

Kimberly Atkins: Welcome back to #SistersInLaw. I'm Kimberly Atkins, and we're coming to you this week in what was a very difficult week after the horrific attack near Atlanta that left eight people dead, including six Asian women who were killed by one gunman. And that will be part of our discussion this week. Our hearts go out [00:00:30] to everyone who was affected by that awful tragedy. But we're going to be talking about hate crimes. What makes a hate crime? And what do we think the intersectionality is there in how we deal with it? We'll also explain the importance of the Violence Against Women Act and examine the possible legal solutions to racism, radicalizing many of the insurrectionists as well as serving members of the military and veterans. And as usual, we'll be answering some of your questions at the end of the show. [00:01:00] So sisters, my fellow sisters, some of us were very focused on one thing this week, while the rest of us were not. Barb, What had your attention?

Barb McQuade: Well Kim, when the calendar turns to March, certainly March Madness has to be high among my priorities. So I have been dutifully filling out my brackets. My dear Michigan basketball team has made the tournament in both the women's and the men's bracket. In fact, our men's team [00:01:30] is a number one seed. Juwan Howard is the first person to both coach and play in the NCAA tournament as a number one seed. So I'm very excited about Michigan's chances. I do note that Alabama is in our bracket. I think Jill, your husband's beloved Florida State is in our bracket. And I know your Illini are roaming around there in a number one seat as well. Are you looking at them, Jill?

Jill Wine-Banks: I am so not a reader of the sports pages, but you have forced me into it. And I [00:02:00] am all for the belief that the University of Illinois men's basketball is going to win the whole thing, March Madness. Over my husband's FSU, over your beloved, and over Joyce's. So we'll have to see soon what happens.

Barb McQuade: All right. That's adorable. We'll see you on the court.

Kimberly Atkins: I feel so weird having absolutely no dog in this fight having gone to an [00:02:30] undergraduate school that has never, has nothing to do with any of this. And I paid no attention to sports when I was in college. But my default is to root for Michigan State University because that's my brother's alma mater, but that is not an option. So I am-

Barb McQuade: It's already eliminated.

Kimberly Atkins: Yes. I will just go share all of your excitement as we watch these brackets play out. The one thing that I always think of though with the NCAA tournament is the fact that it tends to, my birthday is at [00:03:00] the end of March. And every time I try to plan some sort of party, people will either come late or they'd want to do it someplace where there was a TV. And it would really get annoying because they wanted to watch basketball instead of celebrating my special day. So that has always been a little-

Joyce Vance: And now we find out why Kim doesn't love basketball. The truth comes out.

Kimberly Atkins: At least not college basketball.

Joyce Vance: I actually have a surprise for you guys. Of course you all know me as a devoted fan of the Crimson Tide, who [00:03:30] I hope will beat Michigan this tournament as coach Nate Oats says. He was asked if Alabama was a football school or a basketball school, and he responded, "We just win championships." So I hope that that confidence will carry on. But Barb, you may not know this. I went to UVA, to the University of Virginia for law school. And I am a diehard Virginia basketball fan. I was there during the Ralph Sampson years. So even though Virginia is coming into the tournament, [00:04:00] they're just off of a COVID pause. Their defense is not really up to par this year. And Gonzaga just chased us off of the court earlier in the season. But I'm hopeful that Virginia will survive a couple of rounds this year and that my Tide will take it all.

Barb McQuade: All right. Well, we'll see you on the court. All fun. All fun stuff. Well, let's turn now to the topic that Kim mentioned about what happened in Atlanta earlier this week. Of course, any of these mass shootings [00:04:30] which we have seen all too often across our country are always tragic. But there is an extra element of concern I think when it has with it, an element of potential hate crimes, as we've seen in this case. And just to summarize, earlier this week, Robert Aaron Long, a 21 year old man was charged in the shooting deaths of eight people at three different massage businesses in metropolitan Atlanta on Tuesday. And among the victims [00:05:00] were six Asians and seven women of those eight. So we have people who are both Asian and women. And this comes at a time when hate crimes against Asian Americans are up 150%, according to the Washington Post.

Now, some people have attributed this increase to the anti-Asian sentiment that was stoked by Donald Trump and others blaming China for the coronavirus and using racial slurs to refer [00:05:30] to it. I won't repeat those slurs here. So we have seen Mr. Long be charged in the state of Georgia with eight counts of murder and aggravated assault. We have not seen any hate crime charges, at least not yet, and not any federal charges. Joyce, let me start with you to talk about hate crimes. Georgia has a new hate crime statute. Why not charge it here?

Joyce Vance: So it's a really great question. People really want to see this charged [00:06:00] as a hate crime. It's sort of like you know it when you see it, right? I mean, we can look at what happened here. We understand the context that you laid out. So why isn't this being seen as a hate crime? And the problem is that hate crimes have an unusual element of proof. In most cases, prosecutors don't have to establish the defendant's motive. To prove a hate crime though, you have to prove that the motive was hate.

And these charges can be very difficult to prove. Let me give you [00:06:30] a quick example, a federal example before we discuss the Georgia statute. Because I think it explains the issue very well.

Yesterday, a Kentucky man pleaded guilty to hate crimes. And here's what he did. He shot and killed two black people that he didn't know at a Kroger in Kentucky. Approached a third black man and shot him. And then as he was walking out through the parking lot, approached a white man who had a gun and said, "Don't shoot me, whites don't kill whites." [00:07:00] Throughout these encounters, he was using racial slurs. So there's a lot of indication that the only reason he killed and shot people who he did not know, who he had never laid eyes on before, he selected them because they were black. And he has pleaded guilty now. And he has acknowledged that.

So the evidence was really solid. The motive was unambiguous. It was race and only race. And that's the kind of evidence that prosecutors in Georgia now will have to search for. [00:07:30] They'll need it whether they want to charge a federal hate crime or charge under Georgia's new statute. Because Georgia has a hate crime statute. It's less than a year old. And the way it works, it actually increases the sentence. If the victims fall within a protected classification like race, national origin, gender, sexual orientation, and if prosecutors can prove the motive, then the sentence is increased. So it's a modest increase. Frankly, you could [00:08:00] argue that it doesn't really account to much in the case of a murder. It's two years and an additional \$5,000 fine when Long is already looking at a life sentence.

