

Jill Wine-Banks:

Welcome back to #SistersInLaw. I'm Jill Wine-Banks. This week we'll be explaining how the Department of Justice is once again, flexing its civil rights enforcement muscles. We'll also look into the case of the Snapchat cheerleader and give you the dirty and Rudy Giuliani's legal woes. As always, we'll be answering some of your questions at the end of the show. Well, before we get to all those subjects, what do you all think about having seen two women sitting behind the President when he addressed both houses of Congress?

Kimberly Atkins:

I thought that that was great, it was really something. It shows you progress, it's too long and coming. But that women are finally occupying the top positions, if not the top position but many of the top positions in government. Just a couple of things. One, particularly for Vice President Harris, I saw on Twitter of photo. A juxtaposition of a photo taken of her walking into the House chamber. I believe it was taken by Frank Thorp at NBC of her striding in and it was juxtaposed the Norman Rockwell painting of Ruby Bridges as she was walking into the desegregated school. It just shows a trajectory of how far women of color have come, in particular. I found that was very moving. I thought about another times in history, it's beyond politics, it shouldn't be partisan. I remember when Condoleezza Rice became Secretary of State. I agreed very little on policy reasons with her positions. But at the same time, when she reached that position and she was the chief diplomat for the United States to the rest of the world, there was such a sense of pride in me that position was held by a black woman.

A black woman, who grew up poor in the south. Who was whether I agreed with her or not, by all means, intelligent, hard-working, concert pianist, who's fluent in Russian. Just what an extraordinary story and now she is the face of America to the rest of the world. That moment gave me chills, even though I didn't agree with anything that she said. So I think that this is a moment that everybody, regardless of your politics, should be able to embrace and celebrate.

Jill Wine-Banks:

What about what President Biden said in acknowledging this? Did anybody else get chills listening to it?

Joyce Vance:

I really did. It was wonderful the way he stopped and took advantage of the moment to point out what was happening. Then a couple minutes into his speech, he was talking about policy goals. He said, "I'm asking the Vice President to lead this effort because I know it will get done." I thought that was a really nice moment too. This acknowledgement that there's so much competence and so much leadership in Kamala Harris. Then seeing her with Nancy Pelosi. What it meant to me, and I hope my daughter to have this takeaway too. I've got a daughter who's a college senior. I hope it means she can do whatever she wants to do. As Nancy Pelosi says the limit is beyond the sky. The sky is no longer the limit. Women are full partners in governance but in everything else in our society.

Barb McQuade:

Yeah, I thought the whole thing gave me chills, too. In fact, they had me at Madam Speaker. That I actually asked everybody in my household to be quiet for a minute because I so wanted to hear that. I know we've heard that before when Nancy Pelosi previously served as Speaker of the House. But the Sergeant at Arms walks in to announce the arrival of the President. Madam Speaker, the President of the United States. I think that is so significant. To see them both up there, gave me a lot of pride. I saw

an editorial cartoon the next day that had the two of them standing there, whispering to each other, two down, one to go. So we're not quite there yet until the day we see a woman standing in the President's spot. But I give Joe Biden a lot of credit for having the self-confidence to surround himself with women, people who are highly competent. I think it is a credit, not only to them but to him.

Kim, that image of Kamala Harris striding through the rotunda of the Capitol that you mentioned, also gave me such pride. I've made it my wallpaper on my cell phone because I just love that image. It's especially poignant I think knowing that just a few months earlier, that was the place where we had these white nationalists storming the Capitol, trying to upset our democracy. To me, it was not only a symbol of women's empowerment but of democracy prevailing. That this is the certified duly elected vice president, who has retaken ownership, and the power of that place.

Then just that idea of representation and how important it is. I think it's important to our daughters as well as to our sons, to see women as full partners in democracy in the world. I can remember when one of my sons was five years old. It was during the time that Jennifer Granholm was the Governor of Michigan, the first woman governor. She was going to speak at the Democratic National Convention. I wanted to watch it, I wanted my kids to watch it, so I had gathered them around the TV set. They all kind of knew who she was, we'd met her. She used to be an Assistant US Attorney in our office. So they knew her a little bit, so they knew it was a big deal to watch, to give this very prominent speech. As we were waiting for her to speak, there was a prior speaker who was still finishing up. My five-year-old son asked, "Who's that guy?" I said, "That's Ed Rendell, he is the Governor of Pennsylvania. He said, with all seriousness, "You mean boys can be governors too?"

To me, that was such an eye-opening moment of we only know what we see. So for kids to see women standing behind the President, I hope one day standing as the President. As you say, Jill, the sky's not the limit, beyond the sky's the limit. So this representation is really important I think for young people. You hear to be it, you have to see it. So I thought it was great that we got a chance to see it.

Joyce Vance:

Well, this is exciting, Barb.

