

Kimberly Atkins:

Welcome back to #SistersInLaw. I'm Kimberly Atkins. This week, we'll be explaining plea agreements and what one might mean for Joel Greenberg and Congressman Matt Gaetz. We'll take a look at executive privilege now that Don McGahn is set to testify before Congress. We'll examine the NRA bankruptcy case that wasn't. As always, we'll be answering some of your questions at the end of the show. But before we get to that, sisters, I want to get your take on the expulsion of Liz Cheney from GOP Leadership and the replacement in the form of Elise Stefanik. What did you guys think about that?

Jill Wine-Banks:

Let me start by saying I don't usually look for sexism, but I do have to wonder if Liz Cheney were not woman, whether this would have happened to her. She is far more conservative than Stefanik. She supports the programs of Donald Trump at a far higher rate than Stefanik. I just don't think it would have happened if she were a man. What do you think?

Kimberly Atkins:

I just want to jump back and say that's such an important point, because people, this is all about Donald Trump and who supports Donald Trump more. If you look at even that standard, Liz Cheney voted with Donald Trump 90 plus percent of the time on his policy, much more than Elise Stefanik did. Elise Stefanik came to Congress on this bid to be a more moderate kind of new kind of Republican and they seem to have gone in divergent direction. Well, at least in terms of Liz Cheney, she didn't become less conservative.

She just refused to cede to a lie that other Republicans are telling. I think that it's quite extraordinary that this is the person and I think there are something to what Jill said, and I think that's one reason why they chose a woman to replace her in that leadership post. But it's just really remarkable that what qualifies as being completely subservient to Donald Trump, in service to Donald Trump, what that means, it just means at this point perpetuating the election lie, it has nothing to do with policy.

BARB MCQUADE:

I think regardless of your politics, it should be really disturbing to everybody that this has happened, because what was her sin? As you said, Kim, she aligned with the Republican Party and from a policy perspective, her sin was daring to speak the truth. She said the emperor has no clue. She blamed Donald Trump for falsely claiming that the election was stolen and instigating the January 6th attack. All of those things are documented facts. The pretext, if you will, is that it isn't that anyone denies the legitimacy of the presidency.

We just don't want her to keep talking about it. We need to move on. But it is the fact that she dared to call out the truth about Donald Trump, that she has been essentially excommunicated from her party. People can decide who they want to be in their party leadership for variety of reasons, but I think this one is really shocking because she's being punished for speaking the truth.

Jill Wine-Banks:

It's a real low water mark for the entire country, not just for the Republican Party, because it means that we no longer have a conservative party with ideals, whether I agree with them or not is important. It's that yin and yang that has made democracy succeed for so many years. Now, we've just got a cult of personality on that side of the spectrum, and that's dangerous and it's something that I think we have

maybe been really hesitant. I say we collectively, not just the four of us, but we've been very hesitant to call it the cult of personality that it is.

No one want to draw the comparison to take your pick of strong men leaders, stolen, whoever. We're maybe not at that stage yet, but we are in a dangerous place. I don't think that we should underestimate that. A little bit of good news on the horizon though, today, the announcement that there's agreement, at least in the House on a January 6th commission, which would be on the model of the 9/11 commission. A truth finding exercise. So, we would at least have that to counterbalance this denial movement that the Republican Party has become.

BARB MCQUADE:

Yup.

Kimberly Atkins:

That was just one of a lot of big new events that happened this week. Another is our first topic and that has to do with Joel Greenberg coming to a plea agreement and apparently getting ready to cooperate in an ongoing federal investigation that could implicate his wing man, Congressman Matt Gaetz. Joyce, get us started with that.

Joyce Vance:

So, on Monday morning, at 10:00 AM, Joel Greenberg will plea guilty to federal charges against him in an Orlando, Florida courtroom. I'm going to read, if you don't mind, because just a couple of moments ago the plea agreement that he's reached with the federal government was actually released. He'll plead guilty to six of the 33 charges against him. They include sex trafficking of a child, illegally making false IDs, aggravated identity theft, wire fraud, stalking, and federal conspiracy. In other words, all across the spectrum.

He's looking at a mandatory minimum sentence of 10 years to life for the child sex trafficking charge, and the wire fraud charges, for instance, carry a maximum sentence of 20 years in prison. These are serious charges. Greenberg, to no one's surprise, has entered into a cooperation agreement with the government. So, if you need a little refresher before we start our conversation, Greenberg ran for the job of Seminole County Tax Collector on an anti-capitalism cronyism platform. Obviously, he didn't mean it.

He was bad news from the get-go. For instance, he funneled jobs and lucrative contracts to friends and family, including three of his groomsmen. But he's become best known as the self-described wing man for Florida Congressman Matt Gaetz. That's why there's so much interest on this potential plea agreement. Let's start with a little bit of background on the plea agreement process. Barb, can you start us off by talking about what happens at the hearing where a defendant pleads guilty and what it all means?

BARB MCQUADE:

Yes. First though, I have to compliment you, Joyce, on the subtle and perhaps it's southern charm way that you throw shade. He ran on this platform, but apparently he didn't mean it.

Joyce Vance:

No one has ever called me subtle, ever.

Jill Wine-Banks:

I also like your subtlety in saying wing man as opposed to the job he really had, which let's put it in the real words, he was a pimp.

Joyce Vance:

Pimp, right.