But I think that there's something important and compelling about being able to name it a hate crime. Something that I think provides closure for victims. And that's something that I think is incredibly important for both individuals and communities to feel like justice is being done. [00:08:30] That's really one of the important goals that we can fulfill if it's ultimately possible to charge hate crimes here.

Barb McQuade:

And when I was in the U.S. Attorney's Office, we from time to time charge the federal hate crime statute. And I remember occasionally I would be asked by members of the public and the press questions along the lines of, "Aren't hate crimes special laws for special groups that are just to protect special interest groups?" And the answer that I [00:09:00] always gave and still believe is no, they protect everybody. Yes, it protects people because of race. It protects people who are Black, or Asian, or white because of race. And they say, "Well, why not just charge assault or murder? Why isn't that sufficient?" And I think the point is because when a person is targeted because of their race, or their gender, or their ethnicity, not only is the individual who has been killed victimized, but everybody who shares that demographic feels less safe. [00:09:30] And it's very important for the entire community to condemn that act as even worse because of what you did that targeted someone based on the demographic that suggests that you are somehow less American, or somehow

less welcome in America. So that extra condemnation that comes with a hate crime I think is very important. When we think about all of the purposes of the criminal justice system, one of them being deterrence to say, "This is absolutely unacceptable and important in American society."

[00:10:00] Kim, you wrote your column this week in The Boston Globe about this incident, and about how hate crimes are sometimes framed. In this case, we saw a Sheriff's department spokesman talk about things, declining to call this a hate crime, and saying that Mr. Long, the defendant in this case had said that he acted because he had a sexual addiction and wanted to eliminate a temptation. That he was [00:10:30] fed up and having a bad day. And you talked about that as some of the ways that hate crimes are sometimes minimized. You share with us your views on that?

Kimberly Atkins: Yeah. I mean, I want to start by saying I think that it is very important to conduct a completely thorough investigation. And that in the early days of that investigation, it's often too early to know what an individual might be charged with. As we've mentioned before, prosecutors want to charge things that they know [00:11:00] they have the evidence for and they believe they'll be able to convict on. So I don't think that it was necessary for law enforcement to say, "We could likely investigate this as a hate crime, or this might be charged as a hate crime." And they were correct in saying it was too early to do that.

But they seemed to go beyond that. They seemed to say that based on this individual's own word, the word of an admitted from what they said, "An admitted murderer [00:11:30] who targeted these spas that were owned by Asian Americans," that he said that it wasn't race that motivated him. And that seemed to be a presumptive okay. And these spokesperson went as far as to say he was very fed up. He reached the end of his rope, and he had a very bad day.

So I called this the bad day defense. Because what was so difficult for me and what made me [00:12:00] so angry in watching this press conference is that when people of color are targeted, when women are targeted, when other marginalized groups are targeted in what seems as we've all said, seems to clearly, it looks like a hate crime. It walks and talks like a hate crime. There's this tendency among law enforcement, among public officials, to try to search for some reason when a white male commits these crimes other than animus [00:12:30] to pin it on.

In this case, this guy had a sexual addiction and these spas represented something evil to him. Well, why? Could it be because of the long history in this country of over-sexualization of Asian women? Could it be in part because people believe that if there is a spa where Asian women are working, that something nefarious is going on there, that they are some sort of temptresses? [00:13:00] That's racism. That would make this a hate crime, the same way as it would be to presume that Black people are lazy, or to presume some other stereotype that has been imposed on people. And just to say that that's a

reason to explain it away, it reminded me of Kyle Rittenhouse, the man who was charged with shooting and killing two Black Lives protesters in Kenosha, Wisconsin. How President Trump said, "Well this young man just went there to [00:13:30] protect some property. And he fell, and he was attacked."

He traveled from Illinois. He didn't even live in Wisconsin. He was a self-proclaimed militia member. He was one of the folks who traveled and took arms to a protest. For a protest against the killing of Black men and women in America. But this grace is given to him. Hollywood actors were contributing to getting his cash bail in place [00:14:00] so he could be released. And it's just so frustrating. And you're absolutely right when you say the reason that these things need to be called hate crimes, they need to be called hate crimes by police. They need to be called hate crimes by prosecutors. And they need to be called hate crimes by other leaders. Because there is that need for a sense of justice. I am not an Asian American, but I'm a woman of color in this country. And the events of this week were terribly traumatizing to me, especially coming from this [00:14:30] past year which it just felt like the issue of violence against people of color is just incessant. And it is traumatic. So for me, I need leaders to be calling it that. And I think that it's extremely important.

Barb McQuade:

It reminds me a little bit of the statements by Senator Ron Johnson of Wisconsin, about the Capitol Hill insurrectionists. Right? When he said, "I never felt in fear of the people who were storming the Capitol, because I don't believe that people who are supporters [00:15:00] of President Trump would engage in acts of violence," or something like that. There is this presumption that people like me won't attack people like me I think. And you're right, Kim. We need to call it what it is. And I think that's why hate crimes are so important.

Jill, you shared that you have had some experience with the Illinois hate crime statute. And I wanted to ask you about that. My experience with hate crimes has only been the federal statute. And in the Sixth Circuit [00:15:30] Court of Appeals where I practiced, there's a case decision that says it is not enough to show that a significant motivating factor was the victim's race or gender, whatever is the protected class in the case. You have to show that it was the but for cause. That is but for the person's race, this crime wouldn't have happened. Or but for the person's gender, whatever, this crime wouldn't have happened. That can be very difficult when you've got these [00:16:00] issues of intersectionality, right? You have people who are both women and Asian. Well maybe neither one is the one defining motivating characteristic. But together they are. How does Illinois deal with that? And might that be a model for the way hate crimes legislation ought to be drafted going forward?

