

Jill Wine-Banks ([00:00:07](#)):

Welcome back to #SistersInLaw. I'm Jill Wine-Banks. Since we started this podcast, Kim, Joyce, Barb and I have received lots of questions about the processes that keep our legal system running. So, this week, we're going to do a deep dive on what a grand jury is, how they work, and what to expect from some of the grand juries in many of the upcoming high-profile cases. Then we'll take a look at the legal mess facing Governor Cuomo and ponder the fate of the filibuster.

And as usual, we'll be answering some of your questions at the end of the show. Before we get started, I want to share some good news with my favorite sisters. My book, *The Watergate Girl*, came out this week in paperback edition.

Well, Jill, that's great news. That's exciting. That's a great book. I think many of us have read it. And I loved reading it. I found it eye opening in terms not only of the riveting Watergate stuff, I can never get enough of Watergate. I'm really interested in that whole period in history and your stories about the cross examination involving the 18-and-a half minutes of missing tapes of Richard Nixon's Oval Office was great.

But I also found your stories of sexism to be really eye opening. So, great book and congratulations. I know we were talking in preparation for this about what we're all reading. I'm actually reading the biography of Frederick Douglass that came out a couple of years ago by David Blight. It's a Pulitzer Prize winning book. I tried to read something for Black History Month and Women's History Month to expand my horizons a little bit and this book is phenomenon. What an impressive person and just really finding it a very interesting story.

Joyce, how about you? What are you reading?

Joyce ([00:02:00](#)):

Well, we go from a highbrow with you Barb, to lowbrow with me. I do so much reading for my day job that I try to indulge with fiction for my out of office hours reading. And I've just finished Margaret Atwood's *The Testaments*. It's her sequel to *The Handmaid's Tale*. She is hands down, one of my favorite authors. She has a great book of short stories called *Stone Mattresses*. And even though it's largely dystopian fiction, I really enjoy the escape into the worlds that she creates.

So, I guess I'm the lowbrow sister. Kim, what about you? What are you reading?

Kim ([00:02:37](#)):

That doesn't seem lowbrow to me at all. I love Margaret Atwood. And congratulations, Jill, that is such exciting news. At times that I'm trying to center myself, I go back to my favorite classics. So, I've actually just started rereading the *Odyssey* by Homer, which is one of my favorite books. And-

Joyce ([00:02:57](#)):

Okay, that's the winner for highbrow right there.

Kim ([00:02:59](#)):

No, it's not.

Barb ([00:03:00](#)):

Definitely.

Kim ([00:03:00](#)):

I don't think it is at all. I feel like it's very grounding, I feel like it, when you can take yourself out of your own life is the ultimate escapism, right? So, I can go on this journey with Odysseus. And think about how his adventures mirror the things that we're going through and the challenges that we have in our lives right now. They seem so plentiful.

And so, for me that's calming. That's a way for me to give myself a little bit of therapy. Of course, I also have Jill's book that I should reread as well, and in light of this conversation, so I appreciate that.

So, let's start our discussion this week. We, as we mentioned, we want to do a deep dive in one of the areas that our listeners really want to know more about. And right now, a very timely thing to look at, our grand juries. I think a lot of folks, myself included, because I was never a criminal attorney, don't fully understand everything that grand juries do. And we're going to hear a lot about them.

We're going to hear about grand juries in cases involving former President Trump. We're going to hear about grand juries involving the case of Derek Chauvin in Minneapolis, the officer who we all saw with his knee on the neck of George Floyd. We're going to see it in a number of cases. And I think we should get down to basics and start with, what is a grand jury?

And I'm going to kick it off with Joyce, to get the discussion started about what the grand jury is.

Joyce ([00:04:31](#)):

Well, a grand jury is a very different creature from what we're used to seeing on TV and in the movies that the trial jury or petit jury, a much smaller group of people who decide whether or not a defendant is guilty. Grand juries are larger. They serve for a longer period of time, in my jurisdiction, 12 or 18 months. And their job is to decide whether or not the prosecution has offered probable cause to indict cases.

So, they either return what's called a true bill, an indictment or a no bill where they declined to charge. Grand juries can also be used for investigative purposes. But these are larger, more cohesive bodies.

Kim ([00:05:14](#)):

And I want to encourage all of you as former prosecutors to jump in on this conversation and really show us all your expertise. But I really want to dig down in how it's different. Because, particularly in the Derek Chauvin case, for example, we're going to see a grand jury playing out at the same time that the state court is conducting a criminal trial based on the second-degree murder and other charges that he faces.

And I think for people watching that, that's going to be very confusing. Barb, can you help us work through exactly what is different between a grand jury and a regular criminal trial, including things like the secrecy rule that grand juries have?

Barb ([00:06:00](#)):

Yes, there are a number of ways that grand juries are different from a regular trial juries. In fact, I once had an FBI agent tell me this story, I think he was probably pulling my leg. But what he said is he was once testifying before the grand jury, and he identified himself as Special Agent, so and so. And one of the members of the grand jury asked him a question, "Agent, so what makes you so special? I hear Special Agent with all the agents? Aren't they all called Special Agent?" And the agent claims to have

testified, "Well, I've testified before a lot of juries before, what makes you so grand?" So, who knows? He's probably making [crosstalk 00:06:32].

Kind of funny. But it's a good question, Kim. And I think there are some things that are surprising to people. Number one, there's no judge in the grand jury room. The prosecutor is really running the show. They have ethical duties as an officer of the court. And there is a court reporter who is recording everything that occurs in there. So, there are some checks on misconduct, but there's not a judge there to play referee the way there is in a normal trial situation.

There is also no defense attorney, which some people say makes the system somewhat unfair because the members of the grand jury don't hear both sides of the story. They hear a very one-sided presentation. And that's true. But remember that the question before a grand jury is very different from the question before a trial jury, and it's a protection actually put there by the Fifth Amendment that prevents the government from charging someone without probable cause.