BARB MCQUADE:

Yeah. Well, to explain what happens at a plea hearing, first, something like 95% of all criminal cases are resolved with a guilty plea. Sometimes, people wonder why on earth would anyone ever plead guilty. I'd fight to the death. Well, it's because a person can extract some benefits from the guilty plea. So, ordinarily, a plea occurs when they have become convinced that they will be convicted at trial. That's because there is a discovery process that takes place where the prosecution shares its evidence with the defense.

So, they can see all the evidence. They can see recordings, documents, and learn about the evidence. So, if they conclude that their likelihood of conviction is very high, then their lawyer works very hard to negotiate the best deal they can get for them. As you heard in this case, he's pleading guilty to six out of 33 counts. So, that means those other counts will be dismissed. So, that's a benefit. If he were convicted at trial of all 33, he will certainly face longer prison time. There is also in the sentencing guidelines a benefit merely for accepting responsibility with a guilty plea.

It is not a gift in exchange for pleading guilty, because everyone has a right to go to trial, but for standing up and accepting responsibility, showing some remorse and demonstrating a desire to move on with your life and to rehabilitate yourself. There is a reduction in sentence just for that. Then, as Joyce said, the part that really can be a benefit is in exchange for cooperation. If someone agrees to cooperate by providing what's known as substantial assistance in the investigation or prosecution of others, then that's usually worth something.

The prosecution will usually not say what that is at the moment because they want to hold back that reward as leverage, so that the person has to go through with the cooperation providing information, or testifying, or whatever that may be. Only upon completion of that cooperation would the person get that benefit in the form of some sort of request to the court to reduce the sentence. But there's a rule, a court rule, Rule 11, that requires certain things to occur at a hearing. A plea hearing can take up to an hour to occur in federal court.

Sometimes in State court I am told they can be very slapdash and quick, where people are maybe not fully aware of all that is happening. But in federal court, there is typically a written plea agreement that's very lengthy, that goes through all of the things the defendant is giving up, all of the benefits he'll receive, all of the promises from both sides. Then, the court will go through it in great detail to ensure that a plea is knowing, voluntary, and intelligent, which is what the law requires. So, going through all of the rights that the defendant is giving up, making sure that there is no coercion, or threats, or promises outside of the written plea agreement.

Then, a really important part of the plea hearing is what's known as the factual basis. So, it's not enough for the defendant to say, I'm guilty. The judge will say, "Tell me in your own words what it is you did that makes you believe you're guilty." So, that is when typically the defendant will recite exactly what he did that makes him guilty of this offense. In some cases where it's complicated, and this one I believe is one of them, the plea agreement may articulate in writing exactly what it is the defendant admits to having done so that there is no confusion on either party as they walk into that courtroom.

Joyce Vance:

This plea agreement is 68 pages. I'm not sure I've ever seen one that's that long before.

BARB MCQUADE:

No, same here.

Joyce Vance:

Yeah, prosecutors in the middle district of Florida seem intent on getting this right. Barb, can we just pull one thread about cooperation? Because you talked about how prosecutors don't necessarily agree in the plea agreement itself. What kind of sentencing reduction a defendant will earn. Even the notion that the defendant will get credit at some point in the future, maybe when they're sentenced or even afterwards. That's not set in stone either, isn't it? It's contingent on how they perform.

BARB MCQUADE:

That's right. Usually, it says something like it will be up to the government and the government's sole discretion to determine whether the defendant has completed the cooperation that he is agreeing to. It's really an agreement to explore cooperation, I suppose. It might be a better way to think about it. The defendant has agreed he's going to try to provide information and the government has agreed that if he comes through and does all the things they ask him to do, which is to testify truthfully, to provide leads or information or whatever it is.

Then, and only then will they file a motion with the court. Then, it's typically up to the court to decide whether the defendant gets that benefit. So, it maybe that the government ask for a particular sentence and the judge thinks that it's too much or not enough. Ultimately, it is the judge's decision as to whether and how much of a reduction the defendant will receive in his sentence for cooperating.

Joyce Vance:

So, Jill, in many ways it sounds like this process is weighted in the prosecution's favor. As a defense lawyer, how do you prepare a client? How do you prepare a defendant for this process and what it means?

Jill Wine-Banks:

Well, let me start with what Barb was just talking about, which is that the judge is the one who makes the ultimate decision. If as part of the plea agreement there is some indication that there will be a reduction in the sentence for cooperation or for anything else, as a defense lawyer you have to tell your client that it's up to the judge and whatever the prosecution recommends. It does not mean that you will get that reduction, and you need your client to be completely aware that it's possible that the reduced sentence will not be accepted by the judge.

You also have to make sure that your client is ready to allocute in a way that says, "I am sorry for what I did. I understand what I did. I'm remorseful for what I did." To admit to facts without equivocation that are the basic premise of the different causes that he is pleading to. So, he has to be able to admit that he did the things that are elements of the crime for which he is pleading guilty, he or she is pleading guilty. That's sometimes is where defendants falters. They're willing to admit some things but they just can't get the words out of their mouth to admit to all of them.

That's up to the defense lawyer, because it won't be accepted by the judge if he does not believe, he or she does not believe that the defendant actually did the things. The judges don't want people pleading guilty just to avoid the cost of trial or just because they've been told that there's a risk to them. They want them to be pleading guilty because they are guilty. That's one of the things that the judge takes very, very seriously in questioning a defendant. That's one of the jobs of the defense lawyers, to prepare the client to correctly answer those questions.