Jill Wine-Banks:

Yes. I think you're absolutely right that Illinois could be a model. Because in addition to the burdens that Joyce has mentioned that happened in terms [00:16:30] of using hate crime, in Illinois, you do not have to prove that it is the but for or sole cause of the crime. You would just have to show that either race, gender, sexual orientation, or any of the other categories is a cause, even if

others exist. So it says a cause regardless of the existence of any other motivating factor. And it is a separate crime so that it adds [00:17:00] to the penalty. And it's a pretty stiff penalty in terms of they're all felonies, different categories. On your first offense, it makes it a class four felony. But on a second offense, it makes it a higher felony.

So I think that is a good thing. Because as you said, and particularly we can look at this case. Was he attacking them because they were women? Clearly, that was what he is now saying. He's saying, " [00:17:30] They were too big a temptation. I couldn't resist it so I had to kill them." Or was it because they were Asian Americans? And if you have to prove that it's one sole cause, you might have a problem. Whereas in Illinois, you could have it both ways. And I think that is an advantage that other laws need to look at, making it not a sole proximate cause one particular factor. When many may be at play.

Barb McQuade: [00:18:00] Yeah. And Joy, I want to ask you about this idea of intersectionality as well. You are our wise Yoda when it comes to matters of sexism with all that you have seen and experienced in your life. I can't help but note that this sheriff's spokesman, and sometimes people misspeak. Sometimes people frame it in ways they wish they hadn't. So I don't want to condemn him, although I know he's been removed from the case for some other conduct we can talk about. He said [00:18:30] this bad day fed up defense that Kim referenced. But one of the things he said is that he had a sexual addiction, and he wanted to eliminate the temptation. So therefore, this wasn't about sexism. This was about eliminating the temptation that causes him to want to have sex. Isn't that targeting victims based on their gender. Right? I think the word they use in the statute is sex, because of sex.

So [00:19:00] it reminds me of, there was a scandal at ... scandal is probably too strong a word, but there was an issue at Notre Dame when some mother wrote in that the girls there should stop wearing yoga tights because she was tempting all the boys. And if you want to cut down on sexual assault on campus, tell the girls to stop wearing yoga pants. I mean, really? That's your answer to stopping sexual assault? How about just don't sexually assault people? That's a good way to stop sexual assault.

So I think the framing of this, you could frame this a very [00:19:30] different way, right? Because he has a sex addiction, he wanted to kill women who work in a massage business. Do you see that as substantially different, Jill? Is it a matter of semantics, or is it something different when someone is acting on a sex addiction and decides to kill women who are working in a massage business?

Jill Wine-Banks: So Barb, let's start with the fact that killing is a crime and is wrong, no matter what your motive is. You cannot kill people. And yes, this falls [00:20:00] within hate crime. And it is sexism. You sort of suggested maybe it's not sexism. But I go back far enough that an excuse was you couldn't do things because you look

different. Rape victims back in the day had to prove that they were chaste and pure as snow. They had to prove that they weren't wearing provocative clothes. It isn't my fault if you are [00:20:30] attracted to me and rape me. It is your fault that you didn't keep your zipper zipped. And I think that victim blaming, victim shaming is something that needs to go completely away. And that this is a form of sexism and certainly gender based attack, which would fall within the hate crime acts. So I don't see any way around this for him.

And as to the spokesman for the sheriff who [00:21:00] made this horrendous comment, I agree. People under pressure can say something wrong. But we have to put his comments in context. He sort of blew away any accusation that this was a hate crime, that it was targeted. Either women or at Asian Americans. Which seems to be way too soon to have blown that off. And he also had a Facebook post where he was selling [00:21:30] anti-Asian tee shirts. I'm not sure he was actually selling them, but he was promoting the sale of these tee shirts that said the virus came from China spelled the way Donald Trump pronounced the word China, C-H-Y N-A. And you can't help but think that this was not accidental, that it reflected his own sexism, his own bigotry toward [00:22:00] Asian Americans. And that has to be taken into account. I'm glad he was removed. It's the right thing to do. He should not be a spokesman on a case of this dramatic proportion.

Kimberly Atkins: I think that also speaks to an issue. We have to hold members of law enforcement accountable. Somebody saw that Facebook post that he put out long before he was a spokesperson in this case. And we need to have a higher standard of members of law enforcement. Particularly [00:22:30] now when they are showing open animus toward a certain group in our society, how can we have trust and confidence that they will carry out these investigations fairly?

Barb McQuade: When law enforcement is normalizing racism, I think it sends a very bad message to the rest of the community about behavior that is acceptable and not acceptable. And let's talk about where it starts. With the president of the United States, as Jill said. He was parroting [00:23:00] something that the president has said. Joyce, I want to ask you about this because you've worked with violent extremism as have I. And so often, what you see is the crowdsourcing of violent extremism through a charismatic leader who pushes ideas. And people who are looking for a cause or looking for something to believe in, will latch on to that cause. And most people don't manifest those thoughts in terms of violence, but all [00:23:30] it takes is one or two who does. We had Cesar Sayoc who sent the pipe bombs. And I don't know whether Mr. Long was responding to something that he heard President Trump say, but there is some cause and effect between what President Trump has said about the coronavirus and all of this spike in hate crimes targeting Asian Americans that I think can only be defined as violent [00:24:00] extremism.

Joyce Vance: You know, I think that's right Barb. And I know you remember the work that we did on Islamic jihadist extremism, and how people were radicalized online by

powerful, compelling leaders. But this radicalization power on the internet is really something that we should think about here. Because in our country, we had the leader of our own country trying to displace his responsibility for what happened during the [00:24:30] pandemic onto China, the Chinese government. And ultimately in the process of doing that, he really convinced people, some people, some of his followers, that it was okay, that it was appropriate to demonize Chinese Americans and other Asian Americans because the pandemic came from China. To me, that seems like a classic effort. Maybe Trump didn't do it intentionally. But once he saw [00:25:00] some of the early consequences, he should have been on notice that his words had power.

