

Joyce Vance: Welcome back to #SistersInLaw. I'm Joyce Vance a former federal prosecutor in the Northern District of Alabama and a professor at the University of Alabama School of Law. The sisters and I have so much to talk about this week. With me as usual are.

Jill Wine-Banks: I'm Jill Wine-Banks, a former Watergate special [00:00:30] prosecutor. And I've had a busy week as I hope all of you have. I actually watched a performance of Molly Bloom's Soliloquy, which is an hour and a half of one person talking, that was quite a lot of fun.

Barb McQuade: I'm Barb McQuade. I'm a former federal prosecutor and I'm currently a professor at the University of Michigan Law School. This week we endured an awful lot of snow. And so I took two cross-country skiing, one out just about every day, got a little exercise and got a little outdoors. So that [00:01:00] was enjoyable.

Kimberly Atkins: I'm Kimberly Atkins, a former civil litigator, and now a columnist at the Boston Globe. And this was a busy week. One of the things that I did with my soon to be step son and my fiance was watch All the President's Men, which made me think of Jill the whole time. And also today I guest hosted On Point's show on NPR. I'll also be doing it again Monday and Tuesday. So check that out if you can.

Barb McQuade: We'll call in and heckle.

Kimberly Atkins: [00:01:30] Thank you.

Barb McQuade: We've all had busy weeks. We even had snow in Alabama. So that was something pretty special for us. This week, we'll take a look at ways Trump can be held accountable for his conduct. Take a look at the importance that words have for the future of our country's non-citizens and fill you in on what judge Garland's in pending confirmation as Attorney General means for us. And as usual, we'll be answering some of your questions [00:02:00] at the end of the show.

Jill Wine-Banks: Today, we're going to start our conversation with a question of what's next? And we're going to look at Watergate and the current moment. As we look forward to what's next for the former president, I think it helps to look back to see what we've learned from history, particularly from Watergate. Back then we didn't indict the president, but we named him unindicted co-conspirator. I wonder if we had, would [00:02:30] Trump have behaved differently? And I wondered that even more as I was watching the vote in the current impeachment, the second impeachment of Donald Trump, when I heard McConnell minutes after voting to acquit, Trump give what sounded like the house managers opening and closing combined.

Jill Wine-Banks: It was a powerful indictment of Trump, totally inconsistent with acquittal. And it gave a roadmap for prosecutors and civil litigators to do what [00:03:00] he claimed falsely that Congress didn't have jurisdiction to do. To me, it was a reverse Watergate roadmap. We gave a roadmap to Congress, which was heavily relied on in pursuing articles of impeachment against president Nixon, but let's look at what McConnell said. And then I would like all of you to tell me what you think of it and what will come as a result of what he said, plus the already filed NAACP [00:03:30] case on behalf of Congressman Bennie Thompson, a Democrat of Mississippi under the KU Klux Klan Act against Trump, Giuliani and the far-right groups, Proud Boys and Oath Keepers.

Jill Wine-Banks: McConnell put out this excuse for voting to acquit because Trump was no longer president. And then he said, while former officials were not eligible for impeachment or conviction, they were, and this is extremely important. He emphasized, they were still [00:04:00] liable to be tried and punished in the ordinary tribunals of justice. Put another way he said in the language of today, president Trump is still liable for everything he did while he was in office as an ordinary citizen, unless the statute of limitations has run still liable for everything he did while in office. He didn't get away with anything yet. Yet. So let's start by talking about some of the criminal cases that might face Donald Trump in the wake [00:04:30] of the acquittal in the Senate. Barb, do you want to start?

Barb McQuade: Yeah. Well, first I want to comment on Mitch McConnell. Talk about trying to have it both ways. He votes to acquit and then he says, but of course president Trump could be responsible criminally or civilly. And to me, what a cop-out, the standard for impeachment is if anything certainly no higher than guilt beyond a reasonable doubt, which is the standard in a criminal case. [00:05:00] And he said that he was voting as he did because he believed it was unconstitutional to try a president after he has left office. But in that same case, of course, the majority of senators had decided that it was constitutional to proceed. And to under something known as the law of the case that matter was resolved and their question was guilt or innocence. And so I thought he really punted on that.

Barb McQuade: But then did a lot of finger wagging to talk about some of these other ways that president Trump could be held accountable by other people, just not by me. [00:05:30] So, there's that, but we talked a little bit last week about this investigation that's going on in Georgia about a solicitation of election fraud. That is certainly a possibility, now that's all going to depend on what the evidence shows in terms of president Trump's intent, did he intend to defraud an election? Or is it... I don't know if you guys are Seinfeld fans, but remember this episode where George Costanza was going to have to take a polygraph and he was afraid because he lies about everything he couldn't pass. [00:06:00] But he realized that if you believe it's true, then it's not a lie. And so does president Trump convince himself that he was just asking the secretary of state of Georgia to uncover what was truthfully his win in the election and stopping the steal?

Barb McQuade: So there's that. Certainly there's potentially federal criminal charges for his role, not only in the election, but in what happened at the Capitol on January 6th. [00:06:30] I think it's, again important to look at the evidence. We didn't see witnesses in the impeachment trial, but the people who are with president Trump at the time that the insurrection was occurring and others who might have known his statements could unearth some additional evidence there. So something that could be looked at. And then of course, there's all the stuff, besides relating to the insurrection, there's all the stuff relating to obstruction of the Mueller investigation, financial fraud [00:07:00] that is being investigated by the Manhattan district attorney. And so it remains to be seen, I think in the coming months, whether president Trump will be held accountable for some of this misconduct criminally.