I'd say those are some of the big things, is to make sure that they know that the sentence is not set in stone no matter what, and of course, in preparation you would also say, "This is what you give up. Not only do you give up the right to a trial, you give up certain appellate rights." You can't appeal if you plead guilty and it's accepted by the court. You would fail your client dramatically if the client was not aware of all the rights that they have given up by accepting the plea. Of course, you would explain the benefits, which as you has already been correctly identified, could be a reduction in the sentence that you might get.

In this case, it is a reduction from 33 to six charges. Now, the six charges carry sentencing possibilities that exceed life. So, he still has the potential for a very long sentence, but it's still less than if he had 33 counts against him. So, I think those are the main things I would tell a client of mine.

Joyce Vance:

So, I think you and Barb make an important point, which is that the signed plea agreement is only worth the paper that it's printed on. It's up to a judge to accept the plea. That means that Greenberg will have to walk through all of these steps successfully in his hearing on Monday. I'm sure that you all, like me, have had hearings that have started and stopped, where a defendant bucks at fully acknowledging guilt and the judge tells him or her to, "Go out into the hall and talk to your lawyer and come back and if you don't want to plea, that's fine with me."

Judges don't want to coerce the plea. I even handled an appeal, it was thank God not my case at the plea hearing, where the hearing had started and stopped and the judge failed to cover all of the Rule 11 requirements that Barb outlined. There was some question about whether the defendant had formally said on the record that it was a knowing and voluntary plea. The 11th Circuit sent it back for a new plea much to the judge's chagrin. So, although the process in some ways sounds prosecution oriented, the judge stands there as the neutral arbiter.

Kim, we've now seen the plea agreement or at least we've had a chance to skim it since it's just come out. It confirms what we suspected all along, which is that Greenberg is going to cooperate with the government in exchange for a reduced sentencing agreement. But what does that mean? What does that tell us will happen next? Social media is full of these memes suggesting that Matt Gaetz is [inaudible 00:17:11]. Is that really what happens here?

Kimberly Atkins:

Well, we don't know yet. That's a big maybe. Listening to you all talk about plea agreements and the role of the judge in accepting them made me think about Michael Flynn, which is a great example of that. Remember, Michael Flynn-

BARB MCQUADE:

Me, too. I had that same thought when Jill was explaining.

Kimberly Atkins:

He pleaded guilty. He went before the judge. He was ready to be sentenced and his lawyer thought that he would probably get time served, or a suspended sentence and the judge looked at and said, "You didn't cooperate enough." And sent it back, and it was really shocking. After that, that really soured Flynn and his lawyer, who I believed was Sidney Powell. That soured Flynn and then he withdrew his guilty plea, which a defendant is allowed to do. Then, he fought it ever since. So, that's a great example of how a judge can step in and say, "Wait a minute. Not so fast."

But as for what happens to Matt Gaetz, it's unclear what happens to him. This document did not apparently name him specifically, but at the same time if a judge reduces all but six of 33 counts, or rather if prosecutors reduce down to six, 33 counts against an accused sex trafficker, that says to me that he has information that is really valuable that can be given up. Is that information related to Matt Gaetz? Again, we don't know. It could be someone else technically who is a target of this investigation, but the tea leaves tell me that Matt Gaetz could be in trouble.

One of those leaves is Matt Gaetz's ex-girlfriend, which according reports in political and elsewhere, could also be cooperating with the prosecutors. She has reportedly asked for her own immunity for fear that she may face obstruction of justice charges because she called the alleged 17-year old involved in this case. Well, the 17-year old who Matt Gaetz is alleged or Joel Greenberg is alleged to have had relations with from any as well as a lot of other people too. Again, we don't know that that is Matt Gaetz. As well as the 17-year old's roommate.

I don't know what she said to them, but if she's worried about facing charges based on that and seeking immunity, that's probably bad news for Matt Gaetz. So, if you have the former girlfriend, the 17-year old, and Greenberg all being able to provide information, I think that is not good news. So, I think we will still have to see. Again, that doesn't necessarily mean that this is about him. There's still so much that we don't know. We probably won't know it after Monday, and we won't know it until the government really has all of its ducks in a row.

Again, as we've mentioned before, prosecutors don't move forward and bringing charges against someone unless they know they have the goods. Unless they really believe that they can get a conviction. It's very different from civil cases, where as a former civil litigation attorney, when you're filing suit, you throw everything into the complaint and then you whittle it down later. Federal prosecutors go in the opposite direction, particularly, when you are dealing with a high profile person like a member of Congress. So, I think we will have to see, but if I were Matt Gaetz, I'd be nervous.

Joyce Vance:

So, Barb, I agree with Kim. I'm in the never count your chickens before they hatch school of waiting on federal prosecutors to indict people. The tea leaves do look like they're headed somewhere. Do you think their case would be strong enough with just Greenberg alone or do you think it's a better case with multiple cooperators?

BARB MCQUADE:

Yeah, with someone like Greenberg, Joyce, I am sure you would agree that it's very rare to cooperate a sex trafficker, a sex offender of any type. We'd be pretty reluctant to do that unless we thought he could deliver somebody whose conduct was even more egregious. That doesn't mean just somebody who has a big position or title like Matt Gaetz, it's because the conduct is more egregious. But it's always better when you have cooperators to have other witnesses who can bolster that testimony because I think the jury is naturally skeptical as they should be and prosecutors are naturally skeptical of a person who is testifying in exchange for a promise of leniency.