And so, there is a check to make sure not that they've heard the whole side, of both sides of the story and that there isn't some defense that the defendant might present, but is there sufficient evidence that this is not some abuse, it's not some political vendetta that is causing these charges, but there's actually evidence on every element sufficient to take the case forward. And then as to secrecy, of course, in a trial, everything is open, it's open to the public, people can come in and watch and it's all recorded, and the members of the media might be there.

In a grand jury, it's all secret. And there are a number of reasons for that. One is to protect the integrity of the investigation. If people knew that there was an investigation going on, the targets might destroy evidence or tamper with witnesses or flee. It is also there to protect the accused.

So, if somebody before they are accused in case they never are charged with a crime, so you might be investigating some high level public official for allegations of public corruption. If it turns out that there is not sufficient evidence to charge them, you don't want their reputation to have been stained by the mere fact that there was an investigation. So, for all those reasons, there are secrecy rules that prevent the prosecutors and the members of the grand jury themselves from talking.

However, there's one exception, and that is the witness. The witness is permitted to talk. I think the reason for that is to prevent abuses from occurring before the grand jury if there are asked questions that are inappropriate. But when you hear about leaks about grand juries investigating certain things, I believe that those leaks typically come from witnesses who have testified before the grand jury about the questions that they were asked.

Kim ([00:09:03](#)):

That's really interesting. I hadn't really thought about that in that way before. I want Jill to jump into this, too. But I also want to just underscore as we talked about this, one big difference with grand juries is a grand jury is purely a tool for prosecutors. And when you're talking about being fair, and having the defense is no defense attorney, there's no judge.

Well, a grand jury is not rendering a verdict. A grand jury is deciding whether to bring an indictment. This is all on the prosecutor side. So, it's really not the same considerations, when you think about fairness, when you think about due process as with a traditional trial. But, Jill, I want to bring you in on this too. What questions do you get? I get questions about things like this all the time that you get to help people understand just how grand juries work and how important they are.

Jill Wine-Banks ([00:09:55](#)):

I think the major points have been made, but I want to emphasize its investigative powers. It is the grand jury that issues subpoenas, for example. It is the grand jury that asked for documents and witnesses under those subpoenas. Not the prosecutor. That has to be done by and on behalf of the grand jury.

And in many of the complex cases that I've been involved in, we use the grand jury as a way to gather information that you couldn't get without a subpoena. And so, that's an important part. The other thing is, you've mentioned the rights of people before the grand jury, and they come in, a defendant does not have to testify. In fact, it would be mostly unusual to even allow a defendant to come in.

But if they requested, they can, but they have to come in by themselves. They do not have a lawyer to advise them at that time. And when you think that it's a decision of the prosecutor, I've been involved with a lot of very active grand juries who say, "Here's who we'd like to hear from," or "Here's who we'd like to indict." And I can point to the Watergate case where our grand jury wanted to indict Richard Nixon, the President of the United States, and actually sorted most of the prosecutors, not all of us, but some of us.

And we actually had Leon Jaworski, the special prosecutor come in to explain why he was opposed to it, and why he wanted to allow impeachment to proceed. And then we violated, not violated, we got permission to reveal testimony from the grand jury in a briefcase full of evidence that we presented to the House Judiciary Committee as a roadmap to impeachment, because we weren't indicting. And so, there was this alternative way of proceeding, but we didn't want them to have to reinvent the wheel and do everything that we had already done.

So, the roadmap was unique, as was the investigation of the tapes hearing. Normally, if the White House had said, "Well, we can't produce some of the tapes," we would have taken it in secret to the grand jury to investigate. But the Judge overseeing that thought that it was of public interest and therefore should not be done in secret before the grand jury and had a public hearing that we questioned witnesses during.

So, it worked together with the grand jury. And then the evidence from that hearing was presented to the grand jury.

Joyce ([00:12:39](#)):

Jill makes a really important point here, which is the prosecutor's job in the grand jury is to advise the grand jurors about the law. That's really what you're there for. The witnesses are there for testimony, the grand jurors are amongst themselves decide what they believe the evidence to be. But prosecutors are there to tell the grand jury what the law is.

Kim ([00:13:03](#)):

And Joyce, while you're speaking, can you talk about things like immunity and being held in contempt? These are things that we hear about in connection to grand juries. What do those things mean?

Joyce ([00:13:16](#)):

So, because the grand jury is an investigative tool, you sometimes find yourself in a situation where you have a witness who does not want to testify. And in that situation, as a prosecutor, you might be deciding whether or not your witness is actually a defendant. But presumably, they're there because they have testimony you want them to give, they have perhaps some exposure to criminal conduct, but you've made a decision that they're better as a witness than as a defendant.

So, in the federal system, at that point, you can seek permission to provide them with immunity and compel their testimony. The reason that they can avoid testifying is because they have a Fifth Amendment right to avoid incriminating themselves. Once that Fifth Amendment prospect is removed, because you've told them you won't be prosecuted, then they have to go ahead and testify.

And if they don't, I suppose at that point, you can talk about contempt. I've actually never had that happen. I've given a number of witnesses' immunity, and at that point, they've all gone ahead and testified.

Jill Wine-Banks ([00:14:22](#)):

And could I just add, there are two kinds of immunity. There's use immunity, which means you have to testify and anything you say cannot be used against you. And then there's transactional, which means you will not be prosecuted for anything to do with your testimony. And so, of course, prosecutors try to use "use immunity" to be sure that if someone says something it can't be used, but they might still be held accountable for the conduct in question.

Kim ([00:14:54](#)):

And Jill, can you explain what being held in contempt means?