Jill Wine-Banks:

It was powerful.

Joyce Vance:

Barb, I look forward to working on and donating to your presidential campaign down the future, so that women can finally get there.

Barb McQuade:

Someone someday will be that woman, I look forward to voting for her.

Jill Wine-Banks:

I don't think it'll be that far off. But in the meantime, there are some women at the Department of Justice who are going to be helping the Attorney General Garland in the civil rights area. I think now it'd be a good time to talk about that. So Kim, do you want to start us off on that subject?

Kimberly Atkins:

Yes, absolutely. It was a big week for the Department of Justice this week. With Attorney General Merrick Garland and the women that you talk about on some civil rights issues that are moving forward. First, hate crime charges were filed against the defendants accused of murdering Ahmaud Arbery in Georgia. That horrific video that we saw last year of Ahmaud Arbery while he was out jogging. He was ultimately followed and shot by three individuals during that jog. They were already facing murder charges but they are now facing federal charges of hate crimes. Also, the Attorney General announced that there will be a pattern or practice investigation into practices at the Louisville Police Department and local government. That is in part in response to the shooting of Breonna Taylor in her home. Watching these and as you said, Jill, instrumental in these cases are the newly installed women at the Justice Department, including Vanita Gupta. Pam Karlan is in charge of the civil rights enforcement in some of these cases. Of course, we're still waiting for the confirmation of Kristen Clarke, who will lead the Civil Rights Division once she is confirmed.

But these cases coming the week after we got that verdict in the George Floyd case, we talked a little bit about that. About how that felt good but it certainly was necessary but insufficient. In terms of doing things like rebuilding trust in communities that have seen this sort of violence from police. To me, to see this movement from the Federal Justice Department, which is such a departure from what was done in the previous administration. Seeing Attorney General Merrick Garland himself come out and talk about the importance, for example, of these pattern or practice investigations in places like Louisville. Praising the ongoing investigations that are going on in Minneapolis and other police departments. Other local officials who want this help from the Department of Justice to fix the problems that they have in their policing department. How it is important, not just for the communities but for police themselves, for everyone to feel safe.

Really made me feel for the first time in years that the Justice Department understood the importance of this. Merrick Garland himself talked about trust and I wrote a column about it this week in the Boston Globe. About how that trust is so important to restore and he seems to know that. I remember him during his confirmation hearing, he talked about himself. His parents coming to the United States, being immigrants who were persecuted, and fleeing that. How the United States welcomed them and gave them a chance at the American dream. How that influenced him and how that's why he wanted to do the work that he is doing. It seems that he is on the right path to that. The proof is in the pudding, this is still early, and this won't do it on its own. But it's such a change in tone from the top. I was really skeptical when he was nominated. I think we talked about this before, I wasn't sure that he would be the civil rights warrior that I thought. Given everything that was happening was necessary at the top of the Justice Department. But I think between him and Vanita Gupta and the other people who are at the Justice Department, that we are turned in the right direction.

I want to talk a little bit more about these cases. Barb, the charges in the case of Ahmaud Arbery, where Gregory McMichael, his son, Travis McMichael, and Roddie Bryan were charged with federal hate crime charges. Now, they're already facing murder charges in Georgia. Talk a little bit about what this federal hate crime is and how federal charges and state charges can be moving forward simultaneously.

Barb McQuade:

Yeah, I was really a little surprised and gratified to see these charges get filed because of the fact that there are already state murder charges pending. Which bring with it life in prison, even death-eligible. So some pretty steep penalties already there. But I think really important to see this Justice Department demonstrating that it is back in business. So filing these charges against the father and son, Travis and Gregory McMichael, and their friend Roddie Bryan. With attempted kidnapping, firearms offenses, and

civil rights offenses. There's a federal civil rights crime that makes it a crime to use force to willfully injure or interfere with anyone because of their race or other protected demographics. When they are participating or enjoying some sort of benefit service program or facility that's administered by a state. So here, the indictment alleges that he was simply using a public street when they attempted to kidnap him and ultimately shot him to death. When you think about what was happening there, they suspected that he had been involved in some break-ins in the neighborhood earlier. There's no evidence to tie into that first.

But even if, in the unlikely event that were true, think about what they're doing here. They are taking the law into their own hands and trolling around, looking for a guy. The black guy who shows up, they've got their gun, and they try to falsely imprison him and ultimately, shoot him.

Kimberly Atkins:

It's worth noting that Gregory was a former police officer, he was not a police officer at the time that this happened.

Barb McQuade:

Yes, right.

Joyce Vance:

He was a failed police officer, in fact. He had resigned after failing to comply with his firearm certification in prior years. So there's some indication that he had problems while he was a police officer too.