But there are a number ways you can ... Our friend Pat Fitzgerald, who was the former US Attorney in Chicago used to say, he's cooperated murderers. The way you do it is you don't ask the jury to take their word for it. You corroborate all their testimony but they can also provide some really important leads. For example, if Joel Greenberg can tell the names of the 17-year old girl or girls, then they can go talk to her and find out all the information they need. If they used encrypted messaging apps, where they can't obtain the messages by going to the service provider, they could go to Joel Greenberg and say, "Show us your phone."

Find text messages between him and Matt Gaetz or others who maybe involved in this. They could get other apps, payment apps like Venmo apps to show payments and other kinds of things. So, in that way, he can provide leads to other evidence, either documentary or witnesses. Then, if you can corroborate his testimony, sometimes a cooperator like that could just be a useful narrator. When you put up various documents, can help tie them all together and connect the dots for people. So, you don't have to get very far with the cooperator if they can provide you with other evidence that can prove the case.

Joyce Vance:

Totally agree with that. I would not put Greenberg on the witness stand unless I could corroborate everything that he was testifying to. Sometimes you'll see the government hug their cooperating witnesses and be buddies with them. Not with Greenberg, he's a witness that you put on the witness stand and you treat him with other contempt from the get-go if you want to maintain any credibility in the eyes of the jury.

I suspect that this case is not over yet, that we will talk about it probably extensively in the weeks and months ahead. But hopefully that gives our listeners some good background for understanding the plea hearing on Monday.

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Kimberly Atkins:

All right, and also in the news this week, the return of Don McGahn, who has struck a deal to testify before Congress at long last. This brings up the issue of executive privilege. Jill, tell us what's going on.

Jill Wine-Banks:

Let me put it in context first, because this is a subpoena that has been pending for more than two years for Don McGahn who was then President Trump's White House counsel to testify before the House Judiciary Committee. There's been a contentious court battle ever since then, but finally, the Department of Justice and McGahn's lawyers have reached an agreement with the committee for him to testify with some serious limitations.

This will be going back to the Mueller Report and his knowledge of obstruction allegations against Trump, particularly about firing Mueller and then being asked to write a memo that said, Trump never asked him to fire Mueller. So, that's the background of whether there is anything of interest in his testimony before the committee. It's been two years, but even now he's not fully testifying because it's going to be only in secret and only limited to what the Mueller Report publicly identified concerning his role.

So, let's first look at what stopped him from testifying before, and that was a claim by Trump for complete immunity and for executive privilege. So, I want to start, Kim, with you talking about what is executive privilege and what is its legitimate purpose?

Kimberly Atkins:

Yeah, so it goes back to a case that you know very well, Jill, it goes back to the Watergate case and President Nixon. There's a Supreme Court case, *United States versus Nixon* and it involved subpoenas from federal prosecutors seeking the Watergate tapes, the recordings that Nixon made of conversations that he had in the White House. Now, President Nixon asserted that he did not have to comply with any subpoena of those tapes. He said that there was basically a total executive privilege because as president he was entitled to absolute immunity.

He said, the conversations that he had in the White House are entirely protected from any other branches of government seeking to compel him to produce them, for a lot of reasons, including the national interest and national security. The Supreme Court said, "Yeah, not so much." They rejected that broad unqualified immunity, but they said, "In certain circumstances there is an executive privilege." In circumstances, for example, when it comes to military or diplomatic affairs, things that are said or where, "The fundamental demands of due process of law in the fair administration of justice require that the White House can refuse to comply with the production of certain information."

So, with Don McGahn cutting this deal and agreeing to testify under these specific limitations, what this case does is avoid yet another potential big Supreme Court decision if this were to go up there, that could further delineate just exactly how far this executive privilege goes. It could have given the Supreme Court the ability to either expand it and say, "No, there are a lot more things, a lot more leeway that a president has in refusing to produce documents, or tapes, or individuals from the administration or former administration to testify."

Or, they could have narrowed it even more but that's not going to happen here. A deal is cut and that fight will have to wait for another day.

Joyce Vance:

I just have to say, that's such a disappointing development from the point of view of an appellate lawyer. Because it's not like Nixon was the first time executive privilege had been asserted. There's a long history of it. From the early days of the country on virtually no court cases deciding its validity. Here, we had an opportunity for the issue to reach the Supreme Court and to finally get some clarity on what this privilege means, and we're not going to get it.

BARB MCQUADE:

Oh, you're just such an appellate geek, Joyce.

Joyce Vance:

I know.

BARB MCQUADE:

They're actually supposed to try to work it out. This concept of negotiation and accommodation is actually based on respect for a separate and co-equal branch of government. But I agree with you, it is frustrating because then you never get clarity on any of these questions.

Joyce Vance:

It would work if we did have separate but equal branches of government that respected each other. But I think that's an outmoded notion [crosstalk 00:29:54].

Jill Wine-Banks:

I think one thing that needs to be pointed is that the decision in Nixon was for the Watergate special prosecutor to get the tapes. They never decided whether Congress, as part of the judiciary committee, could get it. So, the issue here, again, is what is Congress' right in terms of separation of powers, and whether Congress can have the same power that the judicial branch has, that the executive branch in the Department of Justice has, but there is a legitimate purpose.

Kimberly Atkins:

Well, Joyce, can I just ask you a question?