Joyce Vance: There's an interesting development in the Manhattan DA's case too Barb. Did you see last night that Cy Vance, the Manhattan DA has brought on a former federal prosecutor, Mark Pomerantz, who was the criminal chief in the Southern District of New York, the guy who prosecuted John Gotti. [00:07:30] He is one of these people who really understands complex investigations. So in the last month, Vance has brought on a forensic accounting firm and a sort of legendary prosecutor. Now, look, I don't want to be Pollyannish here, but it doesn't seem to me that you do both of those things, if you don't think that you've got a very serious investigation on your hands. So I think we need to keep our eyes on the Manhattan DA's office for the next [00:08:00] few weeks.

Kimberly Atkins: Yeah. That's the kind of thing that folks like us call circumstantial evidence, that something is clearly going on there in those investigations. Yeah. I really thought a lot about the way Jill framed this and I was really grateful for her Op-Ed in USA Today, which I read in which you can find in the links to our show notes. In thinking about this because after Mitch McConnell gave that speech, I have to say I was furious. Just as [00:08:30] Barb hinted, what a cop out, and if you can lay out a case that clearly essentially for conviction, but turn around and say, Oh, well, because the constitution prevented you to, when the Senate has now voted, not once, but twice that it is constitutional to convict someone after they've left office. So that is the law of the case. That, that was else. I felt like I needed to grow stronger ocular muscles to give it the eye roll it deserves.

Kimberly Atkins: [00:09:00] But if you want to take something from it, I think Jill is exactly right. Now it is really clear in many ways on multiple records, including the transcript of what Mitch McConnell said exactly what prosecutors can and should do and why, and if they failed to do that, and if the convictions fail to come afterward, I hate to say that history will be a judge because history usually isn't a judge. History is a terrible [00:09:30] judge. What we need are the judges and the jurors in the current time. And since it won't happen in Congress, it's really important that, that happens in the courts, in all of these cases that we've been talking about.

Barb McQuade: And what about civil remedies? Jill, what are your thoughts about that? I mean, it seems-

Jill Wine-Banks: Well before we get to civil, I wanted to just ask about, we mentioned that the Southern District of New York now has a prosecutor that's moved over to the Vance team. What about the Southern District of New York and any criminal [00:10:00] cases that they might bring? Does anybody think they're likely to go ahead with any of the cases that are possible there?

Barb McQuade: Hard to say, they closed the case against individual one. Remember there was the case where they had charged Michael Cohen who was convicted of a number of financial crimes. And in the... I think it was in the information, the charging document to which he pled guilty. I think that was the document that referenced that he had committed his crimes in coordination [00:10:30] with individual one.

Barb McQuade: And it also identified individual one is the person who won the 2016 presidential election. So I think most of us can infer from that individual one is Donald Trump. I think you could correctly characterize individual one as an unindicted co-conspirator or an accomplice. But it is DOJ convention, not to name people if you're not going to charge them. And why was he not charged? One reason may be that he was a sitting president and it is the policy of the department of justice, [00:11:00] not to charge a sitting president. But then later they indicated to the court that the case had been closed and they are going to unseal some of the search warrants in the case. And so the fact that it's already been closed seems to me perhaps to make it unlikely that it will open again.

Barb McQuade: But I suppose there's always additional evidence that could come into play that could cause them to reopen that. I also don't know what effect William Barr had on the closure [00:11:30] of that investigation and whether a different regime would see things differently. So I guess it's a possibility.

Joyce Vance: It's a real mystery to see a case closed like that after the Justice Department has taken the step of identifying someone as an unnamed unindicted co-conspirator. And so I think Barb, when you say we don't know what effect William Barr had on that. I think we might be interested in knowing a little bit more about whether there was a political spin [00:12:00] on any of this, as much as I just hate the notion that, that would ever be a factor in a DOJ case. We've all lived through the last four years, and we know that there have been a number of cases where that happened. Stone comes to mind pretty readily, Flynn. So I think that that does bear investigation, but Barb, I bet that you like me have on occasion told the agent, listen, we're going to close this case for now. It's [00:12:30] not prosecutable, but if you get new evidence, you can always come back to us. So I'm not sure I would rule out the Southern District, even though the signs are that there's nothing imminent there.

Jill Wine-Banks: And I'm with Joyce, I think it's still a possibility, but before we run out of time, I do want to go on to some of the civil liabilities that face Donald Trump. There is one case that's already been filed by the NAACP, charging him with civil liability for [00:13:00] interfering in the government's operations. And there are several other possible cases, I would say, for example, there's possible personal injury and death cases that could be brought against him for his role in inciting the domestic terrorists to do the violence at the Capitol. E. Jean Carroll will not have to face the Department of Justice as the defense for the president, because I'm [00:13:30] sure DOJ will not continue the absurdity of defending the president for having defamed E. Jean Carroll or having raped her, which are the allegations. We don't know that they're true, but they're allegations. Some observers say this case is still pending.

Jill Wine-Banks: And then most importantly, there is Letitia James, the Attorney General of New York, who is doing a lot of civil investigation of the president, tax liability, for sure. [00:14:00] And I would say the federal government still has that audit going. It hasn't been closed as far as I know, and he may owe a lot of money for having taken a refund of tax that he would now have to pay back not only the refund, but also all the interest and penalties for having done that. So he's facing a lot. Are there any other civil ones?

Kimberly Atkins: I don't know that there are more civil ones, but I think it's important for [00:14:30] our listeners to know that when we're talking about civil cases, first of all, the burden of proof is different. It's a preponderance of the evidence, it's not beyond reasonable doubt like you have in criminal cases. Certainly criminal cases can play a role in these civil cases, for example, if he is convicted of incitement. And that will certainly be brought into court, if there are civil cases based on the people who were injured or suffered some sort of damage based on those incitement actions, [00:15:00] if they are brought. And most importantly, I think now that he's out of office, there was the constant claim that while he was in office, a president can not face even civil suits while he's there. And so the fact that he's out means that we're going to see probably a lot of these coming out in the days and weeks ahead and as they do we'll break them down here for everyone, but I [crosstalk 00:15:26]. Go ahead.