And we saw that really come to life in the series of hate crimes. Many of them directed against elderly Asian people across the country. It wasn't something that wasn't readily apparent to everyone, the trajectory of what the former president's words and comments did. So I don't think anyone is really very surprised that we are where we are this [00:25:30] week. We've seen incidents in both San Francisco, as well as in Atlanta. Fortunately in San Francisco, no one was killed. But elderly Asian people were viciously attacked and severely, severely harmed in those attacks. This is a problem that we need to get a handle on. Because the voice that's radicalizing people, it's coming from inside the house. And when law enforcement is picking up that message, we need to do something. It needs to be confronted directly in a top down fashion [00:26:00] by our leadership.

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Jill Wine-Banks: Boy Barb, that sure sounds good. I particularly like the fact that it has high protein. I find that really keeps me going all day if I have protein for breakfast.

Barb McQuade: Yeah. Well just the opposite for me a lot of times. I don't like to eat a heavy meal when it's later in the evening, but I like to eat something that feels sort of healthy. So oftentimes, a bowl of cereal is my go- [00:27:00] to when it's a late dinner. So Magic Spoon is the perfect late night entree for me.

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Kimberly Atkins: This talk about violence against women leads us pretty seamlessly to our next topic, which is the Violence Against Women Act, which is again before Congress to be authorized. [00:28:00] There used to be a time that it would be reauthorized. But I want to turn to Joyce to talk to us a little bit about what is going on in Congress and where we stand.

Joyce Vance: Yeah. This is an interesting configuration of events that this week, the Violence Against Women Act, which was originally passed in 1994. I had been a federal prosecutor for three years when it was passed, signed into law by Bill Clinton. And the law was actually sponsored by then [00:28:30] Senator Joe Biden, and it passed with broad bipartisan support.

So it got reauthorized as Kim says by broad bipartisan majorities in 2000 and 2005. There was a little bit more of a fight in 2013. And then it expired during the government shutdown in 2018. There was an effort to temporarily bring it back, but that was not very long lasting. So after a lot of effort to restore the [00:29:00] Violence Against Women Act, an act that protects women in large part from domestic and intimate partner violence, this week finally, a new bill cleared the house. But its passage in the Senate is far from assured. There was bipartisan support in the house. 29 Republicans crossed over and voted with their Democratic brothers and sisters. But Barb, can you maybe start us off by talking about what the VAWA does and why it's so important?

Barb McQuade: [00:29:30] Sure. So number one, it created criminal statutes making it a crime to commit acts of domestic violence when there's an interstate component against women and men. Despite its name, I know it's called the Violence Against Women Act. And it came about as a result of taking seriously domestic violence. Which before 1994, believe it or not, was often thought of as a private matter between a husband and wife, something for which law enforcement should not get involved. And this increased [00:30:00] awareness, led to the passage of the Violence Against Women Act. But its language covers men and women. It doesn't matter the victim's gender.

So it creates a statute. And I will tell you the number of cases that are charged under is not that high, because it requires this interstate component to be a federal crime. It has a stalking statute as well, and it has some internet stalking that's charged a little more readily. But to me, the most important part of it is it created [00:30:30] this Department of Justice Office of Violence Against Women, which provides resources and grant funding to community service providers. Like rape crisis centers and shelters for survivors of domestic violence.

For example, I serve on the board of a wonderful organization called SafeHouse Center in the county where I live, Washtenaw County in Ann Arbor. And it gets a lot of its funding through VAWA grants. And it does tremendous work as a shelter for survivors [00:31:00] of domestic violence. It responds to every sexual assault in Washtenaw County. Does tremendous work to help survivors get back on their feet.

But as Joyce said, this law lapsed during the government shutdown. So it's much needed revival to get it back on the books. And it likely will get back in some form, but there are a couple of provisions in it that are a little bit controversial in the Senate relating to gun restrictions [00:31:30] and application to transgender women. So guns and sex, I suppose not surprising that there is some controversy about that in today's political environment.

The prior version prohibited people who'd been convicted of a felony, domestic violence crime to possess a gun. This extends that now to misdemeanor offenses of domestic violence. Prohibiting those people convicted of a crime, of the misdemeanor crime [00:32:00] from possessing a gun. So the NRA is opposed, and some gun advocates in the Senate are opposed. There's also something that's been known as the boyfriend loophole that exists on this gun prohibition that extends it beyond just married couples, but to intimate partners. And there is a extension to providing services to transgender women at shelters.

So the need is more acute [00:32:30] than ever I think because of COVID. More people are spending time at home. So it makes it more difficult for people to get help when they need it. So I think the need for the statute is more acute than ever. So let's hope that some of these obstacles can be cleared in the Senate.

Joyce Vance:

The boyfriend loophole was always really troubling to me. Because if you're under a domestic violence restraining order, if you've been convicted, and you're a spouse, then you can't get a gun. But if you're just the [00:33:00] boyfriend or the stalker, you still can. So I thought it was particularly alarming the last time that they tried to pass this in 2019. And Joni Ernst, the Republican Senator from Iowa was part of a group that was trying to negotiate. And this is how she characterized the gun issues. She said, "Certainly we ran into hiccups with some of the gun issue. And that's a big one for a number of us. Stripping away people's constitutional rights is not something that we should be doing." [00:33:30] Oh the irony that's wrapped up in that. Right?

But Jill, give us some context here. This law first gets passed in 1994, [inaudible 00:33:40] in all. And what was the compelling force? What was the driver that finally brought these issues that for so long had been relegated to the privacy of a marital couple's bedroom? What brought them to the forefront and provided these new protections for women?

Jill Wine-Banks: So I think it's important maybe to go back even further than [00:34:00] that. Because when I was in law school, a man could not rape his wife. That was not the law. And a woman could not be the sole witness to her own rape. She had to have some corroboration.

So think about that. Rape is normally not committed in a public place. But you had to have a witness in order to be able to be, because women weren't trusted. So with that background, I think you have to [00:34:30] keep that in mind as we look at why is it necessary to have a Violence Against Women Act? And just for our listeners who may not know the lingo, VAWA is Violence Against Women Act. It's easy to see it when you are reading it in a newspaper. But when we're speaking it, it may not be so clear.