Jill Wine-Banks:

Yeah.

Kimberly Atkins:

Do you think that the fact that McGahn struck this deal is any indication of the fact that he thought that if he fought it, he would lose and he was trying to cut his losses? He didn't want that precedent set?

Joyce Vance:

I think that that's one of the possibilities here. I wouldn't discount that, particularly with this new Congress in place. But that question would have ultimately gone to the Supreme Court, and we all know what the composition of that court looks like right now.

BARB MCQUADE:

Yeah, I think there is a little bit of case law out there. It's not binding case law, but there have been a couple of instances where these issues have come before lower courts. Harriet Miers was one, who was the General Counsel in the George W. Bush administration, who defied a subpoena, a Congressional subpoena and a district court did order her to appear and rejected this idea of absolutely immunity in the Congressional context. You have to at least show up. You don't have absolutely immunity.

You have to at least show up and then maybe you can assert executive privilege on a question by question basis. But you still have to appear and answer other questions unless you can show that they're protected by some sort of privilege. That got vacated after they ultimately resolved the issue through this negotiation and accommodation process. Then, just a couple of years ago in this case, in the McGahn case, Judge Ketanji Brown Jackson ruled that she followed the logic of the Miers case. Recognized it's not binding precedent, but it seems like a good logical conclusion. Same thing, rejecting this idea of absolute immunity that you can just stay home and thumb your nose at Congress.

You have to show up and maybe assert this privilege on a case by case basis, question by question basis. There was a panel of the DC Circuit that reversed her opinion. Then, the full DC Circuit, the en banc reviewed that decision and disagreed with that panel and said that, "We think she was right, that Congress does have standing to bring this lawsuit." But again, now, I think because of the risk of losing that lawsuit, McGahn has an incentive and the White House has an incentive to come back and resolve it. So does Congress, in a way, because they don't want to get bad case law on this.

They really just want what they want, which is for McGahn to answer questions. Because as you all know, his testimony or information that he provided to Robert Mueller, to me, was the most damning information in that entire report. Because it was Don McGahn who provided Robert Mueller with the information that Donald Trump asked him to fire Robert Mueller, the Special Counsel, and to create, fabricate a false memo denying that he had done that. So, I think it's a really important testimony. So, even if the only thing he does is come back and repeat what he told Robert Mueller, I think that's very important testimony.

Joyce Vance:

I can't believe you accused me of being the appellate geek in the room and then gave that amazing layout of Miers, Barb. Also, just an aside, Ketanji Brown Jackson, who Barb mentioned, remember that name. We may mention it again on the future episode when we're talking about potential Supreme Court nominees.

BARB MCQUADE:

Absolutely.

Jill Wine-Banks:

She has now been nominated for the Court of Appeals by Biden and so that is possibly a indication that she maybe high on the list for further elevation to the Supreme Court the next time there's a vacancy. So, her opinion becomes very important. I think Barb has covered pretty much the issue of what we might learn from the testimony, which will be publicly released within a week of the secret testimony. But it doesn't address, really, what is the reason for having an executive privilege at all? What value does it provide to the Executive Branch? Joyce, do you want to talk about that?

Joyce Vance:

It really puts the Biden justice department in an interesting position, because when you think about it, McGahn was asserting the privilege while Trump was the president. Of course, now there's a new administration. There might have been an assumption that the Biden folks would have just let this go, right? Let McGahn testify, but for prudential reasons, they have to think down the road where they might want to assert executive privilege to protect some of their internal conversations. Let me give you an example.

The deliberate of privilege is meant to protect advice that's given to the president that enables him to make decisions. You want people around you to be able to be candid, and forthcoming, and explore all of the options. They're not going to do that if they're worried that conversations and memos might be disclosed. So, that's the real rationale behind the deliberate of part of the privilege. The Biden lawyers, both in the White House and the Justice Department, have to be concerned not just about this one situation involving Don McGahn, but about really the institution of the presidency and preserving its power.

Of course, that balance seems to have strayed a little bit in favor of the executive in the last couple of decades, but I think Barb hits this important point which says that there is value even to this limited testimony. The marquee question here, it seems to me, is for someone to ask Don McGahn, "Why did you threaten to resign when the president ordered you to fire Bob Mueller and how did you feel about being ordered to lie about it after the fact?" Because inevitably, the answer to a question like that would have to be, "The president wanted me to commit crimes with him."

McGahn won't say it that way, but essentially, it begs this whole issue of obstruction of justice. So, maybe this agreement lets McGahn dodge that question a little bit, but getting part of the answer, at least the factual part, under oath on paper, that really supports the truth seeking function that we need here.

Jill Wine-Banks:

Right, and of course, the exception to executive privilege has always been crime and fraud. Similar to what is with an attorney client privilege, is if the conversation is about policy, it's protected. If the conversation is about how to cover up a crime or how to obstruct justice, it's not protected by any privilege. But let's get to maybe the basic question here, which is, this has to do with the Mueller Report. I want all of you to comment on whether you think there's any relevance or any reason to be talking about the Mueller Report anymore. Does it matter anymore?

Joyce Vance:

Well, I'll start. I think it absolutely does matter. Here's is why. We're talking about whether a president, now a former president, engaged in conduct that was potentially criminal, obstruction of justice. Trump always tried to push obstruction of justice off as some sort of minor level of crime. It's not important. It's just a process crime. It goes to the heart of our criminal justice system. If people aren't truthful when they talk to investigators and prosecutors, if they can lie to keep crimes from being uncovered, then our system has no integrity and it's doomed to failure.