Barb McQuade: Well, I was just going say one last point about [00:15:30] the standard of proof. You mentioned that it's not guilt beyond a reasonable doubt by preponderance of the evidence, and that can make a huge difference. It may sound like a legal technicality to people, but guilt beyond a reasonable doubt is the highest standard we have. Guilt beyond all reasonable doubt, and you have to get 12 people to decide that unanimously that can be very difficult to do, but preponderance of the evidence is really just 51% more probable than not. In a classic example of that is the O. J. Simpson case, he was found not guilty [00:16:00] when the standard of proof was beyond a reasonable doubt, but essentially the same evidence, a jury was able to find him guilty by preponderance of the evidence.

- Barb McQuade: And so I think that really could matter in a case where things like intent and other things can be really nuanced. And so that could be the difference. So I'm going to keep an eye on that lawsuit that was brought under the KU Klux Klan Act. I think that's a really interesting lawsuit. And I know Joyce, you may know this, the Southern Poverty Law Center has brought a lot of these cases against white supremacy groups, KKK, [00:16:30] and others with great success.
- Joyce Vance: So they have the Southern Poverty Law Center actually put the KU Klux Klan out of business. They bankrupted them with one of these lawsuits. It was a very clever strategy that they used almost like an Al Capone tax prosecution, right? You don't necessarily have to go for the most serious charges if you can put bad guys out of business. It's a very interesting case, the NAACP case here, [00:17:00] it uses as Barb points out this older KU Klux Klan Act statute. And essentially it says, listen, these folks got together, the president and the Proud Boys and the Oath Keepers and others, and they colluded in an effort to keep us, and in this case, Bennie Thompson, a Mississippi Congressman from executing our constitutional duties.
- Joyce Vance: And so this really goes to this notion of the different burdens of proof [inaudible 00:17:28] that case is proving collusion [00:17:30] between the defendants, essentially that there is a conspiracy to prevent Congress from fulfilling its acts. And that might be easier to prove if you just have to say it's more likely than not that they conspired together, then prove it beyond a reasonable doubt. But if I was a betting person, I would say that we'll see this NAACP case undergo a little bit of revision. I think for one thing, there will be the addition of some more plaintiffs along with the Mississippi congressmen. [00:18:00] And also it's possible that we may have some theories that more clearly mirror strategies used by the Southern Poverty Law Center that avoided the need to prove a conspiracy and talked about action by the actors. So like Barb, my eyes are on that lawsuit.
- Jill Wine-Banks: And I love that you used the word collusion because that reminds me of impeachment number one, which was a question of whether there was collusion with Russia. So that was a good thing. I also want [00:18:30] to just before we move on to topic number two, is that if there is a finding of incitement, which I think there will be in some of these civil cases, that could be a trigger for the 14th Amendment and a prohibition of Donald Trump running ever again. So we should keep that in mind as we move forward. Kim, why don't you take it away here.
- Kimberly Atkins: Yes. We should definitely watch that 14th Amendment case, which would require congressional [00:19:00] action because that's a constitutional remedy there, but yes, moving on to the next topic. It's about how words matter. And this week the Biden administration made a directive to several agencies to change the way that language is used in the Department of Homeland Security and other relevant agencies. There was a directive issued that the term alien or illegal alien should not be used [00:19:30] in internal communications or in some external messaging, including press releases and other things. And instead

language that they said would be less dehumanizing, would be used words like non-citizen. And to me, that struck me as something very interesting. Also in president Biden's immigration plan, it calls for changing language in relevant statutes, like [00:20:00] the Immigration and Nationalization Act of 1965, which still uses words like alien.

Kimberly Atkins: So that, that does not happen in legal pleadings and other legal papers, which has been the justification for folks, including in the Trump administration for why that word has been used. And it hearkens back to 2018 when then Attorney General, Jeff Sessions issued a directive within the department of justice, [00:20:30] which required the use of alien and illegal alien in federal pleadings instead of other language like undocumented immigrants. He said, because that's the language that appeared in the statute, of course Sessions was someone who used that kind of language on the campaign stump and elsewhere with gusto. I wrote about that a little bit in my column in the Boston Globe that came out today. But to me, this is an important move by the Biden administration. It [00:21:00] alone, won't eliminate the use of the word alien from the federal government, but it's moving in the right direction.

Kimberly Atkins: It took until five years ago, for words like Negro and Oriental to be eradicated from federal statutes. But finally, Congress acted to do that. And that doesn't mean that up until four or five years ago, people were using that word actively the way they had been using the word alien and the Trump administration. But words indeed matters, especially for people of color like me [00:21:30] who have been on the receiving end of words, that are meant to dehumanize. That should not be the policy of the federal government, even if you want to be very strong and very forceful in enforcing your immigration laws. There's no reason to dehumanized individuals, the term illegal alien has always been particularly awful to me because it's not even grammatically incorrect. A human being can not be illegal and they should not be called as such. So I [00:22:00] want to hear from my sisters about what they think about this new move by the Biden administration.

Barb McQuade: I'm really glad you wrote about this, and you can find Kim's column on our show notes. It's a terrific piece and tells a heartbreaking story, a personal story that I think is worth reading. When I was in the U.S. Attorney's Office, I remember a time when we made a decision that in our press releases we were going to stop using the word alien. And we were going to start using the word undocumented [00:22:30] immigrant, because there are cases involving people who are undocumented immigrants, and that is sometimes the essence of the charge. But for this exact reason that you're talking about, I think people who are lawyers and journalists, who we are all among us care a lot about words and the connotation that words bring with it and the message you're sending with words.