Barb McQuade:

Well, in this particular statute does not require that the perpetrator be a police officer. There are some statutes that do. That say when you're using the color of law or authority of your badge, there are certain things that are criminal. This is one that applies to anybody who deprive someone of their civil rights by injuring them while they're using a public street. As you said, Kim, it's a little interesting. How does it work when you've got state and federal charges? So ordinarily, there is something that Justice Department called the Petite Policy. That doesn't mean it's a small policy or diminutive in any way, it comes from a case of Petite versus the United States. The core part of the law is that there is something called the Dual Sovereignty Doctrine. Which says that it is not a violation of double jeopardy to be prosecuted for the same conduct in the state and then by the federal government. That because they're separate sovereigns, with separate statutes, they could each, in theory, prosecute somebody in the state and in the federal government for the same conduct.

But the policy says ordinarily, we shouldn't do that. Ordinarily, we want to make sure that we use scarce resources as efficiently as possible. We don't want people to feel the burden of defending themselves in multiple jurisdictions for substantially the same conduct. We want to promote coordination and cooperation between federal and state. So unless there is a substantial federal interest that is not vindicated, ordinarily, the default policy is for the federal government to stand down and allow the state to proceed in the interest of comity. That's not comedy with a D but comity with a T. So it is common to see the state go first in these cases and then the federal government might sit back and say, well, was the person brought to justice? Where they held accountable? Did they get a sentence commensurate with the conduct involved?

In some cases, though, where there is both a murder, a state offense, and a federal civil rights offense as there was here. It wasn't just that he was murdered, it was that he was murdered on account of his race. There was at the time no hate crimes statute in Georgia. He was deprived of his civil rights, his rights to peacefully walk and run down a street. So that is a federal interest that has not yet been vindicated, even if he is convicted in the state. So I think the government will be judicious in seeking penalties where there's already a state charge. But that is how the policy works. It's interesting you see this, Kim, from time to time. For example, Dylann Roof was someone who was prosecuted both in the federal government and in the state. At the time, one of the statements by I think it was the state charges. The person who filed the state charge in the case said, "We want to make sure we have a backstop in case these penalties ever go away by an appellate court, in sort of a belt and suspenders approach. This is such a serious crime, that we want to make sure there isn't some change in the law down the road that causes the release of Dylann Roof because we believe him to be such an egregious offender."

Interestingly enough, there has been reporting. I don't know if this has been confirmed yet. That the federal government is looking into the Derrick Chauvin case and may be considering federal charges there. They have been investigating but I don't know whether they'll wait to see what the sentence is in that case. Again, there is a separate federal interest that has not yet been vindicated, which is the deprivation of civil rights of George Floyd, in addition to the state court murder charges. So we'll have to wait and see what happens there.

Kimberly Atkins:

Yeah, and you're talking about that belt and suspenders approach and going back to what Attorney General Garland said about trust. In this case, in the murder of Ahmaud Arbery, the only reason that the public knew about it. That the people who were involved in this were free, the police knew who they were, they were aware. There was a video and the police were aware of the video. No charges were brought, these people were still walking free. It wasn't until one of their attorneys released the video publicly that the state stepped in and criminal charges were pursued. So you can understand why a lot of folks watching this, who may not be lawyers, may be glad that there are multiple levels of government looking into this and bringing charges.

So, Joyce, I want to move on to these pattern or practice investigations and consent decrees. These are things that went away in the Trump administration, under an attorney general from your home state. But now they're coming back. Talk a little bit about why that's important.

Joyce Vance:

Well, it matters a whole lot. So many of the changes that Jeff Sessions made at the Justice Department, it's good to see this one reversed. See the restoration of the process of using pattern and practice investigations. But let me say what pattern and practice investigations aren't. These aren't routine investigations that are conducted in large numbers across the country every year. They're very intensive investigations. I think we've talked a little bit about the Ferguson investigation in the past. Which was an intensive, all-hands-on-deck investigation into policing in Ferguson. The reason is that's what the pattern and practice process envisions. You're looking for systemic abuses. So DOJ isn't quick to open these investigations. I think that there may have been 14 in total during the Obama administration. That's because of the resource drain and the limited resources. In fact, one of the things that the George Floyd Act would do if the Senate will get off the stick and pass it, it would add additional resources. So that more of these investigations could be conducted.

By using them and Merrick Garland has already opened two of them. One in Minnesota, which I think is the one that's the furthest along. This will be a look at policing, not just from the police's point of view but from the community's point of view. To determine whether or not there are systemic abuses that can be addressed with a consent decree. That's a voluntary agreement between the police department and DOJ, which then becomes enforceable by a federal judge. So that if the city's commitment lags down the road, you can still have a guarantee that policing that is unconstitutional, will be reformed. I think it's interesting though, to note, Kim, we had talked a little bit about the shooting of Makiya Bryant in Columbus. The fact that the city there has asked DOJ to intervene. The request, it didn't come from the police department, it came from the mayor. He said something pretty interesting, I wrote it down, I wanted to read it. He said, "The city needs additional help because of "fierce opposition" to reform within the agency."