So, of all the crimes that a president could commit, obstruction of justice seems very important to me. Getting to the bottom of this matters even at a couple of years removed.

BARB MCQUADE:

I would just add that you may recall, Jill, that Robert Mueller when he wrote in his report said that, "I accept that it is the policy of the Department of Justice that we should not charge a sitting president, but

I write this report and I memorialize all of this evidence while memories are fresh and evidence is available so that when Donald Trump is no longer president, future prosecutors may use this evidence and decide whether to bring charges in the future." So, I think we're at that moment, where someone is going to have to review this evidence and make such a decision.

Joyce Vance:

Do you think they'll jump, Barb?

BARB MCQUADE:

I don't know. I think it's a tough decision and I think you have to look at all the equities. As you know, Joyce, number one, is there a probable cause that a crime was committed? Even if so, then the question is, is there substantial federal interest that has not yet been vindicated? So, that's a very tough decision for someone in this justice department to make.

Jill Wine-Banks:

I do think that now that we're days away maybe, we don't know an exact date for McGahn's testimony, but the court made it clear that it should be as soon as possible, that our audience will now be better prepared to understand what happens in that hearing and what the evidence means, and what legitimate claims there are to executive privilege. Joyce, I got a new mattress from Helix and it was so much fun to go through the quiz to find out what the right mattress for me was. Did you take the quiz?

Joyce Vance:

I did the same thing and I've been really focused on getting enough sleep. One of my hopefully post-pandemic things is really trying to improve the quality of my sleep. Getting a firmer mattress was really important to me and that's what taking the Helix quiz did for me.

Jill Wine-Banks:

Interesting, because mine ended up being slightly softer. It turns out that when you sleep on your side or your stomach, it should be a little softer than the very firm mattress I was using and I definitely have a much better wake up time when I'm on the new mattress.

Joyce Vance:

So, it's pretty interesting to have that opportunity to get a mattress that works for you. You can do that, too. Just go to [helixsleep.com/sisters](https://helixsleep.com/sisters) to take the two-minute sleep quiz that Jill and I took and you'll be matched with a customized mattress that will give you the best sleep of your life. Helix has a 10-year warranty and you get to try it out for 100 nights risk free. They'll even pick it up for you if you don't love it.

Jill Wine-Banks:

But you probably will love it, and Helix is offering up to \$200 off all mattresses and two free pillows for our free listeners at [helixsleep.com/sisters](https://helixsleep.com/sisters). That's [helixsleep.com/sisters](https://helixsleep.com/sisters) for up to \$200 off and two free pillows. Look for the link in our show notes and thanks to Helix for sponsoring this episode, and we thank you, our listeners, for supporting Helix.

Kimberly Atkins:

Now, onto the NRA bankruptcy that couldn't. Barb, tell us about that.

BARB MCQUADE:

Well, this week we also saw news that a bankruptcy court had dismissed the NRA's effort to claim bankruptcy, of course, the National Rifle Association. As you say, Kim, things must be going pretty poorly for you when you even fail in seeking bankruptcy. But you may recall that the NRA had been under investigation by the New York Attorney General Letitia James for allegations of fraud, focusing on improper use of funds. It's a non-profit. It has certain rules about how it can spend its money, but use of funds by leadership, especially Executive Director Wayne LaPierre for things like expensive meals, chartered flights for his family, plans to build a house for him.

The Attorney General's investigation could result in the loss of the NRA's non-profit status and could even result in the dissolution of the organization. So, Kim, how about if you tell us what happened in the bankruptcy court this week and what that might mean for the future of the NRA?

Kimberly Atkins:

Yeah, so I think if I have to come up with a legal term to describe the whole process of the NRA's attempt to file for bankruptcy, that legal term would be a hot mess. So, what happened is on Tuesday, a federal bankruptcy judge in Texas denied the NRA's bid for bankruptcy as Barb said. Saying, essentially that it was obviously an attempt to get around the lawsuit filed by Attorney General James and other several lawsuits that the NRA was facing. So, the NRA is a non-profit that was established in New York State and has been established in New York State for 150 years.

But what happened after this New York action began was that Wayne LaPierre decided, "I want to pick the NRA up. Leave New York and instead establish it in the State of Texas, and let's do that by filing for bankruptcy." Claiming that it was insolvent and had to be reorganized under the rules of the State of Texas. Wayne LaPierre declined to consult the other members of the board of the NRA before making this decision, one of many problems with this bankruptcy filing. That's why the judge said essentially, "No way."

Bankruptcy Court Judge Harlan Hale said that, "The NRA is using this bankruptcy case to address a regulatory enforcement problem, not a financial one." Noting among other things is that the NRA said, not only did it not say that it's insolvent, but it said that it had been cleaning up its act. It's the defense that it was making against this New York action. Hey, hey, what we're doing isn't so bad. We've cleaned up our practices. Everything is fine here. Well, if everything is fine, then what do you need to file bankruptcy for?

Clearly, they are just trying to get out of this act. The judge also pointed out the fact that LaPierre is pretty much acting on his own. This was not an action by the NRA. There was no vote by the board to do this. In fact, one of the former board members is a party on the other side opposing the bankruptcy, because they weren't consulted. It really is a big mess and it was not super surprising that it was thrown out. But where this leaves the NRA now is right where it started, which is subject to this really wide ranging suit, which could lead to the demise of the NRA. That's what Attorney General James is seeking to happen.

