there are 53 vacancies total. Three appellate, 46 district judges and four more between the federal claims court and international court of trade. And that doesn't include future vacancies. So judges who may retire or take senior status later this year. Some of them have already indicated that they'll do that.

Joyce Vance ([29:38](#)):

There are a lot of judges out there and it's time to have a huge push for diversity on the courts, really at all levels. After four years of the last administration, we need racial diversity, ethnic diversity, gender, LGBTQ judges, and we need to have professional diversity too, which takes me back to the point that Kim made about the Supreme Court and President Biden's commitment that he would put a black woman on the Supreme Court.

Joyce Vance ([30:07](#)):

We no longer have a court that has a civil rights lawyer on it with the passing of Ruth Bader Ginsburg, and that court I think it's moral center has often been the civil rights lawyers who have been appointed. So it's time to do that. There are lots of incredibly qualified black women out there for that job that the three of us all know and recently had the opportunity to be on a podcast with Sherrilyn Ifill, who's the head of the Legal Defense Fund.

Joyce Vance ([30:36](#)):

But there is just such a rich vein of qualified people who could really help drive that court in a positive direction. And that's to say nothing of diversity on the Courts of Appeals, the fifth circuit which includes Texas for instance no longer has a Latino judge. So Joe Biden really needs to get to work and fill these vacancies.

Jill Wine-Banks ([30:57](#)):

If my statistics are correct my research shows that there are no women of color on the bench in the Court of Appeals.

Barb McQuade ([31:05](#)):

Oh, wow. I did not know that.

Kimberly Atkins ([31:06](#)):

And that is so crucial. I mean just to underscore the types of things that will be coming before the federal courts that are already making their way through challenges to affirmative action challenges to a lot of these restrictive voting laws that we talked about in terms of the importance of voting rights. I mean there are just so many challenges to education. I mean, there's just so many things that are coming up that are crucial in the civil rights arena, that are going to be making their way up to the Supreme Court.

Kimberly Atkins ([31:40](#)):

We've seen the Supreme Court be in recent years antagonistic to things like affirmative action, antagonistic to things like voting rights. So even if it still has that 6-3 split at the top if you have at least one other person who could be a vocal advocate as Joyce says somebody who comes from a civil rights background in the vein of Thurgood Marshall, in the vein of Ruth Bader Ginsburg. That would make such a big difference.

Barb McQuade ([32:05](#)):

Diversity comes in a lot of shapes and forms also and I think if you look at the Supreme Court, there is so little diversity even in terms of law school. I think we've got maybe one or two who went to law school at some place other than Harvard and Yale. Their backgrounds, their practice area, people who have served as public defenders and all different kinds of things. So often we see a pipeline where there is a real profile of what makes a judge or a justice, and I think we really need to cast a wider net to do that.

Barb McQuade ([32:39](#)):

I think one way we can improve the diversity of the bench, which I think makes better decisions when we have decision makers that reflect the diversity of the country that we serve is to expand the circuit Courts of Appeal, not just pack the Supreme Court. That may be a bridge too far. That is a pretty perhaps radical change, but adding judgeships to the federal circuit courts of appeals, I think is a way to add to the diversity. We can beef up the numbers. You say there's only three vacancies on those courts.

Barb McQuade ([33:11](#)):

Well, if you add a number of seats to all of those, the senate can do that. Congress can do that with the democratic majority in the house, the senate, and the White House. They now have the ability to do that and I think that's perhaps an opportunity that should be seized. But let me push back on one thing that

that Kim said just for the sake of argument, on your very kind invitation to Justice Breyer. I know that there are some judges who at 12:01 on January 20th took senior status so that the president can replace them.

Barb McQuade ([33:49](#)):

If Justice Breyer does that, does that signal to the country that he is part of team Democrat. And if he does, does that further polarize the judiciary along the lines that President Trump has done referring to people as an Obama Judge or a Bush judge, which to me has been a way of really tainting the independence of the judiciary. Until President Trump, I never really thought much about which president had appointed a particular judge or justice and does this just feed into that, that each team has sides rather than respecting the independence of the judiciary thinking of these judges and justices by the party that appointed them?

Kimberly Atkins ([34:30](#)):

Well, I'm going to say no for a couple of reasons. One, I think if you look at Stephen Breyer's record on the Supreme Court, he is by no means has a record as an activist judge, as somebody who was there to advance a Democratic agenda. So I don't think that that's the legacy that he'd be left with. He is also, and I don't mean to be ageist in any way, whatsoever, but he's 82. He's about the same age as my dad who's been retired for 20 some odd years.