That's the tension here, police departments don't always see a need to reform. Just like what you guys were talking about in Georgia. Where the police department was aware of the situation that surrounded the death of Mr. Arbery. They still failed to bring prompt charges until it became a public issue. So this will be the problem. DOJ has limited resources, they can't do pattern and practice every place. Local elected officials may see the need for reform in some cities where DOJ doesn't investigate. Like all politics, this will have to be local. Ultimately, DOJ will have to get resources to police departments, where there aren't pattern and practice investigations, to encourage local action to bring about change.

Jill Wine-Banks:

Kim, I'd like to add something to what Joyce is saying because Chicago was a victim of Jeff Sessions dropping pattern and practice and consent decrees and not enforcing them. I'm hoping that we'll get back on track here in Chicago. But another thing that she said earlier, was about one of the defendants being a police officer and being a wayward police officer. Who had lost his certification because he was totally non-compliant with training rules and regulations. If we can go back to the policing reforms that are pending, there would be a national registry. So he couldn't then go somewhere else and get hired. That's a really important part that we keep forgetting about. I think transparency through consent decrees. The other advantages for consent decrees. Yes, it only deliberately applies to the particular venue where it was investigated. But it sets a pattern of better behavior, it sets a rule, it sets a model. Other jurisdictions can voluntarily make the changes that are recommended and mandated for Chicago or Minneapolis or anywhere else. We should pay attention to that because it has a multiplying effect. It's not just that you can only afford to do 14 and eight years, you have a much broader impact from those 14.

Kimberly Atkins:

That's absolutely true and Jill, I want to stick with you because one thing that struck me about Merrick Garland, when he was talking about these investigations and consent decrees. Is that he kept reinforcing that, this doesn't just keep the community safe. This helps protect police officers. Talk a little bit about how that is in that messaging, the importance of that messaging right now.

Jill Wine-Banks:

The messaging is very important. When you're in an environment where defund the police developed a life of its own, this says police matter. We need to protect the police as much as anybody else. The rules that come up from consent decrees give credibility. I can liken it to something I did when I was general counsel of the army, I oversaw some intelligence operations. I said I don't care if you're investigating

Americans overseas, I want the constitution to apply overseas. They, of course, resisted at first. But by the time my term was up, the intelligence community said you really did a lot to give us credibility. You made us comply with rules and regulations and constitutionality. The same is true here. Consent decrees can give credibility to the police and make them a partner with the community. Make the community accept them and value them. That will ultimately protect them, and also help them to solve crimes. People in Chicago, we have so many murders but people will not cooperate with them. But now, maybe they will.

Barb McQuade:

Can I just add one quick thing? We had a consent judgment in Detroit with the Detroit Police Department. I saw that there were some early chiefs who did not embrace it. The current chief, James Craig, did embrace it and reached full compliance. It was he saw it I think accurately for what it was. It was not an us versus them, it was an opportunity. He really valued it and he used that opportunity to transform the police department. So it's still not a perfect department but it's so much better than it was. They got expert advice on how to implement better policy, training, programs, systems, resources. So it is today a much stronger police department than it was before.

Jill Wine-Banks:

So, Barb, could you lead us in a discussion of Snapchat cheerleader? It's a great topic.

Barb McQuade:

Yeah, it's a little topic I like to call give me an F. The Snapchat cheerleader. There was a case before the Supreme Court, they heard oral argument on Wednesday involving the First Amendment rights of a student. She was a 14-year-old sophomore who communicated on social media. She was off school campus and outside of school hours, a student named Brandi Levy. She had been cut from her Pennsylvania High School varsity cheerleading team back in 2017. She was disappointed as kids are and she made the junior varsity instead of the varsity. So over the weekend, she's at a convenience store with some friends. They post a picture on Snapchat, the social media app, with the words and spelled out in full profanity, F school, F softball. She plays on a non-school softball team. F cheer, F everything. The Snapchat also included a photo of her and her friend with their middle fingers extended. So she posts it, which makes it visible for her friends on Snapchat, about 250 young people.

There's one important aspect of Snapchat for those who don't use it, I think. Is that the message in the image are designed to disappear after 24 hours, so they don't last. So she didn't intend for this to be out there forever. But as luck would have it, one of her so-called friends took a screenshot, and it ultimately got back to the cheerleading coach. Who suspended the student from the cheerleading team for a year for violating team rules and school rules. They have filed a lawsuit against the school district. The question is whether the First Amendment permits school administrators to regulate the speech of students when they're off-campus. It raises all kinds of really interesting issues because of the technology. So, Jill, let me start with you and ask, what are the arguments on each side of this case?