They want this organization dissolved. We've seen this happened with other things such as Donald Trump's "charity", which had to be dissolved in New York because of the mismanagement of funds. It was not used for charitable purposes. It was basically used to underwrite the Trump organization and its business and pay for lawyer fees and stuff like that. So, we've seen this happened before. The bankruptcy case is not going to get the NRA out of it this time.

BARB MCQUADE:

Yeah, and Joyce, let me turn to you. Now that we've seen the bankruptcy judge in Texas appeared to see right through this, as Kim noted, found that the NRA is not broke, is not financially insolvent, and said it did not use good faith in filing this bankruptcy. So, now that bankruptcy is not going to be an escape hatch for the NRA, what do you think is coming next in that New York Attorney General investigation?

Joyce Vance:

The bankruptcy judge, for sure, took no prisoners. Although the NRA could still appeal, he intimated that the likely outcome was that they would end up with a trustee. Probably not where LaPierre wants to go. So, I think you're right. This is back to Tish James. She has already signaled that she too will take no prisoners. She was pretty fierce in the way she went after Trump's charity. Took them down. They no longer exist. She even forced Trump's children, who were on the board, to go to some form of reeducation for bad charitable board members.

Prohibited them from sitting on any other New York charities. So, I think that we'll see that same thing here. She's going to try to dissolve the organization. That would be a stunning development for the once powerful NRA. She will remove or attempt to remove its leaders, order restitution for the tens of millions of dollars, and she'll try to make sure that none of these folks can ever serve on the board of New York corporations again. Of course, this is still a court room proceeding. So, it will take place in front of a judge, in a trial court in New York, but she is fully committed to taking the NRA down.

BARB MCQUADE:

Yeah, and think about that maybe, Jill, with the big picture and what that might mean. The mission of the NRA is to promote gun safety and defend the Second Amendment. In recent years, we have seen them become a major political donor that has made it practically impossible to reform gun laws. Do you think that either this bankruptcy ruling or the AG's investigation might ultimately reduce their influence on Congressional races?

Jill Wine-Banks:

I think the combination of the bankruptcy and the action in New York is going to definitely hurt the ability of the NRA to continue to have the influence it has. What I worry about is that there will just be a substitute organization. It will reincorporate maybe in Texas, maybe in some other place that's extremely friendly to guns, and it will have different leadership, because this leadership ... If I were a member of the NRA, an unlikely scenario for sure, but if I were, I'd be really mad that my money was being spent for the kind of vacations that the executives were taking.

That's not how you want your money spent. You want your money spent to promote gun safety and gun advocacy and that's not what it was being spent on. So, other than another organization evolving, I think the NRA may be done.

Kimberly Atkins:

It's worth noting that that's what Attorney General James is seeking in part, is the return of the member's money that was misspent allegedly in this way by LaPierre and his cronies.

BARB MCQUADE:

So, you've heard it here first folks. Jill says, NRA is DOA. That was my effort at a hard stuff.

Joyce Vance:

It was a good one.

Kimberly Atkins:

That was classic radio DJ voice, that was nice. Do you know, Jill, when it comes to this time of year, I really love grilling, and I really love pairing a great wine with the food that we grill. The Russian River Valley Pinot Noir from Cameron Hughes goes great with barbecue. It's smooth and savory, but it's light enough to sip. At \$16 a bottle, it's less than half of what you'd normally pay for this wine under its original label at the tasting room. It's so good.

Jill Wine-Banks:

The best thing about Cameron Hughes is that now that we are actually back to seeing people live and having company at our house, I have a great collection of wine to serve to my new company. I love all of their wines. If you love Chardonnay, their Chardonnay, which is lot 746 is a terrific choice, so is the Zinfandel. I think you'll love it all.

Kimberly Atkins:

Cameron Hughes sources top rated wines directly from the best wineries around the world. Exclusive wineries over produce and keep official quantities low to keep prices high. The surplus is acquired and relabeled by Cameron Hughes and the savings are passed on to you.

Jill Wine-Banks:

That's so great, Kim. Go to [chwine.com](http://chwine.com) today to get 20% off the already great prices, plus free shipping when you buy three or more bottles. Just enter our code, sisters, at checkout.

Kimberly Atkins:

That's a great deal. That's [chwine.com](http://chwine.com), with code sisters, for 20% off, three bottles or more, plus free shipping. Great wine. Great prices. Delivered right to your door. You can find the link in our show notes. All right, as always, we've received some great listener questions this week. If you have a question, please email us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet using #SistersInLaw. If we don't get to your question during the show, keep an eye on our Twitter feeds throughout the week because we often answer the rest of the questions there.

So, first, we have from Sarah in Scottsdale, "What the hell is going on with the so-called Cyber Ninjas here in Arizona?" What's going on, sisters?

Joyce Vance:

Well, speaking of hot messes, what's going on in Arizona is something that's being called a recount, but the Cyber Ninjas have no expertise in this area and they seemed to be doing everything wrong, frankly, just rebuilding a round two narrative of the big lie.

Kimberly Atkins:

Yeah. So, this is a recount that was authorized by, and it wasn't even the full Congress, it was just some Republicans in the legislator in Arizona called on this to happen. There can be no actual impact from it, no matter what this so-called recount finds. It will not change the result or the certification of the

election. But it is an effort to, again, as Joyce said, perpetuate the big lie. It is being carried out. Some of the folks who are taking part in the counting and who have access to these ballots are people who have perpetuated the big lie.