Barb McQuade: And so our press releases started changing and many other offices around the country were doing the same thing. And so when that article came out two

years ago, that order from [00:23:00] Attorney General Sessions to change undocumented immigrant, or non-citizen back to alien, it really struck me, telling us what to do and telling us not to do that. What good reason can there be other than a political reason to try to suggest that the people involved are somehow other and foreign and different, and to demonize them. In the other part of that memo Kim, you may have seen... I think you cited [00:23:30] to it in your article. It said you should also do the following. If, for example, you have a defendant who is originally from Nicaragua, but is currently living in Toledo. You should not say Toledo man charged with carjacking.

Barb McQuade: You should say Nicaraguan national charged with carjacking. And again, what is the purpose of that other than to advance this narrative, that immigrants are criminals. And so I really took offense to that language. And I think the word alien in particular [00:24:00] is one that is demonizing and an effort to promote otherness. If you are an iPhone user, Jill, I know you're the lone Android user among our group, but if you're an iPhone user go into your text messages right now, wherever you are, wherever you're listening to this, get out your phone type into a text message, the word alien, and how little emojis come up type in alien and look at the picture that comes up. It's a little space alien, right? Because that is what we think of when we hear the word alien.

Barb McQuade: And so, [00:24:30] when the word was first put into these statutes in the 1700s, 1800s, whatever it was, it predated the space program, perhaps we weren't thinking about these things. And maybe at that time, it was a less loaded term, but language evolves and we need to evolve with it. And so I think that this is an important change, I applaud the Biden administration. I did some training this week on diversity and inclusion, and I know how it can feel sometimes that, gosh, I can barely keep up with the way language changes. I used to use this phrase, and now I have to use that phrase. [00:25:00] Yes, language evolves and it's on all of us to keep up. And so we have to educate ourselves and make sure that we're using language that's inclusive and respectful.

Jill Wine-Banks: In terms of the evolving language that you're talking about, Barb. I had started on Twitter, a #SayThisNotThat because there are so many phrases that I find both inaccurate and offensive. And because words matter so much about how we actually interpret what's happening. [00:25:30] So if you call a group militia that's one thing. If you call them domestic terrorists, you see it differently. And I think we have to be careful that we do say this not that. Obviously we should all be careful not to use the word alien for exactly the reason you're pointing out. And we should really keep a list as we go forward of things that are no longer acceptable to say and pay attention to that [00:26:00] it will change how politics responds if we're using the right words or how people vote if we're using the right words.

Joyce Vance: Over the last four years, I know we've all had people reach out to us and ask what can I do? I'm just an average citizen. What can I do to make a change, to have an impact on civil society? I think Jill's absolutely right. This is something

that we can all do. We can be mindful [00:26:30] of the language that we use. I was especially sensitized, frankly, to what our former Attorney General, my former Senator did in the area of referring to people as illegal. And in 2011, I challenged Alabama's brand new immigration law. We challenged it successfully. It was unconstitutional, but something that has stayed with me is that one of the worst features of that law in my judgment was that it prevented [00:27:00] children from going to school by the very neat device of forcing the schools to collect information on their parents' immigration status. So if you were in a mixed status family, or if you had a parent who wasn't documented, whether the child was an American citizen or not, many of them were American citizens, they did not go to school that year.

Joyce Vance: And shortly after we sued the state of Alabama, I was obviously still at the Justice Department. Then Senator [00:27:30] Sessions gave a radio interview and he used the word illegal to describe these children over and over. And I thought, how horrible must it be to be a child? And this is the Senator on the radio, but they're hearing it replicated over and over in their communities. And other kids are growing up in homes where people are being referred to as illegal and really dehumanized. So this is I think something concrete that we can all [00:28:00] do to fight back and reclaim the kind of society that we want to live in. Be very careful about any language that dehumanizes other people.

Kimberly Atkins: And it's not always easy, right? I've worked for certainly not my current employer at all, but I've worked at news organizations where I had to push back against my own editors who wanted to put in the phrase illegal immigrant in a story. And I said, that, that is again, it's grammatically incorrect and it's also cruel. [00:28:30] And I think for a lot of people who use that term, the cruelty is the point. And I think the former Attorney General would fall into that. And I had to push back against my own editors. This particular publication even would use the even worst approach, which is saying illegals, like a noun in some of the columnists and op-eds, which was just really terrible. So it's not always easy to push back against this thing, but I think for one of the easiest ways to go about it, at least for me, and as a journalist, [00:29:00] I think you're describing what's happening.

Kimberly Atkins: So if you are talking about violation of immigration law, then what happened? That means that a person either came into the country in a way that wasn't following the rules, or they came into the country on a visa and they overstayed the visa. And may are still here. If you explain exactly what happened, you can explain it as if this is a human being while still explaining exactly what happened, why they have run afoul of the law. And it's actually more information, better information [00:29:30] for people. Because again, I think when you just label people illegal as their very being, as their very sense, it's meant to categorize them in a certain way. So I love Jill's approach, say this not that, if you just say the facts, then you can usually avoid dehumanizing.

Jill Wine-Banks: There's one other target audience that needs to have this brought to their attention. And that is the people who work for the immigration service. When I first [00:30:00] started practicing in Chicago, one area of practice I developed was immigration. And I did some pro bono work in addition to representing corporate people who were bringing in senior level executives. And I took one client over to the Immigration Service and waited in line like everybody else. And I watched how the people behind the counter were treating each immigrant who was there for whatever reason. They were mean, they were nasty, [00:30:30] they were rude, dismissive, and my turn came up and they don't even really look up. And so they started yelling at me and then looked up and realized that I was a well-dressed white woman and they changed their entire attitude. And I think that if it was brought to their attention of how mean and cruel and dehumanizing their language and behavior is that they would treat people better. So I think we need to make everyone aware [00:31:00] of this. And I'm so glad your article today was very powerful and very emotionally moving. So I hope everyone will read that.