And I think it just got to the point where there was a recognition that it happens in good families. It's not something that's only limited [00:35:00] to out of the way things. And that there was a need to protect women in the domestic setting. And as you've noted right now of course, the numbers are increasing because of COVID and the fact that people are spending way more time together. And that the shelters are getting overrun in terms of how they're able to help people. As to why specifically, I'm not sure I can answer what made it [00:35:30] happen at that moment.

Kimberly Atkins: Well, I just want just bring a little more clarity to the points that we already have been making. One reason that it lapsed, yes it lapsed because there was a government shutdown. But once the government restarted, you would think that if it was something that had enjoyed long bipartisan support, that there wouldn't have been a problem. But there was. For all of the reasons that Joyce and Barb laid out, you had these provisions that extended protection for LGBTQ [00:36:00] folks. You had these provisions that expanded jurisdiction to include tribal regions so that people who are Native Americans would be also covered under this. It had the boyfriend loophole too.

That really angered the NRA. And at the time, the NRA was still extremely powerful. And the NRA threatened to run ads and to really go against Republicans who supported it. It was a very [00:36:30] sustained effort that ended up bearing fruit and being successful in that there were not enough Republicans in the Senate to back what had been a really bipartisan provision.

And look, you've seen this in other areas. I'm old enough to remember, because it wasn't that long ago. When the Voting Rights Act would be reauthorized, broad bipartisanship. We saw George Bush sign it. We saw everybody signed it. Ronald Reagan signed [00:37:00] it. There would be big ceremonies when they did it. And then once that provision by the Supreme Court was gutted from it, you could not get a Republican to touch it because they knew that that was part of their plan to try to hold onto power. And once it's gone, it's so much easier to not bring it back than it is to reauthorize. It's a much more terrible look to suddenly stop supporting something that you supported in the past and being

asked to bring it back. So I think one thing [00:37:30] that's different now will be the loss of power of the NRA.

Gun rights is still a really strong issue, particularly for conservatives, for Republicans in Congress. But the NRA is not the juggernaut of a force that it used to be. And that may prove a difference here. I think the people to watch in the Senate to see what happens is watch Joni Ernst, watch Lisa Murkowski, watch the women in the Senate essentially, and see if [00:38:00] they can find a way to bring at least a strong version of this bill back to a vote and get support for it.

Barb McQuade:

The polarization is so troubling in our country now. I really look forward to a time when we can get back to moderating our views. And I lay that squarely at the feet of Donald Trump, who I think used polarization as a wedge to gain political clout. We live in a world of both and. Justice Scalia, one of the most conservative justices [00:38:30] on the Supreme Court wrote in the Heller decision, which talked about gun rights being an individual right under the Second Amendment even said, "There are places where we need to limit people's abilities to possess guns." In government buildings like our state Capitol, or people who have been convicted of certain crimes. It is perfectly acceptable under our Second Amendment. It is not an absolute right. Like all other rights, there are reasonable restrictions. If you can say that there's either a rational [00:39:00] basis, or in some instances where it's a fundamental right, that it's narrowly tailored to achieve a compelling governmental interest. And then in this instance to say if you have been convicted of a crime of domestic violence, you are just too dangerous to possess a gun, right? Is that so ridiculous? We're not saying nobody can possess a gun. We're not saying we don't permit the sale of guns for hunting, and personal protection, and other things.

But if you have been convicted in a court of law of a crime of domestic violence, even if it is a misdemeanor, [00:39:30] that is sufficient to deem you unworthy of possessing a gun. So I think that we need to recognize the lost art of compromise when it makes sense from a common sense perspective.

Joyce Vance:

Well, here's something that we can all do. We can all call our senators and encourage them to vote in favor of the violence against women out when it comes up for a vote. As we've pointed out especially during the pandemic with local and state governments running short on fundings, [00:40:00] to keep some of these programs working, we will definitely need to have the VAWA reauthorized. And that's something that we can all do to help.

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- Joyce Vance: You can save 50% or more by comparing quotes and feel [00:41:00] good knowing that if something happens, your loved ones will be taken care of. So just go to [policygenius.com](https://policygenius.com) to get started. When it comes to insurance, it's nice to get it right. Check out the link in the show notes.
- Kimberly Atkins: Well, I'm going to turn to Jill for our final topic, which is the issue of racism and radicalization within the military. That was something that certainly played a role in some of [00:41:30] the veterans we saw taking part in the insurrection, Jill.
- Jill Wine-Banks: It's such an important topic. And as someone who really valued my time working in the Pentagon and admires so many of the leaders of the Pentagon, it's a problem I know they can deal with. And the first step of course is admitting that there is a problem. And the new Secretary of Defense is doing exactly that. And he has basically [00:42:00] ordered every military leader to find time in the next 60 days to have a discussion about the causes of extremism, the existence of it, and what they can do to expunge it from the military.
- And that's because there are now many Facebook posts that have never been looked at as part of recruitment. So I want to start with that because how do you get into the military? And [00:42:30] let's also point out relevant to what we've been talking about. You have now got soldiers, sailors, airmen who have guns, and sophisticated training, and weapons, and security clearances. And it's in some ways related to the post on Facebook by the sheriff who was selling anti-Asian or promoting the sale of anti-Asian tee shirts.
- If you looked at his Facebook [00:43:00] posts, you might not have put him as a spokesman for this. You might not even have hired him. And the same thing's true with recruiting military. No one's looking at their Facebook posts, and some of them are saying very openly that they are extremists. So what do we think about whether we can start looking at that? Or is that too much an invasion of First Amendment rights of speech? Barb, do you want to start on that one?
- Barb McQuade: Yeah. I think one of the things [00:43:30] that's noteworthy is this is not just rank speculation. We know that one in five of the defendants who've been

charged in the capital insurrection on January 6th have been in the military. So I think that ought to give us pause. And I'm pleased to see the Secretary of Defense taking this action where every group, every individual within the military in the next 60 days will spend an entire day talking about this and thinking about this, about how to [00:44:00] address this issue.

Imagine if instead of right-wing extremism, violent extremism, this was Al-Qaeda or ISIS in our military. We would absolutely recognize it as a very significant problem. So the fact that it's right wing violent extremism I think should concern us just as much.