Kimberly Atkins ([35:01](#)):

If you're going to enjoy your life, enjoy your family, this is a great time to do it. He's also somebody who is as Jill mentioned a veteran of the senate judiciary committee where he was chief counsel for a while, so he understands politics. Right now, the senate has a razor slim majority. When Senator Patrick Leahy got sick this week, and there's a republican governor in Vermont who would replace him if something terrible were to happen, I think that kind of send a shockwave through Democrats.

Kimberly Atkins ([35:35](#)):

And I think with such a just a narrow precarious majority in the senate to confirm his replacement, I think Stephen Breyer would be more than... It would be more than understandable if Stephen Breyer chose to step down this year.

Jill Wine-Banks ([35:50](#)):

I just have to add one thing because I have to put in a plug for my law school, Columbia, Ruth Bader Ginsburg went to Columbia, as did many other prominent justices. But I think we need someone from Columbia. So a black woman from Columbia is what we need.

Barb McQuade ([36:08](#)):

I think the heartland should be better represented. Go blue. I'd like to see a Michigan law grad in here.

Joyce Vance ([36:14](#)):

So if we're going to all debate the merits of our respective law schools, I guess I need to put in the plug for UVA. But Barb, I think you raised this really interesting question about whether the public now thinks of judges as Trump judges or Obama judges or Biden judges. And I agree with you, that that's a really unfortunate state for the judiciary to fall into because they decide some of these really difficult

intractable issues. So the public has to have confidence that those decisions are being made on the law. And one of the serious pieces of damage that's been done to this country over the last four years is eroding the public's faith in the judiciary.

Joyce Vance ([36:57](#)):

We're not going to like all of their decisions. They will make decisions in some cases that I will strongly disagree with. But as long as I trust their integrity and that they're making their judgments based on the facts on the law and not on politics or other improper motives, then I'm okay with it. So I have this sort of humble suggestion which is that I think the courts actually need to assume the responsibility for restoring the public's confidence in their integrity.

Joyce Vance ([37:26](#)):

The courts are used to standing a ways back from the rest of their communities. I think when the chief justice went to bat for, it was Judge Jon Tigar in Berkeley deciding one of the immigration cases, and the then president came out and criticized him as an Obama judge, and the chief justice pushed back and said, "There are no Democratic judges and Republican judges." We need to hear more of that from the courts. And they need to say it, they need to show us that it's true. And they really need to help restore public confidence in the institution of the judiciary.

Kimberly Atkins ([38:00](#)):

And I would extend that even to the practice of Supreme Court nominees from having big elaborate events at the White House whether they turn out to be super spreaders or not, or just being that close to the political side. I would love to see members of the judiciary step back from that completely, and just make it... If for no other reason than civics education for the public for them to understand that the judiciary is independent.

Barb McQuade ([38:30](#)):

Yeah. You see these instances where say, John Roberts rules in favor of the Affordable Care Act and you see outcry that he has betrayed his party and the like. That to me is one of the most un-American things that you can say because he made a decision based on what he believed to be the facts in the law, and sometimes that is going to be different from the viewpoint of the president who appointed you to the bench. One of the things I tell our law students is law is more art than science.

Barb McQuade ([38:58](#)):

You look at statutes, you look at constitutional principles, but there's a lot of area of gray. And what often influences people are their lived experiences and their worldview and that is more likely to align with the president who appointed you. So it's not surprising that on these really hard issues, we might see five-four decisions. I don't think that justices and judges are voting which way does my president want me to vote. I think that that's the way they see the world because that's the way they see those shades of gray.

Barb McQuade ([39:28](#)):

It's natural and I think it's valuable to have those different perspectives at the court so that there is some push and pull. So I think that seeing people who work in the law promoting that idea that our judiciary is independent. And although presidents appoint them, they are then free to make their own

decisions about cases. And I think that's one of the real harms of the Trump administration is that portrayal of the judiciary as being just one more piece of the political machinery.

Kimberly Atkins ([40:04](#)):

So now we're going to get to some questions. If you have a question, you can write to us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or send a tweet to @Politicon for next week's show and we'll get to as many of your questions as we can. But for this first episode, we'll take on some of the questions that we've all been asked recently. The first one that I will pose to my sisters is why are some of the breachers of the capital, I will call them insurrectionists. That's not the question, but I'll put that in. Why are some of them being charged and others aren't?

Joyce Vance ([40:40](#)):

So this is a great question, Kim and a lot of it has to do with what Barb just called the art of prosecution, the art of the law. Prosecutors right now are making decisions about who to charge based on a couple of factors. One of the most important ones is who can they identify. Rather, they haven't identified everyone in these photos yet. They're likely working through that process. We know from reporting today that one of the most serious aspects of what happened on January 6th, the planting of explosive devices at the RNC and DNC headquarters that although they have video, they haven't identified the perpetrator.