Kimberly Atkins: Oh thank you for that, Jill. And I think just what we're seeing happening after some terminology that was used to describe the pandemic, what's happening to people of Asian descent and Asian-Americans in this country right now with the attacks that are happening on them. Show that words really matter a lot.

Barb McQuade: [00:31:30] Why don't we move on from there? One of the things I know we all wanted to talk about there's still time is the upcoming confirmation hearing for judge Merrick Garland to be the Attorney General of the United States. Joyce, do you have any thoughts about what you expect that judge Garland will be asked when he faces the judiciary committee next week?

Joyce Vance: So I suspect that he'll be grilled. We've come to look forward to these rituals where much as in Supreme Court confirmation hearings, [00:32:00] senators from the opposition party, we'll try to get the nominee to commit to positions or prosecutions, and that nominee will bob and weave as best he or she can to avoid giving any concrete answers. Something I think we'll hear from judge Garland will be a strong affirmation of the independence of the Justice Department. I would say a reaffirmation, a return to the position that the Justice Department [00:32:30] should hold in the executive branch. Which is a little bit different from other agencies because as we've all discussed among ourselves, DOJ, at least when it's prosecuting criminal cases, or even when it's engaging in some of the civil enforcement actions that it does can't engage in any sort of political decision-making.

Joyce Vance: It just has to make decisions based on the facts and the law. So I'd look for judge Garland to take a strong stand in that direction. But I think after [00:33:00] all the shouting is over, he'll be confirmed along bipartisan lines. I would be surprised if this was a straight party line vote.

Kimberly Atkins: Yeah. He should be confirmed along bipartisan lines if for no other reason, then if you recall, the first time he was waiting for a confirmation hearing that never came when he was nominated to be a Supreme Court Justice, the line of every Republican who refused to even grant him a hearing was, Hey, this has [00:33:30] nothing to do with qualifications. We don't have a problem with this qualifications. So I think it's almost a matter of judicial notice to use another legal term that he has no problems with his qualifications. I think if Republicans now start trying to pick it that both the fact that they said that before and that he has been confirmed as a federal judge would make that very difficult.

Kimberly Atkins: But I do think that the point that Joyce makes is really important about [00:34:00] Justice Department that should be removed from politics. I think in that vein, we may see not an actual appearance, but you'll be able to feel the presence of former Attorney General Barr, just because it will serve as such a dichotomy from what we just had and the picture of the DOJ. And being the top lawyer for the federal government that judge Garland will likely paint will [00:34:30] be one that is unrecognizable, if you'd only seen the Justice Department over the past two years.

Jill Wine-Banks: I think you're all completely correct. And that judge Garland is exactly what the department of justice needs. He is not a political person. He is someone who is known for his integrity and someone who can and will restore that to the Department of Justice, which is probably the agency most damaged by the [00:35:00] Trump administration. I think what happened there was horrible. I guess if we can go back to the Watergate era, the Attorney General of course, was indicted and convicted. And so were subsequent members of the high level at the Department of Justice. He wasn't the only one. So it needed that kind of repair and a nonpolitical person from the University of Chicago. And of course, Merrick Garland is also from Chicago, [00:35:30] was brought in to restore that kind of integrity and respect and to free it from its political use as it had happened during Nixon and happened during Trump. So I'm going to predict that it will be a super majority vote that it's not going to be close.

Barb McQuade: Yeah, I think you're right in terms of questions about that, if I were asking questions, I'd want to know what steps do you plan to make to restore public [00:36:00] trust regardless of your political background? I don't want to hear that it's now is the Democrats turn to take on politically charged cases. I think what we want to hear is cases that will be free from partisan politics or the appearance of it. And what are you going to do to remedy that judge Garland? I think that is what I would be looking to hear. And he gave a very good speech about that when he was first nominated, when he was introduced by president Biden he gave a speech along those [00:36:30] lines. And so I'm hopeful that we'll hear more about that.

Barb McQuade: I think that is for all of us, who've worked in the Justice Department, we know that it is a nonpolitical place. And I think one of the great harms of the past four years is this perception that it is. So much of our world has become partisan that

I think people don't understand that U.S. Attorney's Offices and the Department of Justice just aren't. And so I hope a restoration, not only to the reality of that situation, but the public perception of it.

Kimberly Atkins: [00:37:00] Yeah. I find that-

Joyce Vance: Prosecutors are used to sitting back from their communities a little bit. In large part, much of the criminal part of what our offices do involves investigations that can't be discussed publicly until they result in an indictment. And even at the time case indicted prosecutors are restricted to discussing the four corners of the indictment itself. They can't discuss the facts more generally. So there's [00:37:30] often been, I think in some ways, really a wall between U.S. Attorney's Offices, the Justice Department and communities. My sense is that this Justice Department will have to take on the additional burden of going out to communities very deliberately to explain, not to talk about individual cases, but to talk about process and to really rebuild faith with communities that they serve, that's going to be essential. And it's going to be a little bit unfamiliar territory [00:38:00] for Justice Department folks.

Kimberly Atkins: Yeah, that's right in line with what I was thinking, Joyce. I think if I have substantive things that I'm looking for in this hearing with judge Garland, it would be after seeing this insurrection with really very violent people storming the Capitol after a year where people were crying out for racial justice in the criminal justice and civil justice system. And when the immediate predecessor [00:38:30] Attorney General Barr said that he did not think that there was systemic racism in policing. I would be looking for a really strong commitment from judge Garland to prioritize that. I think we've already seen that from the Biden administration, from some of the nominations that he's made in the civil rights division and elsewhere throughout the department. But I really want to hear that from the person who is going to be at the helm of the Justice Department, really saying that he recognizes and understands it.

Kimberly Atkins: [00:39:00] He did speak about that too, after he was nominated, but I would like to see more because that is such a crucial, crucial issue that the Justice Department really needs to prioritize, not just bringing back justice inequality in policing and in the justice system, but also really noting that the violent threat that some right wing domestic groups face Americans.