But it's really tricky, because certainly we are all permitted to have under our First Amendment rights, we're permitted to have views, and [00:44:30] opinions, and political views. But it certainly crosses the line when you're someone who's advocating violence against other people because of who they are. And I think in the military, it's another one of those places where there are reasonable time, place, and manner restrictions on First Amendment rights as a matter of discipline in the military. You have to be able to trust that people can live together and get along when they may be serving in a very diverse unit anywhere around the world. [00:45:00] So I think it's a really important conversation to have, but it's definitely a challenge.

Jill Wine-Banks: The First Amendment can be, I can only think of the word trumped. And I'm sorry because I would like to think of an alternative, by the fact that you don't have a right to be in the military. To get our training and to defend America. And you take an oath of office. So does that somehow limit your First Amendment rights to speak up? Not just to [00:45:30] obviously participating as they did in the January 6th insurrection. That's a crime. But what about just checking out their social media before you even let them in the military?

Barb McQuade: Certainly, reasonable time, place, and manner restrictions apply. And there's extra deference when you're talking about running the military, or running a prison, or even running a school. That there are interests of discipline and good order within your organization. They have to wear a uniform. There are certain things [00:46:00] they have to comply with. And I know that even as a prosecutor, we had to comply with our office's media policy when it came to social media as well. I couldn't go on social media and say, "Well, we all know defendant so-and-so is guilty." Because at all times 24/7, there were certain restrictions on my First Amendment rights about what I ... if I wanted to have that job. I could quit that job and say all the things I want to have. But if you [00:46:30] want to work for the government or for the military, there are certain rules that you need to comply with. And I think among those are the things that you could say that could bring a loss of confidence to the organization to which you belong.

Kimberly Atkins: I want to point out, I know lots of people who have either worked for the government, or known, or lived with someone who worked for the government

in any role that say required a security clearance. You had some nice person from the FBI who would come ask you questions. [00:47:00] Has this person done anything that would make you question their allegiance to the country, or done anything that would make them seem a threat? These are honest questions that we need to ask. And I think there's a big difference from saying, "I think that this person had some good points," and identifying yourself with extremist groups. The FBI and the Department of Homeland Security has said that the biggest domestic terrorist threat, the [00:47:30] most deadly domestic terror threat is from this extremist ideology. And I don't think that it is against the First Amendment. I think the First Amendment does not protect being a part of an extremist ideology.

But I think the problem is now the difficulty is trying to root that out. I think one of the things that the Defense Department has to do is really look at the way that it recruits, and brings [00:48:00] new recruits into the military, and have that access point be a focus. Because it's very difficult once they're in to get them out.

And I was looking, and there was an NBC report that talked about the fact that where a lot of extreme far-right groups are tend to be the places, particularly where Army and Marine recruits come from. Places in the Southeast and in the Northwest. And there was also a 1998 Department of Defense report that found that [00:48:30] leaders of far right extremist groups encourage young women and young men to enlist in the military to gain access to weapons and to be trained in how to use them. So that when they got out, they could be better 'soldiers' for the cause.

So these are things that we are aware of, there's documentation of, and that the DoD really needs to put in place strong recruitment criteria that is aimed at identifying and weeding that out. Just as we said, there's no [00:49:00] right to be in the military. And that has to be a really high focus.

Jill Wine-Banks: Kim, that's such a great point.

Joyce Vance: So something that you say Kim, that I think really resonates with me having been a prosecutor in the South and having dealt with domestic terrorism in the South. I was actually the first prosecutor from my office on the scene after a man named Eric Robert Rudolph set off a bomb at a Birmingham abortion clinic that killed a police officer. Ultimately, he was also [00:49:30] found to be responsible for three bombings in Atlanta, in the Atlanta area, including the bombing at Olympic Park.

And his device, the one that he used at the Olympic Park was actually a military rucksack into which the device had been placed. He had military training that enabled his activities. And in some ways, it seems to me that what the army, what the military will need to do in this process will be akin to deprogramming people [00:50:00] who've been brought into a cult. We talked earlier about

whether or not people were radicalized by some of the extreme points of view that we heard advocated during the Trump presidency.

I think to be fair, we have to say that those ideologies have been pre-existing. The white supremacist ideology is one of the unfortunate themes of American society. But this is a turning point where we can confront it. And whatever right you might have in your private life [00:50:30] to possess an extremist ideology or even to express it, it can be inappropriate in the context of military and law enforcement. Especially when you have to take an oath to protect and serve. And it seems to me that if your ideology is that of white supremacy, and if you don't believe that you have to protect Black people, or Asian people, or gay people, or women, then you've really violated that of in the moment when you've taken it. And that to me overcomes this sort of notion [00:51:00] Jill that you started by asking about that well, maybe we shouldn't look at these people's Facebook posts. Maybe it's unfair. I think absolutely not. If they want to be public servants, we need to make sure that they are people who can uphold-

Jill Wine-Banks: I think that General Austin, Secretary Austin now has recognized the exact risk that Kim has raised and that you've raised. And that is that with military training, people are much more dangerous. Secretary Austin said [00:51:30] the numbers may be small, but they have an outsized impact. And that's because of the military training. And if I was unclear, I wasn't suggesting that we shouldn't look at their social media posts. I was raising whether anyone would argue that the First Amendment made that impossible. I think that for any job, your social media is part of what gets looked at. So you should either be careful on your social media, or bear the consequences. And you don't have a right to the job.

The [00:52:00] big question is what kind of training and deprogramming might be effective once we find out how large the problem in the military is. Dismissing them from the military just puts them with the training, out in the public, able to do terrible things. So what could the military do?

Kimberly Atkins: And able to join law enforcement, which a lot of vets do. They go right to law enforcement, which just perpetuates the problem.

Jill Wine-Banks: Exactly.

Joyce Vance: Right. There's actually a [00:52:30] veterans' preference in hiring.

Jill Wine-Banks: So no one has any suggestions on training. We're going to have to do some research on that.