Jill Wine-Banks:

The First Amendment is so complex. But this goes back to a case from my era, which is a 1965 case called Tinker, where students wore armbands to school in protest of the Vietnam War. Again, the school punished them by saying you can't do that and expelling them. It went to the Supreme Court and the Supreme Court said unless you disrupt the school day, it is your right to have free speech. So the question here is now that we have social media, can you disrupt a school when you're not in school? It's

one thing to wear an armband to school but if you're wearing an armband on the street, clearly no one would think that's disrupting school. So is posting something on Snapchat disruptive of the school? I think the argument is going to be that it was disruptive. Although, the Supreme Court could decide this on two grounds. One is that free speech rules and you cannot punish for off-campus comments. That this off-campus comment did not disrupt the school and so it doesn't get to the actual First Amendment issue.

So I think those are where the arguments are going to... Do you want to win on the First Amendment or you just want to make sure that you win? She's probably already out of high school by now. She did finally make... She made the junior varsity team and she was mad about not making the varsity team for her softball as well. So I think those are the arguments that you're going to see. Is that it's not harmful to the school and that there is no First Amendment right. I think there is a First Amendment right and that we need to be teaching our students to be smart about what they say. But I wanted to say one thing, which is students need to be very careful because employers are going to be watching what they post on social media. People will not get jobs if they're posting pictures of them drunken at a wild party or saying things that are socially and politically unacceptable. So you should be careful about what you say and be willing to take the consequences because that's not a First Amendment right to get hired by somebody. So it could affect your life.

Barb McQuade:

F that, Jill? No. Kim, you covered the oral argument in this case for the Boston Globe. So you got a chance to observe the justices. Did they give any indications? Sometimes they expressed some skepticism with the argument of one side or the other. Did they seem persuaded by the schools or by Brandi Levy about their arguments?

Kimberly Atkins:

Well, first of all, I didn't really observe it because the arguments are being conducted telephonically right now in this pandemic. So I usually like to be in the court and watch these but you can't. It's also, so they go in order of each justice gets asked a bunch of questions. It's also why this argument, which was supposed to be an hour, went on for two. Which annoyed me a little bit because chief justice is not always a great timekeeper.

But yeah, so like many constitutional issues, right, during oral arguments, you could really see how uncomfortable all of the justices were at the prospect of drawing a hard line. When it came to where these students First Amendment's protections began and ended. Where not just how far outside of the schoolhouse doors. But in cyberspace, since this was being done on the internet, we know that none of our constitutional rules apply to the internet. They have not caught up to the internet, they may never catch up to the internet. To ask the US Supreme Court to draw the line of where in the internet these First Amendment protections go is something they are loath to do. Especially Justice Breyer, particularly, was like, "I don't want to come up with this test, essentially." I'm paraphrasing. Yeah, but it's... Yeah, go ahead.

Barb McQuade:

No, you go ahead.

Kimberly Atkins:



Well, it's really this issue. So as you said, generally speaking, if things... That the issues are okay, well, on the one hand, this was done outside of school but it affected school people. I'm not sure that's a strong argument. I personally think there's an adage, that bad facts make bad laws. I don't think that this is a great set of facts for our case to really examine the extent of First Amendment protections. There are so many things that issue. First of all, it's not involving school, like a math class. This is an extracurricular activity. I'm a former cheerleader. Look, full disclosure, I should have said that in the beginning.

I was a cheerleader in high school, I understand that not making the team would have been devastating. I didn't make varsity but if I didn't it would've been devastating.

Joyce Vance:

We need pictures, Kim, we need pictures.

Kimberly Atkins:

I will share something, I will.

Joyce Vance:

The girl you squeezed out is still-

Kimberly Atkins:

I will put a picture in the show notes.

Joyce Vance:

Excellent.

Barb McQuade:

Yes.

Kimberly Atkins:

To prove that I was, I did make varsity. But if I didn't, it would've been devastating, I probably would've sworn. But it was before Snapchat, so I would have been okay. Also, this issue of, well, what was the harm done by this rant? They may not have liked it. What, did she hurt the feelings of the coach and some of the administrators in the school? Is that enough to really punish her in a way for making this comment outside of school? I don't think these are great facts. But there is clearly an issue here, despite the fact that this case doesn't have great facts. I think that it's a winner for the student. But at some point, people will have to grapple with where these rules go out in cyberspace, particularly on the issue of cyber-bullying. Schools and administrations need the ability to really have clear rules when it comes to what people can say. What students can and cannot say on the internet when directed, particularly at other students when it is a threat of harm.