Joyce Vance ([41:22](#)):

So there have been no charges there yet. So that's the first thing, identification. And then the second issue is you don't want to take a scatter gun approach here. What you really want to do is first charge the people who pose an ongoing risk to their community. So identify people who might pose an ongoing risk and charge them, maybe not with the most serious possible charges against them. That might take more investigation and time, but use some of the lower level charges that we've seen being used sort of the federal equivalent of trespassing, to get these folks into the legal system in essence to incapacitate them so they can do no more harm. I think that doesn't explain all of the decisions that we're seeing, but those two principles animate a lot of what's going on right now.

Jill Wine-Banks ([42:13](#)):

Joyce is completely correct, but it doesn't answer the question of why if incapacitating them from future harm is the goal, they are being let out of jail now. Those who have been identified and arrested are mostly being let go. They are engaging, I am sure in the continuing effort to take down our government. The Twitter answer to why they're being let go is white privilege. And we'll have to see whether that is what the actual explanation is, but it certainly looks like there is some racial component to that, and that is a very frightening thing.

Barb McQuade ([43:01](#)):

Well, I think you're right, Jill about the appearance of racial privilege in all of this including the way they were treated that day at the Capitol. You've seen images of the way Black Lives Matter protesters were treated and then the way some of these protesters were treated. The doors in some instances were open and allowed them to walk right through. Although, I also think that the Capitol Police Department was so overwhelmed that in many instances they didn't have options about making arrests and the like.

Barb McQuade ([43:28](#)):

But of course the federal detention statute says that there's a presumption of release. We covered this today in class as a matter of fact and talked about this. We talked about the QAnon Shaman who was detained. But there's a presumption of release and a defendant should be held only if the prosecution can show by clear and convincing evidence that the person is a danger to the community or by preponderance of the evidence that the defendant is a risk of flight.

Barb McQuade ([43:55](#)):

So those decisions will be made on a case-by-case basis. So the man known as the QAnon Shaman has been detained on the basis of danger to the community and risk of flight, whereas some of the others have been released on bond. But you're right, Jill that I think that we all have to consider what either explicit or implicit biases exist in the system, and I think all of us who love justice have to work to make sure that those disparities are eradicated.

Joyce Vance ([44:22](#)):

And I think we're already seeing some progress because in one of the cases where there was release, the man who sat in Nancy Pelosi's desk chair, that sort of famous picture, Barnett, it was a magistrate judge who made the initial decision to release him, Beryl Howell who's a district judge on the District of Columbia court reviewed that decision and she decided that he should remain in custody. So I think as these cases progress, we'll see those decisions get right-sized. But I agree with you there's certainly an appearance of racial injustice and that comes in this larger context of addressing systemic problems with racial injustice in the criminal justice system.

Joyce Vance ([45:04](#)):

If there's a silver lining to what we've seen in the course of the last few weeks, maybe it will be forcing that issue into the public's attention and helping create more impetus to resolve these issues that have stayed in our system for far too long of two systems of justice. One for people of color and one for white people.

Barb McQuade ([45:24](#)):

Such a good point, Joyce, and I also love the way you say magistrate, magistrate. Tomato, tomato.

Joyce Vance ([45:31](#)):

I'm outnumbered by the Midwesterners here, I've realized. I'm the only southern accent in the room, so I'm going to have to bring it.

Barb McQuade ([45:38](#)):

Yes. Although I am south of the Mason-Dixon line, I am Midwestern at my roots. So sorry about that, Joyce.

Joyce Vance ([45:46](#)):

Outnumbered again.

Jill Wine-Banks ([45:48](#)):

The good news is our audience can tell the difference between us when I say, and I'll emphasize it, Chicago. You'll know it's me.

Kimberly Atkins ([45:58](#)):

All right. Let's get to another question. It says with three Supreme Court judges rammed through under Mitch McConnell is there hope President Biden will get to name any of his own? We already talked about the potential of maybe possibly Justice Breyer retiring. But talk to the fact that President Biden comes in with a very different vacancy potential than President Trump did. President Trump installed three justices. That's really rare, right?

Jill Wine-Banks ([46:27](#)):

That's very rare. It seldom happens. I think that there will be at least one appointment and then as you've noted, or all of us have noted, the Courts of Appeal are very important, and there is a vacancy because Merrick Garland left the DC Circuit Court, which is considered the number two most important court in America. And he'll be able to appoint someone to that. And there are many other vacancies. I think, Joyce gave us the number 53 vacancies.

Jill Wine-Banks ([47:00](#)):

So we need to pay attention to all levels of the court in the same way that we have to start paying attention to elections at the state level. The Republicans have installed a lot of Republican governors and the legislatures of many states are now Republican controlled, because that's where they focus their attention. And in this year of jury of redistricting, it's very important because those states that have Republican-led governors and legislatures will redistrict in a way that favors the Republican Party. So I think it's important that he gets to appoint a lot of people, but you can't create a vacancy on the Supreme Court, except by resignation or an untimely death.