Joyce Vance: But I will say there are experts in government who've approached this before in the context of people who again were radicalized to support terrorism, foreign terrorism. So there are programs that have been tried. There are database best practices that can be used. I think the question here [00:53:00] is whether we

have the stomach to do that when it comes to a domestically induced etiology, and whether there will be some squeamishness about doing that in this instance say in the context of the military or law enforcement. Whereas Barb pointed out, no one would have absolutely any trouble criticizing, condemning people for having allegiance to Al-Qaeda, if they were members of the military or law enforcement. I think that there's more squeamishness on this [00:53:30] domestic issue. And frankly, we just need to move past that.

Kimberly Atkins: So I can only hope that the work that Secretary Austin is doing is headed by police chiefs across the country. It will be difficult, but it's really, really important to weed out this threat.

And now it's time to get to some of our listener questions. If you want to send us a question, please email us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com), or tweet them using #SistersInLaw. If we don't get to your question [00:54:00] during the show, keep an eye out on our Twitter feeds throughout the week as we will answer as many as we can. I know I enjoy doing that, and I've seen my sisters doing it too. So keep the questions coming.

So our first question is really a series of questions, because many of you had questions about voting rights. Like for example, Daniel from Melbourne, Australia, a friend of mine taught me that it's pronounced Melbourne. Daniel writes, "Could you please help clarify why citizens of the USA do not automatically [00:54:30] have the right to vote as we do here in Australia when we come of age at 18?" There were also some other listeners who wanted to know what they could do with H.R. 1 pending in Congress. If they support that, how they can help make that happen. But sisters, who wants to talk about the constitutional voting right and how that works here in America, and how that plays in H.R. 1?

Barb McQuade: Wait, hold on. Melbourne, Australia is pronounced Melbourne?

Kimberly Atkins: [00:55:00] Melbourne.

Barb McQuade: Wow. I've learned something today. I will remember that if I ever make it down under. Melbourne. All right, good to know. Thank you.

Joyce Vance: So maybe we should start by acknowledging that the Constitution does not actually create a right to vote. Those words don't appear in the Constitution. But of course we know from the language surrounding voting that we do have a right, that it's incredibly important. Although your right to vote does turn on, [00:55:30] when you turn 18, you still have to register in order to exercise it. And that's where a lot of the problems that we're seeing come into play. It's much easier in some states to vote than others. Some states automatically register you, automatically send you a ballot. Other states like Alabama make you jump through three hoops. And we're practically back in the 1950s where

Black people had to guess how many soap bubbles there were on a bar of soap to be able to register. I mean, it really is difficult in some states.

Kimberly Atkins: [00:56:00] And what about people who want to support efforts in Congress right now, Americans who want to see voting rights expanded, to see more voting protections that are put in place that are pending? What should they do?

Jill Wine-Banks: That should support H.R. 1 for one, but that doesn't really solve all the problems. Because that only impacts federal elections. And people think it's going to solve everything. But state elections can still be governed by state rules. [00:56:30] And the threat now to how voting will take place because of the over 50 acts that are being considered, being passed in the states that will restrict your right to vote. That's an important issue.

Barb McQuade: In addition to the laws, I also think that people can help by volunteering at the polls. So often, what happens is just human error on election day, or in voter registration. Helping [00:57:00] people get registered to vote, getting them rides to the polls. Helping people show up at the right place. Oftentimes, polling places change from election to election, and they show up and don't know where to go. Having people at polling places to be able to check, figure out where they're supposed to vote, and getting people rides to the correct polling place. All of those things can be done by volunteers to help raise voting rates.

Kimberly Atkins: So our next question comes from [Aqua jaws 00:57:28]. It says, "On [00:57:30] religious belief protections on the last podcast, what defines a religious belief? And what's accepted as protected? Can anyone claim any belief they had is religiously based?" So I'll start on this one, and then I'll throw it to my other sisters. The Supreme Court really defines what religions are afforded the constitutional protections. But as the Supreme Court often [00:58:00] does, it doesn't make a list of religions that are in or out. It doesn't set a hard and fast rule. It creates these standards. So the standard is a sincerely held religious belief. Now that's really broad. It goes far beyond just the major religions that we think of. Christianity, Judaism, Islam. It can cover a lot of ground. But at the same time, I can't decide to create the Church of Kim which says I dislike, [00:58:30] or I cannot by God associate with people of a certain racial group or other group and say that's protected by the First Amendment. It's not. That is not something that is a sincerely held religious belief. And it's something that courts have to decide all the time, particularly when you have some religions, which there are religions that need protection. I mean, that's one of the reasons why RFRA [00:59:00] was passed. The law that is used by a lot of conservatives to try to object to things like giving services to LGBTQ folks.

That law was put into place to protect religious minorities, people whose rights weren't really robustly protected elsewhere in the law. And that is important. But at the same time, courts are going to have to draw the line to say where that religious protection extends, and where it [00:59:30] infringes on the

constitutional rights of others. It's not easy. I wish it were more clear cut, but that's the way the law often is.

Joyce Vance: It's almost inherently a case by case sort of assessment. And we actually had a situation in Alabama's prisons where somebody who was Wiccan wanted to be able to exercise their religious freedom. And courts had to intervene and make the decision that yes, if it was a sincerely held belief, was a protected religion. It's also interesting [01:00:00] to note that non-believers are also protected from discrimination under this same religious rubric. So for the approximately 20% of Americans, or as Karl Rove used to like used to like to say have not been given the gift of faith. They too are protected from discrimination. So they can't, because they don't want to pray in the morning at work, be excluded from a job if their employers, under federal employment laws.

Kimberly Atkins: I was going to say, remember those ads by [01:00:30] Ron Reagan, Ronald Reagan's son talking about the rights of atheist? It's true. Atheists do have constitutional rights in this country.

Jill Wine-Banks: Right. And I was going to add that it's not just religious beliefs that are protected by the First Amendment, but also ethical or moral beliefs. So that may help in explaining to people that it's not necessarily an organized religion that we would recognize. But other ethical beliefs that you can prove. But you do have to prove [01:01:00] in the same way that you had to prove you were a conscientious objector. What did that mean? And what was that based on? So that in order to get the protection of the First Amendment, you have to prove that it falls within that category.