Joyce Vance: I think that's right, Kim and [00:39:30] it may hit a little bit close to home. We've already seen the secretary of defense call for a month long stand down so that folks in the military can talk with troops very deliberately in a very forthright manner about the problem of infiltration of the military with domestic terrorist groups. Law enforcement has issues as a sitting U.S. attorney I dealt publicly with one police department in Anniston, Alabama that [00:40:00] learned that some of its officers were members of a right-wing group called League of the South, that had a very similar ideology to some of these groups that we saw involved in January 6th. And now with this newest indictment of members of

the Oath Breakers involved in a conspiracy for January 6th. I think this Attorney General may have to look inside in a very painful conversation to assess whether he like the military has [00:40:30] to do some re-working of his personnel.

Jill Wine-Banks: I want to divert from our conversation just because you mentioned the military and this week two women were nominated for four star positions, nominations that were withheld because Trump might have, and probably would have not made it happen. When I was General Counsel of the Army, one of the things I'm proudest of was that I worked on legislation to abolish the Women's Army [00:41:00] Corps, so that women would be part of the regular army and therefore eligible for these positions. And at the time WAC had two, two star positions. That was it. And now there will be two four-star females in the military. And I'm so excited about that, that when you mentioned the military, I had to just add that, sorry.

Kimberly Atkins: Oh, that is great.

Joyce Vance: That is really exciting.

Jill Wine-Banks: Yeah.

Barb McQuade: [00:41:30] It's exciting. But maybe it's a conversation for another day, why they were delayed.

Kimberly Atkins: Absolutely.

Joyce Vance: Well, now it's time for us to turn to your questions. Each week, we answer your questions and you can send them to us using the email address, [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or via Twitter using #SistersInLaw. If we don't get to your questions in the show, we'll try to answer as many as we can on our Twitter feeds throughout the week. So first y'all, we have a [00:42:00] question from Lynn in Dallas, Texas, and Lynn's question is about impeachment proceedings against that former guy. She asks the Democratic party did not call any witnesses. Why?

Kimberly Atkins: Well, I can start with that. Oh, sorry.

Jill Wine-Banks: No, you go ahead. Because I bet we're all going to say exactly the same thing. That's what my bet is.

Kimberly Atkins: Well, I'm going to start with the political reality of it. I think it gets back to the broader point that we've [00:42:30] made in past podcasts that you don't call a witness or ask a question as a lawyer that you don't know the answer to. I think there was an effort by the house managers to try to call witnesses without really knowing what the Democrats in the Senate were going to do or what some of the Republicans in the Senate were going to do, frankly. And then when the

Senate voted to call witnesses on a bipartisan vote and then the negotiations began, [00:43:00] they realized that politically they were going to run into a big problem if Republicans pushed back and turned it into something that would look like a circus. So that's the political reason why they decided to pull back. And I totally get the political reason.

Kimberly Atkins: I think that undermines the legal reason, which is we had evidence that was coming out during the course of this trial that gave credence to the fact that, that the president of the United States, while this insurrection was going on, didn't do anything [00:43:30] to try to stop it. Even once he realized that the vice-president would be in danger. And we had members of his own party that were saying that, some of that information made it into the record. To me, I think that's a little insufficient because that is a major piece of evidence that the American people really deserve to hear firsthand from people, regardless of the vote at the end, regardless of the outcome. That was a major piece of information that needed to be a part of that trial, but because the political reality bumped up [00:44:00] against it that information didn't come in.

Barb McQuade: Yeah, I agree. I would like to have seen-

Joyce Vance: Go ahead, Barb.

Barb McQuade: I would like to have seen witnesses. I think the same thing, Kim, I think they're calculating, we need to get this trial over with, because we want to get to COVID relief. We want to get to confirmation hearings. And if we go down this road of witnesses, then the Republicans are going to call witnesses. I'm sure much of it was a bluff, but some Republicans putting together, here's my list of 300 [00:44:30] witnesses, including Kamala Harris and other people who clearly had no pertinent information about the situation. But I think that if they were acting honorably and discharging their duty to the American people, they would have recognized that there was a handful of witnesses who had pertinent information who should have been called to testify, like Mark Meadows people who were with president Trump during the time that the insurrection had begun.

Barb McQuade: We had some testimony [00:45:00] that there was an overheard conversation with Kevin McCarthy about what president Trump said, let's hear from Kevin McCarthy. And there was fear that they wouldn't be friendly witnesses to the Democrats. They might say something that was harmful. I think you let the chips fall where they may, this isn't about one side winning or losing. It's about setting the record for history, putting people under oath and asking them what they have to say. And so I think it was a missed opportunity to get a historical record so that we would know what happened there. And I think as [00:45:30] you say, it is politics taking precedence over the quest for the truth.

Jill Wine-Banks: So I would add that, of course this was a political trial, not a criminal or legal trial in a courtroom and the rules are very different. And while I agree that I

would have loved to have seen more than a handful of witnesses, if I was being honest in terms of further investigation, further [00:46:00] elucidation of the facts for the historical record, there is as a trial lawyer, one side of me that says if they had done that, it would have delayed the trial for at least let's say, a week. And a lot of the power and emotion that had come through in what had already gone forward from the prosecution side, from the house managers would have been forgotten [00:46:30] and lost. And I think there is, even though, as you all know, I'm the Pollyanna in this group, I'm always optimistic that people will do the right thing.

Jill Wine-Banks: Even I have to admit in this case, there was no chance that the vote was ever going to be to convict, that it was just beyond hope. And so when you then put it all together with the reality that it's a political trial and that COVID relief was essential, that confirmation [00:47:00] of all of the cabinet is essential and that there would be no change in the outcome. Especially if you're going to go ahead with a 9/11 style commission where all of this public testimony can be heard, where the historical record can be made. I don't think there was that much of a loss. I think the house managers did a brilliant job and that calling witnesses [00:47:30] would not have changed the outcome.