Jill Wine-Banks ([00:14:59](#)):

Well, held in contempt is if you refuse after being ordered to comply with a subpoena to testify. And having been given immunity, so that you can't be prosecuted, either by the use of your testimony or in that whole criminal complaint, then you can be held in contempt and jailed until you testify. This happens, I'm sure you're aware of this Kim, reporters who are trying to protect a source say I cannot reveal my source. And they can be sent to jail until they change their mind.

And there are many famous cases where people have served a lot of time in prison for refusing to divulge the secret of their sources. And of course, sources are very important to you in the same way that we protect witnesses before the grand jury. And also, the defendant, because as Barb said, not all cases end up in an indictment. And someone's reputation could be ruined, if you said there was an investigation of them.

So, you can't reveal who is being investigated. And the same thing is true for your sources. People won't talk to you if you are going to tell them and they risk their jobs for having talked to you about something.

Kim ([00:16:18](#)):

You're absolutely right. And it particularly is an issue, especially now with reporters who are with smaller outfits with, you know I'm very lucky that I work for the Boston Globe, which has gives a lot of resources to its reporters and to protect them in cases like that. But that is very real, protecting our sources is an important point.

So, I want to wrap this up by saying, I know it's a frequent phrase is that prosecutors could indict a ham sandwich, Barb. Is it that easy for prosecutors, especially going through this grand jury process?

Barb ([00:16:56](#)):

No, you could never indict a ham sandwich only a tuna sandwich, if I [[crosstalk 00:17:00](#)]? Now, I've heard that phrase, too. I think where that origin comes from is if a prosecutor brings a case to a grand

jury, and they do not believe there is sufficient evidence. What typically happens is the prosecutor will say, let me come back with additional evidence, and they can go before that same grand jury.

Maybe they didn't think that, they believe there was a bank robbery but they're not convinced that this defendant, that there's probable cause to believe that this person did it. So, perhaps additional investigation will continue where you go say, "All right, well, we did a search warrant at his home. And now we found the money and the mask, and the demand note in his home. Now, are you satisfied that there's probable cause," and then they might.

So, it could be that there is simply not enough evidence. And oftentimes, with additional presentation of evidence, the grand jury will return that true bill as Joyce mentioned, it's called. I do want to note that not every jurisdiction uses grand juries. The federal system does, because it's guaranteed in the Constitution. But the Supreme Court has held that it is not one of those things that will be incorporated to the States.

And so, 18 states choose to have a grand jury. But all the other states use a different mechanism called the preliminary exam. And that's a little different. That is where a Judge finds probable cause in open court. And so, there are pros and cons to either of those systems. There is the openness, it gives people some transparency and perhaps some confidence. But it also doesn't permit that secrecy and investigative use that we talked about earlier.

And there has also been some criticism if that the grand jury can be used as something for prosecutors to hide behind. There have been some accusations about that in, for example, the Breonna Taylor case. The prosecutor didn't say, the grand jury simply did not return homicide charges against these officers. Well, it could very well be because they didn't have a chance to consider that evidence. The prosecutor is the gatekeeper who controls what the grand jury is able to see about the case.

Kim ([00:19:04](#)):

All right. Well, I've learned a lot and I really appreciate you all for giving your expertise on that topic. And I think it's time for us to move to our next topic, which has been in the news involving the governor of New York. Barb, you want to lead us through that?

Barb ([00:19:20](#)):

Yeah. So, I think you've probably all read some of these reports about Mayor Cuomo in New York. Today's Wall Street Journal talks about the first scandal to hit Governor Cuomo, which involved this nursing home reporting that the state of New York had undercounted the number of deaths occurring from COVID-19 in nursing homes. A report from last July said that 6400 nursing home residents had died from COVID-19.

But it turns out they were being a little bit cute with counting the numbers, counting all of those people who actually died in nursing homes. And so, if, for example, you were living in a nursing home, you got COVID and got sick and went to the hospital, and your death occurred at the hospital. They didn't count that as people in nursing homes who died from COVID-19. And so, the Wall Street Journal reports that the total number is actually 15,000.

And so, whether that itself is any scandal, I don't know, but as Chilwell knows, it is just a cover up that is often of concern, more so than the underlying conduct. And so, we'll see where that goes. But on the heels of that reporting, and I think the thing that I want to talk about is three women now have alleged inappropriate, romantic or sexual overtures by Governor Cuomo.

First was an aide who accused Governor Cuomo of kissing her on the lips in 2018, of making inappropriate comments, like asking her to play strip poker, frequently touching her back, her arms and

her legs. And then after that, a 25-year old former executive assistant and Policy Advisor, has alleged that there were a number of uncomfortable encounters with Governor Cuomo, including one where he asked her about her sex life and other one where he asked whether she was open to relationships and said that he was open to relationships with women in their 20s, which would certainly identify her.

And then most recently, a woman who was not someone who worked for him, but a woman who met him at a wedding, where he touched her bareback, asked to kiss her, put both hands on her cheeks, and then kissed her on the cheek. And so, after hearing all of these, Governor Cuomo did make a statement where he said, he never inappropriately touched anybody, he never propositioned anybody. And he never intended to make anyone feel uncomfortable. But these are allegations that New Yorkers deserve answers too.

And so, Attorney General Letitia James is investigating these allegations. And he also said that his jokes may have been insensitive or too personal, and that he was truly sorry to those who might have misinterpreted his remarks as an unwanted flirtation. And so, it's an interesting concept. Let me start by asking Jill, about your thoughts about that.

I mean, certainly, there's no crime that's alleged here, right? But do you think that these are the kinds of things that amount to a hostile workplace such that people should be demanding his resignation?

Jill Wine-Banks ([00:22:30](#)):

So, first, I'd start by saying that there are two different episodes here. The wedding is not a workplace activity. And frankly, I don't think it would even rise to the level of being admissible in a workplace case as pattern or practice, because it's completely a different thing. And assuming that everything that is alleged happened, they are all, in my view, completely inappropriate things that would create in the two instances where they were employees, hostile workplaces.