Kimberly Atkins: All right. I want to pose our last question of this episode to my fellow sisters who are DOJ alums. "There's a policy," from Robert. Robert writes, "There is a policy in the Department of Justice that states that a sitting [01:01:30] president can not be indicted. At the same time, this policy is being held within a country that emphasizes that no one is above the law. How can this policy exist under these circumstances, and what would have to be done to make a change?" Ladies?

Barb McQuade: Well I'll take a stab at that one, Kim. So the Office of Legal Counsel is the part of the Justice Department that writes advisory opinions for government agencies. So if the Department of Justice is thinking about charging a president, they turn [01:02:00] to OLC to get opinions on these things. And in the 1970s, they wrote this opinion that said a sitting president cannot be indicted, and they kind of reaffirmed it in the 1990s. Both during Watergate times, and when Bill Clinton was being examined.

But keep in mind, this is not just a policy. This is their best legal opinion as to what the Constitution permits. So under their reasoning, they conclude that the structure of the Constitution is such that the president cannot be indicted [01:02:30] by his own Justice Department because he is the boss of that Justice

Department. And he gets to decide who is and is not indicted. And if a president were to be indicted, it would be so distracting from his ability to perform his duties as president, that he could not perform them. So as a result, they say it's just physically not contemplated by the Constitution.

What they say is instead that what the mechanism should be is impeach first. Now that he's out of office, then he could be charged with a crime. What could be done [01:03:00] to change that? I don't know. A different OLC would have to come in and say that they disagree with that legal reasoning. Not simply as a matter of policy, but they think it was wrongly decided. I suppose the same way the Supreme Court considers stare decisis, which is the adherence to precedence. And there is a standard for overruling past precedent. And that is that they think that the logic was wrong, that it has proved unworkable in practice. And that there has not been significant reliance on the decision. Those are [01:03:30] some of the bases for overruling a Supreme Court precedent. I think an Office of Legal Counsel in a new administration would have to find all of those things, would require a reversal of that opinion. I don't know Joyce, you're the appellate lawyer in the group. Do you have other thoughts about that?

Joyce Vance:

No, I think you're dead on the money. I don't think that an effort to revisit the OLC memo would be a matter of policy. I think it would have to [01:04:00] be a serious matter of constitutional law. There are people who have suggested that the original OLC memos were improvidently written, and that they were an effort to make sure that Spiro Agnew would have to vacate the office of the vice presidency before the issue of Richard Nixon's criminality was addressed. So perhaps there's room to revisit them and decide that the policies weren't originally written on the basis of sound constitutional law. But I wouldn't expect [01:04:30] this just to be a policy change that sort of flips the switch and says, "Okay, now we've decided that it's fine to indict a president."

And then the last thing that I'll say is I tend to have strong institutional leanings. And usually, I'm not a big fan of revisiting old rules that have been working for a long time. Because of this, the value of precedent [inaudible 01:04:52] but I was on a panel with [inaudible 01:04:56] and my former boss Eric Holder. And he made what I thought was a compelling point. [01:05:00] He said, "The only way that a president ever gets indicted is if the Attorney General who he, who that president appointed to office, if that Attorney General signs off on the prosecution." So you know it would have to be a compelling case, a strong case, a case that demanded prosecution. And I have thought about that since then, and really decided that holder has the better of the argument just from a sheer institutional protection point of view, right? [01:05:30] There's not a concern here that if DOJ could indict presidents, that they would just go off and do it whimsically. I think that there would still be that strong check in the form of sign-off from the Attorney General, if some future head of the office of legal counsel decides that the old policies are legally wrong and should be reversed.

Jill Wine-Banks: We've been looking for an issue that there's some disagreement on. And while I agree with what Barbara and Joyce have said, as someone who had to [01:06:00] live with the impacts of this opinion and had to live with Leon Jaworski saying, "No, you cannot ask for an indictment of Richard Nixon. You have to go through something else." He said, "Impeachment is in place, and we should use impeachment." I just want to say I've reviewed the opinion carefully. I do not agree with its merits on the law. I think that it is not correctly decided. And that if a [01:06:30] new head of the Office of Legal Counsel were to look at it, he or she might well reach a different conclusion on the law.

As a matter of policy, it's quite unlikely that a sitting president's Attorney General would indict that president. But having it available when the situation is obvious as it was in Watergate and possibly was [01:07:00] during the last administration is something that I think needs to be looked at. So I would urge that it'd be re-evaluated on the constitutional premise that it's based.

Kimberly Atkins: And I just want to note that we got so many questions that at least referenced Joyce's knitting. And during the taping of this podcast, Joyce finished a sweater. That's how amazing she is. I just need our audience to know that. So congratulations.

Barb McQuade: I'll post [01:07:30] the sweater on Twitter for those who are curious.

Joyce Vance: Well, knitters are a force of nature. Never underestimate the power of a group of knitters. Y'all remember the pink pussyhats that women knit early on in the Trump administration, right? That was the sisterhood of knitters.

Kimberly Atkins: So we are going to put a picture of Joyce's beautiful knitting handiwork in our show notes. And we're going to all tweet it too. So look out for that. And thank you for listening to #SistersInLaw with Barb [01:08:00] McQuade, Jill Wine-Banks, Joyce Vance, and me, Kimberly Atkins. And don't forget to send in your questions by email at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet them for next week's show using #SistersInLaw. You will find the link 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.

Barb McQuade: [01:08:30] Can also say in addition to the laws on the books, it's important to have good laws on the books that enable voting rights. I've done a lot of volunteering at ...

Jill Wine-Banks: Oh my god, that's my front doorbell.

Joyce Vance: Jill, you have the most interesting musical notifications of anyone I know. That stays in, right? [01:09:00] Her cereal has arrived.

Kimberly Atkins: Oh my goodness.

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Joyce Vance: Make that the outtake.

Barb McQuade: Yeah maybe the outtake.

Joyce Vance: That's classic.

Kimberly Atkins: Oh my God.