Joyce Vance: Jill, it's interesting that you raise the notion of a commission, Nancy Pelosi called for having a January six commission this week. And that led me to go back and re-read the 9/11 commission report. And I had forgotten how factual it was. It really reads like a novel of what happened and they had subpoena power, they didn't exercise it with a heavy hand, [00:48:00] but they were able to get a lot of witness testimony. We all recognize that we live in a different era in terms of witness compliance. There still seems to be either significant allegiance or fear to the former president. But I think a January six commission may get us some of the historical record that we all agree we missed out on by not having witnesses. So at least just that.

Kimberly Atkins: Just one last point. I hope people read it. I hope people read that report. [00:48:30] It's different than an impeachment trial. I was really dismayed at how few people read the Mueller report because I thought that, that was an important document too. So I hope when this 9/11 report comes out, that people do pay attention to it.

Jill Wine-Banks: Even more shocking is how few people watched the trial, because I would have said it was really important to get the witnesses in the trial, because people were watching and they will never watch the commission hearings. They did [00:49:00] watch the Senate select committee during Watergate and paid attention to that. If there's some way to get the people to pay attention, that might be really important because no one's going to read it. They need to watch it live. And I'm sorry that they didn't watch the trial live. And that to me means they certainly aren't going to watch the commission live.

Barb McQuade: Perhaps things can be done to encourage people to watch it, but even so there were some recommendations from that 9/11 [00:49:30] Commission Report that have seen its way into law. And so when you have a bipartisan group that is gathering information and making recommendations, then good government says that they will incorporate some of those. And we have many of them from The 9/11 Commission Report. So I am hopeful that such a commission would have some real value.

Joyce Vance: Our next question goes a totally different direction. It's from Maureen. And she writes, there was a well-known judge who made it a rule that women couldn't wear [00:50:00] open toed shoes in court. The reasoning behind this was that it reminded the judge of cleavage. What do you think Maureen asks of systemic sexism in women's fashion attire? Who wants to go first?

Jill Wine-Banks: I can't wait to take on this question because when I started practicing law, I had to wear a skirt. I was forbidden to wear pants in a court. My first trial was in Alaska in January. [00:50:30] The jurors were all wearing flannel lined pants and mukluks, and I was wearing a skirt. So I've long been offended by the rules of dress for women in a courtroom. I hadn't heard of the one until Maureen asked this good question about open-toed shoes, but it is part of the demeaning of women in a courtroom. It is part of the sexism that we have [00:51:00] all had to endure. And I think we have to stop it. Now you go into a courtroom, the judge and maybe both lawyers and he decided the case are women now. But the rules are still not fair. So this was shocking to me. I think it's a terrible thing. And it is systemic sexism.

Kimberly Atkins: Yeah. Jill, you have me beat because when I started out as an attorney as well, I remember one of the first things that [00:51:30] the other woman in my law office told me was which judges I would have to wear a skirt suit in front of because if I didn't, I would be called on the carpet in open court because they required that. And I was in Boston, so it's not quite Alaska, but it was still cold. And those were the only days that I did not wear a pantsuit or pants and a jacket or some something else, but it was really astonishing to me that none of the male attorneys that I [00:52:00] saw at Suffolk Superior Court in Boston, Massachusetts probably gave a second thought about what they were wearing, but I had to be so mindful of it.

Kimberly Atkins: Another thing that this reminds me of is when I first began covering the U.S. Supreme Court as a reporter, and one person told me that when you go to the U.S. Supreme Court, you'd better be wearing pantyhose. Well, this is Washington, D.C. in October when it is still in the 80s and 90s. And I said, you know what? If they want to kick me out of this court, they can. And [00:52:30] they never did. Although I was told that during the Rehnquist Court, that when people infringed or sometimes when women would wear a scarf that he thought was too busy, he would actually order a marshal to ask them to take it off. So the sexism has extended throughout the legal system in many ways. I'm sure all four of us have experienced it right down to the way that we dress.

Jill Wine-Banks: Maybe we could put on our website-

Joyce Vance: [00:53:00] You think that these things don't have lingering effects, but they really do. As a young lawyer, I was haunted by a story. I started out in private practice in Washington, D.C. There was at the time a junior woman, I think she was either a senior associate or maybe she had just made partner. And she had been involved in a trial in the Eastern District of Virginia. And she tried the case with one of our senior partners. And in the Eastern District, you get to talk to the jury pretty soon after [00:53:30] they returned their verdict to get their views on how the trial went. And so they talked to the male partner and they talked about strategy and evidence and what they thought. And when they got to the woman, they said, we really wondered why you wore the purple blouse on the second day of trial.

Joyce Vance: We talked about that a lot and she she was upset, but she laughed it off. By the time she told me the story, she told it as a joke, but y'all, it stayed with me. And [00:54:00] for years, even after I became a federal prosecutor, I wore a black or a navy blue suit with a white or a blue blouse when I went to court and a lot of time just in the office, because I didn't want the way I looked to in any way, do a disservice to my client. I understood the unfairness and it was really annoying, but at the same time, I didn't want to do anything that could damage my client. And then one day I just thought, this is ridiculous. I'm not going to do it anymore.

Barb McQuade: I will say in response to [00:54:30] that, I do think that there is a certain decorum in the courtroom, right? That men and women need to abide. Like I'm not going to wear shorts to the courtroom. I'm not going to wear a-

Joyce Vance: Oh, come on Barb.