One of the two in the workplace has a lot of verification contemporaneous to her complaints. She went to the Chief of Staff for the Governor. She talked to the council to the Governor. She moved to a different place where she would not have to see the governor. And so, there's a lot of verification of those facts.

The other allegation, which does involve a touching, it involves an accusation of kissing. And that one there does not seem to be the same level of verification for. But certainly, if those things happened to an employee, they are now against the Equal Employment Opportunities Commission rules and regulations. And so, they are maybe not a crime, may not rise the level of sexual assault, but they certainly are illegal and deserve to be looked at.

At the same time, I know it's not popular to say we have to hear both sides. As trial lawyers, we all know that no matter how thin the pancake, it has two sides, and we need to pay attention to both. I would also add that I think that a person who says the things that Governor Cuomo is accused of saying are responsible for what they said and for how a reasonable person would interpret them. And the words he spoke, any reasonable person would have felt uncomfortable hearing from their boss.

So, it's not as if, he can say didn't mean it. Yes, he probably didn't mean it. And maybe he has involved and we have to give him the opportunity to say I have involved and this will never happen again. But it did happen recently where it was during a time when anyone should have been aware of the consequences. So, those are all things that we have to take into account.

The Attorney General, I believe is appointing a special counsel outside of her office, so that it will be a completely independent investigation. And I think that's a very, very good thing. And no one can jump to conclusions until we hear everything.

Barb ([00:25:28](#)):

I was just to say, before I go further, I got to write that down. There are two sides to the pancake no matter how thin is a great analogy. Usually we have to rely on Joyce for those homespun analogies, but I'm going to chalk that one up for Joyce and put it in the book. So, good one. But, Kim, go ahead-

Jill Wine-Banks ([00:25:44](#)):

Wait til you hear about the [Ferdie 00:25:46] bag.

Barb ([00:25:48](#)):

I can't hardly wait. Kim, why don't you go ahead and chime in. You were about to add something?

Kim ([00:25:53](#)):

Oh, I was just going to make two points in response to Jill. One, there's a difference between a court in any criminal action that might result from any of these cases. And then there's also the court of public opinion, which has to do with the politics of this. He is an elected official, he is certainly thinking about the politics and what he can may be able to do and maneuver within that world.

Those are two entirely separate things, and we should talk about them and treat them very separately. On that second point, in terms of politics, I know a lot has been, there's been a comparison made about what Governor Cuomo might or might not do. Comparing it to the governor of Virginia, Ralph Northam, who got into some trouble when some pictures surfaced of him from when he was in medical school, I believe when he was either because he hasn't confirmed which person he was, but either in blackface or wearing a clan's costume, a Ku Klux Klan costume.

First, he apologized. But then he said he wasn't sure he was in the picture, which was a terrible, terrible political response. It was a terrible moral response, in my opinion. But I think there are differences between those cases as terrible as I think Ralph Northam handled it. That makes them not a comparison.

One, is it involving conduct that took place quite some time ago. And while, yes, as someone who used to live in the state of Virginia, when Ralph Northam was a Governor, I would want to have a governor of the place that I live, particularly if it's a former Confederate state, to understand the history of racism, and how it still plays a role in what we are dealing with today. And to not have had the lapse of judgment that he had, but I could have listened to him.

And if he couldn't make the case that he had understood what was wrong about that and learn from those mistakes, as opposed to feigning amnesia about it. That would have gone a long way for me as one of his constituents to making the decision as to whether I could forgive him. And I'm sure that is the same for other Virginians in determining whether they can cast another vote for him.

I think in this case with Governor Cuomo, it's so different, because these are things that have been happening until very recently. It shows that these allegations, if you believe the woman, and I want to say something about that, too, shows that this is someone who has used his position of power, someone who knows who he is, knows the power that he wields, and is using that potentially, in a way to be sexually predatory toward women. And I want to say one last thing about believing the women, which is something during the Me Too movement. We all heard people say, believe the women.

And then there was a backlash against that, which gave the idea that, well, believing the women is unfair, because then you're favoring one side, and we should hear all the evidence and hear all sides. In all of these cases where women are making claims against powerful men, we cannot pretend that the

power dynamic is the same. It absolutely never, ever is. It is not a case that the women have the same protections and platforms that the men who are accused of have. This is a governor of a state.

This is a woman we saw with Christine Blasey Ford in the case with Brett Kavanaugh. No matter what you believed happened, her life got up ended and he got on the U.S. Supreme Court. So, the power dynamic there is not the same. There is very little incentive for women to lodge false claims against people as powerful as Andrew Cuomo. And that needs to be taken into account in what we mean by what we say believe the woman.

We need to try to find ways to level that power dynamic before we can just say hey, "Let's listen to all sides and everybody should be treated the same."

Jill Wine-Banks ([00:30:04](#)):

You do have to hear both sides. That doesn't mean you have to believe both sides. And in evaluating the information you're getting, you have to take into account how hard it is for a woman to come forward and the power dynamics that you're mentioning. But there have been, I mean, does anybody remember Tara Reade, who made accusations against President Biden? And that faded away because there was no real substantiation of her claims at all.

And she proved not to be a credible witness. But there was a period of time where he was suffering for that accusation. So, I still think, yes, we have to give credibility that might go automatically with Governor. I got criticized on Twitter, because I was saying, if you're calling him Governor Cuomo, you can't say Charlotte and Lindsey. You have to use their last names and give them credibility.

So, I think there is that imbalance in power that we have to take into account. But we also have to be careful about overcharging. I recently was on a panel looking at sexual assault in the military, not harassment, but actual assault. And in response to public pressure, the charges started being brought for the slightest thing. A couple dancing together and his hand slips a little too low.