When it is something that is truly in the words of Tinker, disruptive. Even if it's coming through the internet from one's own home but that affects the school. I'm not sure that is this case but that is where the lines are being drawn. You heard people like Justice Kagan saying, "Okay, well, where's the rule? What if a student outside the school on the internet was making lists about the attractiveness of girls in the school? It might be lewd but is that something that enjoys constitutional protection?" Those are the lines that the Supreme Court doesn't like to draw.

So what I think is going to happen is they're going to say you know what? We address this in Tinker, the case that Jill talked about. We're going to remand this down to the lower courts because we don't think they did a strong enough determination of whether it meant that Tinker standard. Wash our hands of it, we don't want to do this. I bet that's what happened. But I'm wondering why they took this case up in the first place because I think the facts weren't great at all.

Barb McQuade:

Yeah, I think you made a very good point about the bad facts make bad law because the Supreme Court doesn't write the facts. Although, they do choose cases based on the facts when they think it tees up the question. Well, I think the difference and the reason they probably took it on is because it brings in this element of the internet that was absent in Tinker. I also think it is a very serious problem that schools are dealing with cyber-bullying. Where outside of school, students are talking to each other on Snapchat or Instagram or whatever it is. Making life a living hell for students who are in school. Although, there is a little bit of a big brother feel when the school starts enforcing rules outside of the school itself. The school culture I think can be affected by things that happen outside because internet communications can occur wherever the students are, including before and after school. So I think that's part of it that makes it so interesting.

Joyce, let me ask you about the thought about where we do this line drawing on the First Amendment. The questions that some of the justices were asking about would it matter if the message had been one like F the trans-students or F the black students? It happened on a weekend, at a convenience store, so they're not in school. So how should people go about thinking about where to draw that line for school administrators? It's so tricky.

Joyce Vance:

It's a really important question and since we're disclosing bias today, I'll disclose my bias. I started life doing a lot of First Amendment work. I was a lawyer in a big firm in D.C. and we defended a lot of defamation cases with constitutional implications. So I have a strong bias in favor of the First Amendment and drawing legal rules that protect our right to free speech. Even when it's speech that some people don't like, which is a really interesting point in this case. I wonder if we would be here if it had been a young man, who would use this kind of language? Are we just here because it was a woman who used this kind of language? But I'll set that aside.

The concern that we should have in this case, Kim is probably right about the outcome here. This is a great case for the Supreme Court to duck and send it back to the lower court to apply Tinker. Determine whether or not the speech was truly disruptive. That sets up a little bit of a problem here that we've discussed before. This notion that the law is not really fully up to the task of dealing with the problems that arise because of the internet. It's almost as though we need a revamping of our rules, of our laws. In a lot of areas that takes into account what's different about the internet and why pre-existing case law doesn't apply.

The real problem here is this notion that if schools can reach speech like this and if the school can call this speech disruptive. Then we live in an area where school administrations can decide to demonize certain kinds of speech. There's nothing, for instance, that would keep them from demonizing progressive political speech, speech supporting the Black Lives Matter movements. We've seen some precedent for that in society. We know that the Black Lives Matter protests over the summer in D.C. were met with a pretty strong police response. While the January 6th insurrectionists were in some ways treated very differently. There's nothing that says that we couldn't see that same sort of a

dichotomy with speech, where some speech wouldn't be threatening to school officials, other speech would be. That notion of disruption would be in the eye of the beholder.

That's why it's really important that we get new legal rules that give us more guidance than what we have now. Justice Thomas, actually is of the view that students have no free speech rights. He has a concurrence in a case called *Morris*. Where the discussion there was about whether students who advocated for the use of illegal drugs, whether that was protected free speech. His view was that the court shouldn't decide whether or not this speech was okay. They should just say students have no free speech rights and so we can do whatever we want in this sort of a situation. I don't think that there are four justices yet who will join him in that ruling. But it's important to think about First Amendment rights in the schoolyard and to take it seriously. Not to think that school administrations will always treat schools fairly.

So I apologize for the rant. I'll just say that one thing I think that Justice Thomas got right when he wrote in *Morris*. Was this notion that we right now have a legal standard where students have a right to free speech but there are exceptions. The only way we know what the exceptions are is when they get litigated. That kind of uncertainty isn't helpful for anyone. So I think it would be a great opportunity for the court to set standards for internet and speech in the context of schools. To protect students from bullying and from other true disruption. But to create a wide band of permissible speech. I'm just not sure this is the case that gets us there.

Barb McQuade:

Yeah, and Joyce, you raise an interesting question or an interesting issue about how the court tries to kind of retrofit these concepts. Like the one, Jill described in *Tinker* with the armbands in the 1960s into this digital world. It doesn't always fit, they try to use these little analogies. Analogies are great in the law when you take something simple to help people understand something complicated. But you often hear these things like think of a computer file like a file drawer. You're opening the drawer and you're putting the paper inside. It isn't exactly like that. The same thing with these ability to communicate through the internet. A very different phenomenon than when people are talking inside the school.