Barb McQuade ([47:47](#)):

I also want to emphasize not only Courts of Appeals, Jill as you say, but even district courts. Most people have their dispute decided in a district court. They may not be making law, the way the Supreme Court does, but they make decisions every day in cases that affect people's lives. So no doubt, President Biden will have an opportunity to appoint judges to the district court and those are important life tenure positions as well.

Jill Wine-Banks ([48:15](#)):

I agree completely. And the 53 includes district court not just Court of Appeals.

Kimberly Atkins ([48:19](#)):

All right. Our last question is, was the former president's use of Twitter a free speech issue or just a public nuisance? I will start because one of my pet peeves is the fact that a lot of Americans don't understand how the First Amendment works. The First Amendment prohibits the government, the government from impeding on a citizen's free speech. It has nothing to do with what Twitter, Facebook or any other private company does.

Kimberly Atkins ([48:47](#)):

We have a free marketplace and people can welcome and not welcome people based on their own criteria, so long as it's not discriminatory that gets to a different part of the constitution. But the First Amendment when people cry it, including elected officials will cry First Amendment violations when

Twitter or some other private company does that. Nope, that's not what this is, but I want to hear my sister's answer to the question too.

Joyce Vance ([49:15](#)):

As a First Amendment lawyer, when I first entered private practice, I was at a firm in Washington DC and defended some libel cases, some commercial libel, but also some cases that involved elected officials. And it's really fascinating this point that you make, Kim about how the First Amendment isn't widely understood as protecting our freedom of speech only vis-a-vis the government, and not as against a private entity.

Joyce Vance ([49:43](#)):

So that's an important point to make. I think that there's also an important principle to understand here, which is that even if Trump had been engaging in protected speech, there's a line and the obvious example that's always offered is that you don't have a right to shout fire in a crowded theater. And what that comes down to is you can't incite violence. There are a lot of cases, a lot of legal decisions that discuss precisely the parameters of what's meant by incitement.

Joyce Vance ([50:14](#)):

But what it comes down to is you can't have a present intent to immediately create or foment violence. So leaving aside all of those legal decisions, when you're on the ellipse, when you point a crowd towards the Capitol, when you're using the rhetoric of violence, fight, take back our country, and you send that mob on its way, it's really hard to see that as anything less than inciting violence. And that goes directly back to the way Trump used Twitter.

Joyce Vance ([50:47](#)):

So very often with a full understanding that his followers would do his bidding, he used this language that was at least ambiguously indicating violence. He had done that for so long, he had seen the results in such a sustained fashion that even if his twitter usage was okay, not in the First Amendment sense, but in the sense of conduct a president should engage in. By the time we got to January 6th he was out of bounds. I guess that takes us back to impeachment and it's a rationale for conviction, but I think it's important to say that.

Jill Wine-Banks ([51:21](#)):

I want to make a little distinction which is that if it was reasonably foreseeable that your words would have the consequence of immediate violence, that's enough to take it out of the First Amendment. So I think that his words on the mall were definitely intended. And as to Twitter, there is a case that was decided by one of my Columbia law school classmates that said that the president's Twitter account was not his personal property, that it was a government entity and that therefore he could not even block anyone from his account. So that also helps put in context his being cut off of Twitter now.

Barb McQuade ([52:08](#)):

Yeah. I think Kim's absolutely right when she points out that the First Amendment restricts the government from suppressing free speech, not private actors. But I do think we still have a lot of work to do in this country thinking about the proper role for social media platforms. Do we need more regulation, do we need...Should it be wide open? I know that most of those big companies do some



work policing themselves. Facebook now has its own Supreme Court of sorts to decide issues about who should be part of its community and not.

Barb McQuade ([52:43](#)):

But if the goal is to have a safe space for free speech, then the way it is used to threaten people, to harm people, to intimidate people, and to organize crime is an interesting problem. Although, as I'm sure most of us found when we were prosecuting cases, when you have open forums like that, not only is it a tool that criminals can use to organize, it is also an incredible way to solve crimes because the evidence is all right there, and I'm sure that evidence is being used right now in these cases against the insurrectionists.

Barb McQuade ([53:19](#)):

And that brings us to the end of our first podcast. Thanks for listening to #SistersInLaw with Joyce Vance, Jill Wine-Banks, Kimberly Atkins, and me, Barb McQuade. Don't forget to send your questions for us by email to [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet them for next week's show to [@Politicon](https://twitter.com/Politicon). To keep up with us every week, subscribe to #SistersInLaw on Apple Podcasts, Spotify, Stitcher or wherever you listen. Please rate the show with a five star review. We'll be back next week with another episode guiding you through the political and legal chaos while we all try to get back to normal. See you next week, #SistersInLaw.