And what ended up happening was juries were acquitting, there was almost no convictions because they were overcharging. So, we have to be careful on both ends of this, both on overcharging and in evaluating the credibility of both parties to the accusation.

Joyce ([00:31:58](#)):

I think this is interesting in both a legal but also in a non-legal context, because I'm sure we all look at what's going on with Governor Cuomo and filter it through our own personal experiences. I happened to flip the TV on in the middle of his press conference, the apology earlier this week. And it felt really pale to me. I mean, I heard him saying, "If anything that I did, offended anyone, I'm sorry."

And it didn't feel like a denial. I mean, I take Jill's point that the pancake, even if it's thin, we should flip it both ways before we decide that it's fully cooked. But even taking that into account, it felt like he was saying, I might have done some of these things, but even if I did, so what? And here we are, it's 2021, we've lived through the Me Too Movement, we seem to be out on the other side, where they're no longer is a crushing imperative that men be held accountable for this kind of conduct.

And I'm in my 60s, no one is going to do this to me anymore. But I have a daughter in her 20s. And the notion that someone would subject my daughter to being kissed, or to questions about her sex life, or is one of the victims is now saying she was a sexual assault survivor. And Governor Cuomo wanted to talk about how that impacted her sex life, that has got to come to an end.

And as a society, if we can't evolve to a place where this conduct is unacceptable, whether it's criminal or civilly wrong, then we've got some progress to make.

Barb ([00:33:39](#)):

I received a response on Twitter about this from someone who said words to the effect of, no harm, no foul. There's no allegation of inappropriate touching. I mean, there is a kiss, which I think is inappropriate touching. But there's no sexual assault here. It really was just propositions and things like that. So, it's harmless.

And I think that this is a real teachable moment for people who may not understand the harms that go on there. For people who want to be taken seriously in the workplace, for their ideas, for their work, for their value, to be diminished and treated like a sex object, diminishes their stature for themselves, as well as in the eyes of their colleagues. Some of these women have talked about how the overtures by Governor Cuomo created friction between her and her colleagues now because they perceived her as somehow being favored by the governor.

And so, it creates all kinds of problems in the workplace. And so, even if these things do not amount to crimes, I don't think they do, even if they don't amount to a civil hostile workplace, which I think is a question. The question becomes, is this person worthy of leading the state of New York? Is this someone who has the moral authority to lead? And if he's treating women in the workplace as second-class citizens or as objects of affection, then I think there's a legitimate question to be raised as to whether he does.

Now, certainly there's the crime and then there's the remedy. I use crime, I guess in air quotes. There's the conduct, I should say. And then there's the remedy. Just because, maybe he says, "I did this, and I'm very sorry. And you're right. And I need to do better." Do we think that resignation is necessary under these circumstances if these allegations proved to be true? Say, Jill, what do you think?

Jill Wine-Banks ([00:35:20](#)):

I think Joyce was correct, that his apology could have been much stronger. That if I'd offended anyone, I'm sorry, as opposed to saying-

Barb ([00:35:34](#)):

Yeah, it blames the people who took offense, right?

Jill Wine-Banks ([00:35:36](#)):

Right. And it should have been quite the opposite. I realize now how wrong what I said was and how it was heard. And I didn't mean it that way. And I will never do it again. That would have made me feel a lot better. But I just want to answer the question that you raised, which is, I mean, this has happened to me in my 40s and 50s, I've had two episodes that I would consider.

One was an inappropriate touching. And it was in public, and someone reported it to H.R., who saw it. And H.R. came to me and said, would I like to file a complaint. And I said, absolutely not. And I did what his aide did, which was I said, I will never ever allow myself to be in a room with him again. But that did hurt my career. It meant that I had to avoid one of the top people at the company.

In order to avoid being embarrassed, humiliated, I thought, everybody in the room is going to think less of me, because they're going to see me as his sex object rather than as a person who had things to say. So, don't underestimate the impact of... Now that one did involve touching. But it was a hand on my knee. It was not anything that I would consider to be an assault.

It was embarrassing. It was terrible. It was inappropriate. But it did affect me. And another was at a law firm where one of the most senior partners did something I thought was inappropriate. And it definitely hurt our relationship going forward, and that affects your career.

So, these things do have an effect. And they create a hostile workplace, which makes it very bad. So, we have to not ignore the fact that these things do have bad consequences.

Joyce ([00:37:33](#)):

So, that I think is a good place for us to break from this topic, which is a tough one and a difficult one that I suspect we're not through with yet, and move on to our final topic for today, which is our first conversation about the filibuster. I have a fun fact to share with you guys. The longest filibuster in the Senate lasted for 24 hours and 18 minutes in August of 1957.

And that involved U.S. Senator Strom Thurmond of South Carolina. He was a Democrat at the time he engaged in this filibuster. He didn't switch parties and become a Republican until 1964. But he used this filibuster to try and keep the Civil Rights Act of 1957 from passing. So, we know that a filibuster is a lengthy speech designed to prevent a vote on a measure.

And the Senate had this tradition of unlimited speech until 1917, when it adopted a measure called cloture. And that meant that if you got enough votes, originally, it was two-thirds of the Senate, you can stop this endless debate that was designed to keep a measure from coming to a vote and force a vote. In 1975, the Senate changed the number of senators needed for cloture. It's three-fifths of the Senate body. Today, that means you've got to have 60 votes to move forward.

So, that's where we find ourselves today. We have a number of critical measures that have passed the House in the last few days, the For the People Act, which restores some of our voting rights, some of the protections for registration and voting. We have the George Floyd Criminal Justice Bill, which invokes some much needed reform. And of course, we have the COVID relief package, which is currently on the Senate floor.