So it's also like there was the carpenter case that talked about the third-party doctrine when it came to cell site location information. It really kind of throws the doctrine out the window because of the ability to monitor somebody 24/7. The doctrine just didn't fit. So I think rather than trying to apply everything and retrofit it to the concepts that we've considered in the past. I think sometimes we need to reconsider how things work in the virtual world. Well, we'll keep an eye on that case, sometime this term, we'll look for a written opinion on that. I'll be eager to read that one.

Jill Wine-Banks:

Hey, Kim, have you tried Headspace?

Kimberly Atkins:

Jill, one thing that I have learned in this pandemic is how important mindfulness and meditation are, just for your own personal health. Especially to deal with anxiety and stress and things outside of our control. I have really found Headspace to be helpful in that. What do you think, Jill?

Jill Wine-Banks:

It is amazing and I'm using it like three times a day now. They have a wake-up, get yourself invigorated. Then sort of a short break during the day to relax a little, which is very helpful. Really does energize me

to get back to work. Then it's very helpful in going to sleep. I got some earbuds that I can use so that I don't disturb anyone, my husband at the same time. They talk you through basically relaxation and it really works.

Kimberly Atkins:

Yeah, I have insomnia as well and it's a wonderful tool to have. Headspace makes it easy to build a life-changing meditation practice with mindfulness that works for you anytime, anywhere. To give you a daily dose of guided mindfulness meditation and an easy-to-use app. Headspace is one of the only meditation apps advancing the field of mindfulness and meditation through clinically-validated research.

Jill Wine-Banks:

So whatever the situation, Headspace really can help you feel better. If you're overwhelmed, have trouble falling asleep, wild kids, Headspace has a meditation for you. Their approach can reduce stress, improve sleep, boost focus, and increase your overall sense of well-being.

Kimberly Atkins:

Headspace's benefits are backed by 25 published studies. 600,000 five-star reviews, and over 16 million downloads. You deserve to feel happier and Headspace is meditation made simple. Go to [headspace.com/sisters](https://headspace.com/sisters).

Jill Wine-Banks:

I want us to have 600,000 five-star reviews, too. But that's [headspace.com/sisters](https://headspace.com/sisters) for a free one-month trial with access to Headspace's full library of meditations for every situation.

Joyce Vance:

Earlier this week, DOJ executed search warrants at Rudy Giuliani's home and his office. Seizing multiple devices as well as the laptop of his assistant, who also received the grand jury subpoena. This is going to get interesting fast. A lawyer associated with Giuliani and Trump, Victoria Toensing's house was also searched. So Toensing was described as just a witness but Giuliani wasn't that lucky. It turns out that the execution of these search warrants has confirmed what I think we've all known for a while. Which is that he's the subject, maybe the target but certainly the subject of a federal investigation. There's a lot of reporting that says that the investigation centers on his Ukrainian connection and the work he did in Ukraine. Trying to get the government there to announce an investigation into Joe Biden's son, Hunter. Maybe that was because former President Trump believed that would help him win reelection. There's a lot of murkiness here about the full contours of the investigation into Giuliani. But the search warrants are pretty serious.

So Giuliani tweeted last night, he said these words. "The DOJ in late 2019 covertly obtained access to my iCloud and never notified me. They invaded the attorney-client relationship as we were defending against the phony impeachment. These prosecutors violated the law, not me. If again, nothing is done, you could be next." So, Barb, is any of this true? Did DOJ covertly access Giuliani's account? If so, why would they need to seize his electronic devices if they'd already taken a look at his iCloud as he puts it?

Barb McQuade:

Yeah, so this language is so interesting. It reminds me a lot of the same language that William Barr would use, covert, secret, spying. To suggest that there is something sinister afoot. In fact, the FBI and the Justice Department every day execute search warrants based on a finding by a judge of probable cause. You can't get these things unless a judge makes a finding based on a detailed factual affidavit that supports a conclusion that they contain evidence of a crime. It's either evidence or [instrumentalities 00:45:37] or fruits of a crime. So it is quite possible that in late 2019 DOJ obtained access to his iCloud account. That would only be done with a search warrant, issued by a judge, based on a finding of probable cause. Never notified me is quite possible, you can get a delayed notification upon a showing to a judge. To notify the subject would undermine the integrity of the investigation. So if you tell somebody, by the way, I'm investigating you. It could cause them to alter their behavior or destroy other evidence.