At least one person who was at the Capitol on January 6th. It really is alarming, but it can only serve to fuel the conspiracy theories that are out there for the folks that believe them. I agree, it's really dangerous for democracy.

BARB MCQUADE:

While some could say, "Oh, we'll just roll our eyes and dismiss them as hoax." I think this is the kind of narrative that is giving fuel to all of these legislative proposals we're seeing across the south to suppress voting rights. So, there is a real danger to this false information campaign.

Jill Wine-Banks:

The more we look into this, the worse it gets because not only is this a waste of tax payer money, and they are using Arizona tax payer money to fund this, there is no basis for it. As you pointed out, it will not change the election results. It has been certified by Republicans as well as Democrats in Arizona already twice. There's an official recount that's mandatory and then there was a second one. It's been confirmed that the win was by Biden, clearer as can be. So, there no purpose for it. The founder of the company is a conspiracy theorist.

Is someone who has supported Donald Trump in the big lie, and it's very dangerous because it does allow people to be misled and for this to be something that could happen. Now, they're saying it's going to go to Pennsylvania, they're going to try it in other places. It just makes it worse for our democracy. So, it's something that we must find a way to stop. But so far, the lawsuits brought by citizens in Arizona have not succeeded to stop it. That's what we need to find a way to do, is stop wasting the time and the money, and the danger to the ballots because they've used blue ink, which is a legitimate color to use on a ballot.

They could have mismarked it and ruined the ballot. Now, they're using technology to look for bamboo fibers, which of course, are used in American made paper just as much. Although, they are using it to say, if there's bamboo, it came from China and it's illegitimate. That simply isn't true. So, we need to stop it.

Kimberly Atkins:

All right. Our next question comes from Amanda in Alabama and it is for our resident Alabamian, it says, "Do you feel that there's any hope for Alabama to ever turn the corner and become more progressive? I've lived here my entire life and nothing has changed." What can Alabamians do to help turn the corner, Joyce?

Joyce Vance:

Well, Amanda, I think I'm probably a lot older than you are. When I first moved to Alabama in the late '80s, it was a solidly Democratic State. Every State wide elected official was a Democrat. Then, that shifted in the late 1980s and the early 1990s. Alabama's senior Senator Richard Shelby, who is now a Republican, was actually a Democrat back then. He changed parties as the State shifted. Republicans gave voters in Alabama a compelling vision that was consistent with the values of Alabama voters and Alabama voters voted for them.

Democrats need to do that now. I think there is an opportunity for Democratic leaders in this State to come back with a new vision, a fresh vision, and some of the wounds in Alabama were self-inflicted. Many of the Alabama leaders in the State House, at least in the legislature, ultimately got caught up in corruption scandals. Those days are our past and there are some new strong leadership in the Alabama Democratic party, but they need to get into the ring and do get out with vision, with ideas.

I think this is really paradigmatic of what we're seeing on the national stage. Voters want ideas and it's not just having good ones, it's figuring out how to deliver them to voters and let voters hear you. That's what Alabama Democrats have not yet done, but I'm internally optimistic and I think that that time is coming.

Kimberly Atkins:

All right. For our final question that comes from Panda Chronicle, it is, "Can an employer require an employee to be vaccinated as a condition of employment, or is that a no-no? Can they ask when a person is applying for a job or would it be considered discrimination? It doesn't make a difference if the job entails working with the public." It's a good question.

BARB MCQUADE:

There is a Supreme Court case from the early 1900s that said that the government can require everyone to get vaccinated. It is not a violation of civil liberties. So, that was, I think, relating to small pox. But with regard to this one, I know that many organizations have refrained from going so far as to mandate it, like the military and others. But private organizations, it would seem to me, would not have such a limit.

Joyce Vance:

There's a potent anti-vaccer movement in this country that has ensnared some relatively high profiled people. So, part of the issue here, and I think Barb is absolutely correct about the law, will be the Biden Administration's efforts to take the politics out of public health, to convince people that getting vaccinated is a positive idea. There will always be exceptions for people who's medical conditions necessitates and some religious exemptions. But going hand in hand with what businesses can and should require is also this notion of making vaccination palatable to most of the American public.

Kimberly Atkins:

Well, thank you all for listening to #SistersInLaw with Joyce Vance, Barb McQuade, Jill Wine-Banks, and me, Kimberly Atkins. Don't forget to send in your questions by email to [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com), or tweet them for next week's show using the hashtag sisters in law. Please support this week's sponsors, Policygenius, Helix, and Cameron Hughes. You can find their links in the show notes. To keep up with us every week, follow #SistersInLaw on Apple podcast, Spotify, or wherever you get your pods. Please give us a five star review, and we love reading your comments. See you next week with another episode #SistersInLaw.

BARB MCQUADE:

... we are explaining plea agreements and the fact that the judge has to accept it, a great example of that-

Speaker 5:

Breaking news, Michael is calling. According to the New York Times-

This transcript was exported on May 18, 2021 - view latest version [here](#).

Jill Wine-Banks:

Sorry. Do you like my phone ring?

Kimberly Atkins:

Michael is calling. Hi, Michael.

Jill Wine-Banks:

According to the New York Times Michael is calling.

Kimberly Atkins:

According to the New York Times.