And the question is whether any of those bills will actually get a vote. It would only take a simple majority of senators to pass any of these bills, but 60 votes to get them past the filibuster. And so, Kim, you actually wrote a really great piece this week for the Boston Globe, where you trace the supposedly institutionalism behind the filibuster. And you concluded and I love this.

So, I'm going to quote you, "Ending the filibuster is no longer a game of Capitol Hill inside baseball. It's not a right versus left partisanship slap fight. It is the one existential decision that will determine whether the very voting rights earned through the sweat tears and bloodshed by kin, and other civil rights leaders are erased." Sounds to me you're not a fan of the filibuster?

Kim ([00:40:19](#)):

Yeah, I'm not. And I had an evolution on this, on the filibuster, because I believed for so long the filibuster was framed as this tool. And by requiring a strong majority, not just a simple majority in the Senate, but a strong majority, for certain legislation to pass or for certain positions to be confirmed, for example, like Judges, it will encourage bipartisanship, it will can encourage consensus. And that sounded such a great idea, especially seeing Washington, when it's caught up in gridlock and when it's caught up in partisan shenanigans.

And then I was actually encouraged to do a little research. And I did, and I found even on the Senate's own website, it paints the history of the filibuster and the cloture rule. And since 1917, as you said, when the cloture rule was enacted, at the time that the Civil Rights Act of 1965 finally passed,

narrowly passed, almost killed by the filibuster, it was saved by one vote. Before that, not a single piece of civil rights legislation went through. Everyone was blocked in the Senate by the filibuster rule.

And what I quickly learned was that the filibuster was not a tool of consensus. It was a tool that allowed a minority number, usually of senators from the south. And I have to say it's not partisan, both Democrats and Republicans have used it in this way to prevent civil rights legislation from passing in order to protect the rights of marginalized folks. That happened time and time again.

And in my column, the point that I make out is, as we have these crucial voting protections that are now before Congress, that are needed more than ever as hundreds of restrictive voting rules are being proposed in state Houses across the country, we had an insurrection that was basically over the desire of a minority of folks to stop the votes of everyone from counting. And we see how important it is when we expand voting rights as we did in 2020.

More people voted than ever in a pandemic, that there was no evidence of widespread fraud. Now, more than ever, it is crucial that voting rights be protected. But this might end up being a case of one of all of those civil rights laws that we never heard of before, because they were killed by the filibuster before the Civil Rights Act of 1965. The current Voting Rights Protection Act, H.R. 1, could fall and be erased in history in the same way when we need it so much.

Yes, you're right. In my opinion, I believe that lawmakers who want to protect the filibuster, including Mitch McConnell, including Democrats of like Senator Sinema, and Senator Manchin, I believe that they're wrong. I believe that they think they're protecting something that never actually existed.

Joyce ([00:43:32](#)):

So, Barb, can I maybe engage you as our institutionalist, or at least I perceive you as often being willing to make the case to preserve institutions and to try to be fair and good process people when it comes to government. And we hear a lot about institutionalism as the justification for holding on to the filibuster, it's necessary to preserve bipartisanship. People say it's necessary to encourage cooperation.

And in fact, there's a little bit of truth to that during the second Bush presidency, when Democrats only had 45 Senators, the filibuster saved the estate tax, prevented abortion from going by the wayside, prevented Social Security from being privatized. So, is getting rid of the filibuster a quick fix that might have bad term consequences, or rather bad long-term consequences down the road?

Barb ([00:44:28](#)):

Yeah. Well, first on the institutional question, I think sometimes we are guilty of thinking that because we've had the filibuster all my lifetime, it must have been around forever. And it's not, I mean, it's not in the Constitution. It was something that was created, I think, in the early 1800s. So, it's been around for a while. But in the history of humankind, it hasn't been around all that long. So, I don't know that it's necessary to preserve it as a matter of preserving the institution of the Senate.

But it does cause some good things, I think, for the institution. It does force some compromise. And it prevents very thin majorities from being able to legislate at will. So, for example, we currently have a couple of our senators who are independents and caucus with the Democrats. If they were to switch parties and become Republicans tomorrow, that would mean, the Republicans would control the Senate.

And we would see some of the opposite of things that perhaps, Joyce, you laid out, they would have a whole new agenda of doing things like a different voting rights statute perhaps, that says you must have voter ID and there can be no early voting and there can be no absentee voting. So, there might be some things that we would consider not to be good laws on the books. And so, there is a

danger that when you change the rules for a political expediency, it can be used against you down the road.

So, I don't know that I necessarily have a strong view of whether we should or shouldn't have it, because I agree, as Kim has said, it has traditionally been used by minorities to prevent the majority of the Senate from enacting civil rights laws. But it does force compromise by requiring that you gather some of those other moderate voices to achieve that 60-vote number. And so, I don't want to, I wouldn't want to see us changing the rules today, only to be bitten by them tomorrow.

Joyce ([00:46:32](#)):

It's a really surprisingly difficult and I think in a nuanced question. I've talked to so many people who've said, "Oh, I think it's important to encourage bipartisanship." But voting rights are so important, we might actually have to do this just because of voting rights. And, Jill, Senator Klobuchar earlier this week, told Mother Jones, that the spread of new anti-voting bills and Republican held legislatures, that that really boosts the need for Democrats to discuss H.R. 1.

We discussed that last week, and that that will increase the pressure to enter, to alter the Senate filibuster. She said this, she said we have a raw exercise of political power going on, where people are making it harder to vote, and you just can't let that happen in a democracy, because some old rules in the Senate. So, what do you think?

Do you think it's a pragmatic matter? Not as a question of whether we should or shouldn't keep the filibuster, but just pragmatically, the Democrats have the votes to end the filibuster in the Senate, Manchin and Sinema have weighed in on this.