Barb McQuade: Well, maybe just once. There is a solemnity to it. A person's Liberty is at stake. I want to show appropriate respect for that. And so I do dress conservatively and like Kim and Jill have mentioned when I first started practicing I wouldn't wear anything besides a skirt in a suit. But what changed it for [00:55:00] me was seeing our governor, Jennifer Granholm, most powerful woman in the state wear pants all the time. She wore pants to her state of the state address. And it was really eyeopening to me. I took notice and I thought, wow, she looks great. She looks impressive. She looks professional. She looks like she is respecting the decorum. And if the governor of the state can wear pants, then so can I. And after that, I began wearing pants all the time and I felt so much more comfortable and [00:55:30] so much more powerful.

Barb McQuade: And I have not gone back, but I think it speaks to the importance of women in leadership positions. When we are at the lower end of the organizational chart, we don't want to make waves and we don't want to do anything that might upset the balance in the courtroom for our client, because we want to think about their interests first. But when you have a woman who is the judge, or who

is the U.S. attorney, or who is the governor of your state, they can give license to the rest of us about what we're allowed to do. And [00:56:00] so I, to this day, thank governor Granholm for liberating, all women in Michigan, to be able to wear pants.

Joyce Vance: I love that story, Barb. That's absolutely wonderful. And it speaks to the power that we all have, right. To help women who are coming up behind us. I think we have time for one more question. So here's one from June in Jerusalem, Israel, and she asks why aren't the rioters being charged with insurrection and how [00:56:30] does this fit square with Trump's being impeached for inciting insurrection and not other crimes?

Barb McQuade: I can take a quick stab at that. Just because they haven't doesn't mean they won't number one. I think that most prosecutors would first charge what is sometimes referred to as the low hanging fruit. That is the lowest charge where you can get somebody in court and get them out of harm's way. And in fact acting U.S. attorney in DC, Michael Sherwin has said exactly that, that he has instructed his prosecutors [00:57:00] to continue to investigate seditious conspiracy and see if they have evidence of that, to date no one has been charged with that. And I know the question was about insurrection. I think the charge that would likely be charged would be seditious conspiracy. We have seen some conspiracy charges, and it's an interesting charge that I really like, I think it has some real attractive attributes to it.

Barb McQuade: They've been charging some of these men in the Oath Keepers and other organizations with conspiracy to obstruct an official [00:57:30] proceeding. And that might be a little cleaner. It might be a little easier to prove if you can simply show that people agreed to obstruct the proceeding, where they were going to count the votes. That's enough and you don't have to show that they were trying to oppose by force the authority of the United States or levy war. And it could be a lot easier, but nonetheless, I imagine that the investigations are continuing and if through social media and text messages and emails and other things they can put together that evidence that we could see those charges yet.

Kimberly Atkins: And that's exactly...

Joyce Vance: [00:58:00] Go ahead, Kim.

Kimberly Atkins: No, I was saying, I think that, that's exactly right. And I think that's one way that members of the public don't always understand that when you have particularly criminal charges prosecutors are very careful. They want to make sure that they can make their case before they charge it. They don't want to get out ahead of it. So if there are less serious crimes that can be charged more quickly, they will do that in order to get a person arrested, in order to get that process started. [00:58:30] But it may seem to folks in the public that they're being soft on them, and that's not the case at all. It's really the exact opposite from civil litigation,

which I did. And I think it's important as we watch some of these civil cases that we talked about at the top of the show play out.

Kimberly Atkins: A lot of times we would put everything in the complaint, everything that could possibly fall from the set of facts that we put out, knowing that at some point in time, some of those complaint charges would be dismissed, but you would still have the [00:59:00] nut of your complaint to move forward on, even if it's not every single charge. So I think that's something that you'll look to happen. So when that starts happening to, and things start being dismissed, you shouldn't get worried as long as there are some counts that remain in those civil suits, but it's really the opposite approach depending on what kind of action it is.

Joyce Vance: And something else that happens in criminal cases that doesn't happen in civil is prosecutors are looking for cooperators. People [00:59:30] who have the choice of being a defendant or a witness, or who might plead to lesser charges in exchange for cooperating in helping the government make these cases. And I'll sort of go full circle here to where we started talking about the difficulty of state of mind and proving what was going on in the president's head during the insurrection, to the extent that any of these people may have knowledge about communications between people involved in the insurrection and people in the White [01:00:00] house or the president's inner circle. That's what prosecutors are really looking for. Either the existence of that communication or the absence of that sort of communication will be very telling in where this is ultimately headed.

Jill Wine-Banks: And I think you probably have all seen that the Proud Boy who was named so frequently in the trial of Donald Trump, number two, has now come forward and is probably going to plead guilty and cooperate. [01:00:30] And he's also said that one of the heads of the Proud Boys has already been cooperating, that he may have been cooperating all along. So that just strengthens what you're saying and shows why they're starting at the prosecution level where they are, and I think as Barb said to begin with, don't count it out yet.

Joyce Vance: Well, all of this conversation is obviously to be continued and we'll be back next Friday to do exactly [01:01:00] that, to continue it. But that brings us to the end of today's podcast. Thank you for listening to #SistersInLaw with Jill Wine-Banks, Barb McQuade, Kim Atkins, and me Joyce Vance. Don't forget to send us your questions by email to sistersinlaw@politicon.com or you can tweet your questions to us for next week show using #SistersInLaw. You'll also find those links in our show notes. To keep with up with us every week, [01:01:30] subscribe to #SistersInLaw, on Apple Podcasts, Spotify, or wherever you listen. And please give us a five star review. We love to hear what you think. See you next week with another episode #SistersInLaw.

Joyce Vance: [inaudible 01:01:45] you a screenshot I took of us. Are you willing to let me tweet that? Can I tweet it?

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Kimberly Atkins: I look terrible.

Joyce Vance: I know. So do I, but what do you think? I look bad.

Barb McQuade: You look good Joyce as always.

Joyce Vance: What do you think? Can I tweet it? [01:02:00] I just emailed it to you.