Jill Wine-Banks ([00:47:38](#)):

So, let me take a slightly different perspective on this, which is, my impression is that the filibuster was done to protect the minority, to allow the minority an opportunity to persuade the majority. But it isn't used for that anymore. Right now, and maybe by the time this is released, it'll be done. But Ron Johnson, the Senator from Wisconsin, has forced the clerk to read the entire 600 and some page COVID relief bill.

No one is in the Senate chamber to listen to it. It's not intended to persuade anyone, it is intended to delay the necessary vote to protect American people, and to give the COVID relief. So, I think what we need to be talking about is a way to amend the filibuster to allow the minority an opportunity to actually present a persuasive, cohesive argument that might persuade other senators and the American public about their point of view.

But if you're having someone read the phone book, or a 600 plus page bill that no one is listening to, that doesn't serve any purpose. So, I think that one of the things that you could do is to say, the filibuster must be addressed to the merits of the legislation at issue, and that you can talk for up to so many hours and maybe even an unlimited time, as long as you are addressing issues and trying to persuade someone.

The other thing is, it hasn't led to compromise. In fact, it's led to gridlock. So, whatever its original purpose was, if gridlock is a result, that's not a good thing. And we're now in a situation where I'm not sure exactly, if I have the numbers correct, but I believe I do, that we're coming to a point where you're going to have 30 senators, which is 30% of the Senate, representing 70% of the American public. And 70 senators representing only 30.

But those 70 senators who represent just 30% of America now have control because of that number. So, if you add to that filibuster, I think you have a problem. And I have come to really oppose it.

I think I didn't mention what I'm reading now, but Adam Jentleson's book about the filibuster, about Senate in general, persuades me that it needs at the minimum amendment, if not abolition.

And, yes, I recognize the risk that it could come back to bite us if and when there is a different situation. So, that means how important the vote is, and that everybody has to get out and vote to make sure that senators represent their viewpoints.

Joyce ([00:50:58](#)):

It's an interesting notion, the idea of amending the filibuster, rather than doing away with it. And I'm curious what y'all think about it, because before 1975, if you wanted the filibuster, you actually had to be in the room, right? You had to be there, and it was a national spectacle.

So, maybe one option would be if you're going to successfully filibuster, you've got to have 41 senators in the room, as Jill says, debating the merits, and that would certainly focus the American people on it, as opposed to letting what Ron Johnson just did, which was this absolutely abominable process that I think abused Senate staff, and in the middle of the night, while the senators were all comfortably resting in their beds just delayed.

Jill Wine-Banks ([00:51:43](#)):

Yeah, those poor clerks that had to do the work of reading it, it was not a Mr. Smith Goes to Washington moment where the lawmaker who had that point of righteousness was making this case to people who actually listened. I think you're absolutely right, Joyce.

Barb ([00:51:58](#)):

Well, it's probably time to stop filibustering about the filibuster. But the only thing I will remind you all of is ending the filibuster for nominations gave us Brett Kavanaugh.

Kim ([00:52:09](#)):

Fair point, Barb.

Jill Wine-Banks ([00:52:11](#)):

It's time to turn to your questions. You can send them to sistersinlaw@politicon.com, or tweet them using #SistersInLaw. And we'll try to answer them during the show. If we don't get to your questions, we will try and answer as many as we can on your Twitter feeds throughout the week. This week, we're going to turn to a couple of questions from listeners.

The first is from Liz. She wrote, I'm a corporate attorney, I always wanted to go into public service, but didn't have the school prestige, grades or money. And I'm now curious if I could swing for it now. What's your view on completely switching career lanes?

Joyce ([00:52:53](#)):

Well, I actually made the switch that Liz is talking about. So, I would really encourage her. I started out in private practice in a big law firm in Washington, D.C. And when I got married, and yes, I did actually follow a man and move for my husband to Birmingham. And I went to a big law firm in Birmingham, and then made the decision a couple of years later that I really was interested in doing public service. And so, I moved over to the U.S. Attorney's Office.

It is only difficult until you set your sights on it and decide to do it. Public service jobs can be difficult to come by. So, you need to be persistent. You need to have a range of choices and ways that you'd be willing to get the experience and move into the job. But you should start applying, you should keep applying. In my case, I took about a 50% pay cut.

I think, I don't think I ever made as much money in the U.S. Attorney's office as I was making when I left private practice. But once you swallow and take in a deep breath and get used to that idea, it's such a worthwhile thing to do. And if you're the kind of lawyer who wants to engage in public service, you should absolutely go for it.

Kim ([00:54:08](#)):

I briefly had a similar thing when I decided to leave the law. I knew not just that I would be taking a financial hit, which I did, but that I'd be disappointing in my family. I was the first attorney in my family, but you have to do what will make you happy. And I found that every time, every Sunday night I was filled with doom with the idea of going into my office.

And no matter what good work I was doing, I knew that I was not doing the best that I could and bringing into the world the work that I should be bringing if I felt that way. So, making the switch from law to journalism was very similar. So, I think you need to do what's best for you.

Barb ([00:54:45](#)):

A friend of mine called that fear of Monday. If you have fear of Monday, you're in the wrong work.

Joyce ([00:54:49](#)):

Yes. Oh, I had terrible fear of Monday.

Jill Wine-Banks ([00:54:53](#)):

So, maybe it's time for the second question, which is a popular question that comes from Lorna in California and from Jim, and it says, Republicans at the federal and state levels appear adamant in their opposition to voting rights expansion. Restrictive bills are going through Republican controlled legislatures. If they become law, what legal remedies are available to combat them?

Kim ([00:55:20](#)):

Yeah, I'll jump in and start on that one. And it depends largely on what the Supreme Court does. Right now, the Supreme Court is considering a couple of restrictive voting laws in Arizona. But what they're doing is since Section five, that the section that used to allow at the Department of Justice, of the Voting Rights Act that used to allow the Department of Justice, to pre-clear laws before they went into effect.

Now there's Section two, which is being used by people who are challenging laws that have already been passed. And the Supreme Court is essentially going to set the standard for what a state has to show and what challengers have to show in order to say, "Hey, this law really violates the Voting Rights Acts prohibition against racial discrimination and making it difficult for Black and Brown folks to vote."

So, if the Supreme Court sets a standard that makes it possible to make that claim, then some of these laws might be struck down. But if the Supreme Court takes a very restrictive view, it makes it very difficult to bring those sorts of cases, it's going to be difficult, if not impossible, to make a challenge to

these laws once they are passed, and in effect, and that's why this is such a crucial moment in voting rights.

Because that can make such a big difference unless Congress moves to fortify the Voting Rights Act, pass H.R. 1, make other moves that make, that reinstate those protections federally, that used to be in place that have since been shut down.

Joyce ([00:56:52](#)):

I think that's right, Kim. The risk in [Bernovich 00:56:55], the case that was argued in the Supreme Court this week, is the court might take an advantage of the opportunity to do more than just pass on the two Arizona laws that are at stake. And it could establish a test going forward. And it sounded like the court was headed that way.

And the likely test that this court would invoke would be a test that would require the plaintiff to make a really strong showing that there was intentional discrimination. That it was not just something that was happening, but it was broad and sustained. And at the same time, they could adopt a second part to that test, that would make Republican-led legislators, because that's where these restrictive rules are coming from.

But it would let them make very narrow showings, not just that there was actual voter fraud because there isn't, but that there was a risk or a perception of voter fraud. And so, it would be a test that would become almost impossible for future plaintiffs to meet. There are over 250 of these very restrictive laws being talked about in more than 40 states.

So, unless Congress is, as Kim says, act and passes H.R. 1 and H.R. 4, it's very likely that it's going to be more difficult to vote, and that the impact will be primarily on Black and Brown voters.

Jill Wine-Banks ([00:58:14](#)):

Our last question for today comes from @JEITBQBE. And the question is, can all of the co-hosts ask me about the procedures behind calling up the National Guard? And it's a complicated answer because it depends on whether they're being federalized or being called up at the state level. And the governors of each state can call them up at the state level. But in the District of Columbia, there is no governor because it's not a state.

So, in the District of Columbia, as is the case, during the January 6th insurrection, only the President can do it. And that's where the problem came. The President did not call out the National Guard. And in fact, the Secretary of Defense, the Acting Secretary of Defense, Miller, put out a memo that basically said, no one can do it without my specific authority, and you can't use weapons and you can't do this, that, and the other thing. And that led to a several hour delay, even after there were urgent calls from the Capitol for help.

And it could have had a very different outcome if that had not happened. If there had been a Governor, he still would have needed the President to allow it, but it would have been a different outcome. So, I think we need to keep that in mind.

Barb ([00:59:46](#)):

Yeah, I think its three hours and 19 minutes that elapsed between the request for the National Guard and when they actually showed up. So, I think if nothing else, it just begs the question of further investigation. Yet another reason why I think we need a January 6th commission to look into all the things that went wrong including the reason for that delay.

Jill Wine-Banks ([01:00:05](#)):

Thank you for listening to #SistersInLaw with Joyce Vance, Barb McQuade, Kimberly Atkins, and me, Jill Wine-Banks. Don't forget to send in your questions by email to sistersinlaw@politicon.com or tweet them for next week's show using #SistersInLaw. You will find the links in the show notes. To keep up with us every week, subscribe to #SistersInLaw on Apple podcasts, Spotify, or wherever you listen. And please give us a five-star review. We love to read your comments. See you next week with another episode of #SistersInLaw.

Like before I was sitting at the table, what pin do I wear to interview Madeleine Albright? And my husband came in and said, "What are you doing? You're playing with your pins." And I have 30 pins on the table. Well, this one would mean this, this would mean that. And it was the hardest thing to decide what pin to wear to interview Madeleine Albright.

Joyce ([01:00:05](#)):

I love that.

Kim ([01:01:11](#)):

Jill, you have to be honest, you play with your pins even when you don't have the big interview, right? Don't you set them all out and look at them and marvel at where they all came from.

Jill Wine-Banks ([01:01:21](#)):

Yeah, I don't really play with them where I spread. I mean, I literally was bringing down boxes of pins. And then I ended up wearing not a message pin. I actually ended up wearing, it's the pin that I'm wearing the day that I went to the White House to cross-examine Rose Mary Woods, which was in the days when I used to wear pretty pins just because they were nice accessories.

And it is a pin that I bought at a place called the Tiny Jewel Box in Washington.

Joyce ([01:01:50](#)):

I remember the Tiny Jewel Box, do you remember?

Barb ([01:01:53](#)):

It's still there, isn't it?

Jill Wine-Banks ([01:01:53](#)):

It is. It is definitely still there.

Joyce ([01:01:55](#)):

It's still there. [crosstalk 01:01:55]

Kim ([01:01:55](#)):

It is right across the street from the Globe's D.C. Bureau right on Connecticut Avenue.

Barb ([01:01:55](#)):

Oh, is that right?

This transcript was exported on Mar 08, 2021 - view latest version [here](#).

Joyce ([01:01:59](#)):

Yeah, it's right where Elizabeth Arden's used to be.

Jill Wine-Banks ([01:02:02](#)):

Yes, exactly. That's exactly where it is.

Kim ([01:02:02](#)):

Or just north from the Mayflower Hotel.

Jill Wine-Banks ([01:02:04](#)):

Right. She mentioned in the book that she had bought pins at the Tiny Jewel Box. So, I thought we were related because I had bought that at the Tiny Jewel Box. So, that's plan.

Joyce ([01:02:14](#)):

I'm looking at right now online and she refers to one section as the pindex.

Jill Wine-Banks ([01:02:20](#)):

Yes.