Then your other question. If they have his iCloud account and can see everything that's on it, why would they need his phone and his computer? The answer I think is encryption. There was a time just a few years ago when you could use a warrant to obtain everybody's messages. Oftentimes, you did go to the source, to the server, to the provider. There, you could get not only the messages that were out there but also, those that a person had deleted would still be served on the server. So deleted emails, deleted texts, and everything would be there. But now, the people are using encrypted applications, you can't get them from the service provider anymore. You need to actually get the physical phones or laptops or devices. To see what people are sending via signal or WhatsApp or any of those other kinds of things. So that would be the reason that in this search warrant that was just executed this week, they would need to have obtained those additional things. So could this happen anybody? Well, only if there's probable cause to believe that you too have committed a crime.

Joyce Vance:

It's really interesting that Giuliani doesn't seem to realize that if that happened in 2019, it would have been on Bill Barr's watch. Somebody in Bill Barr's DOJ would have signed off on that order. So some witch-hunt. Barb, let me ask you this question because this really troubles me. I keep seeing the searches at Rudy Giuliani's house and his office. In other cases, we see this, they're referred to as raids. Is characterizing this as a raid really accurate?

Barb McQuade:

No, that's another great. Thank you for that softball, Joyce. That's another one.

Joyce Vance:

I know but it's something that just rankles me every time I see it.

Barb McQuade:

Yeah, to my ear makes me cringe every time I hear it. It's right up there with spying and secret and covert and all these words. It is a search warrant, it is an authorized action that the law permits. Congress has enacted this ability and judges must sign off on it before the Justice Department or whatever law enforcement agency executed. So you have actually, involvement of all three branches of government with a lot of safeguards in place. So the word raid, I think we were talking about this with Kim, is in part, it's a short word that headline writers like. You can squeeze it into a headline. But I also think it's a bit of a loaded phrase that suggests government overreach. The vision of the jackbooted thugs with a battering ram barging down your door.

In fact, what usually happens is that these are done during daylight hours, that is the presumption. There is a knock and announce provision that says you have to knock and say we are here to execute a search warrant. A copy of it is given to the owner or the person at the premises. Then the law enforcement officer, usually is a large number will come in and they are permitted to search anywhere, where the items they are authorized to seek may be located. So it could be computers, it could be phones, it could be drawers, they will look in all of those places. But the idea that this is some covert raid, I think is trying to suggest government overreach that just isn't present.

Kimberly Atkins:

I just want to come in to talk about journalism a little bit. This is a good lesson for people in the consumption of journalism. As somebody who wrote for a tabloid newspaper, where we had like 300 words to describe a story. That's where you get words like raid because raid takes up a lot less space than federally executed search warrant. Also, in radio, the same thing to say raid takes a fraction of a second and saying execution of a search warrant takes like a second and a half. These are journalistic tools but you have to understand the meaning behind them. But I understand your frustration [inaudible 00:49:48].

Jill Wine-Banks:

I think it's so important to keep in mind that words matter.

Kimberly Atkins:

They do.

Jill Wine-Banks:

It's the same thing to call this a raid is the same as calling the investigation a witch hunt. It isn't and we need-

Kimberly Atkins:

I don't think it gets quite to that but I take your point.

Jill Wine-Banks:

It's deliberately, sometimes intended but it may be just for journalistic conciseness. But I think words do matter and it's important. I'm glad that Joyce brought that up so that we could make it clear to the audience. That this is nothing that was improper or unauthorized or illegal or covert. It was done pursuant to law. That's important to keep in mind.

Barb McQuade:

Something that's not always clear is that federal judges are not rubber stamps on search warrants. It's not like you take your agent and your affidavit over to the judge. The judge says sure, let me go ahead and sign. Judges read the search warrant, they often ask prosecutors questions about whether the probable cause is complete. I have seen judges reject search warrants and make you go back and do more work before they will sign off on them. There is nothing here that's automatic. I think sometimes that gets lost for people who haven't been at a magistrate judges house at midnight, trying to get an emergency search warrant. In a case where something comes up that impacts the victim safety. The

judge's saying I just don't think your probable cause here is complete. It is a really serious effort that prosecutors make to get this right and federal judges are the gatekeepers.

So that said, so prosecutors and investigators get their search warrants here. They go to Giuliani's house and to his office. But, Jill, you had pointed out to me when we were talking earlier this week, it's not like Giuliani didn't know he was under investigation. That something like this would happen at some point in time. So do you think that there's anything there for investigators to find in the searches? Why didn't Giuliani just delete everything?

Jill Wine-Banks:

Well or throw it into the ocean. I actually did some research today and talked to a forensic analyst of computer data from a company called TeamWorks in Chicago. She confirms that you need the device to break codes. That it is possible to un-encrypt something, a lot easier than it would be from the cloud. She also pointed out that no matter how good the wipe-out is and I think what you're talking about is that Giuliani knew this was coming. So he's not... Well, I don't know if he's smart enough but we can-

Joyce Vance:

We have to say, right, Giuliani is not exactly known for his tech-savvy. Isn't he like the master of the butt-dial?

Jill Wine-Banks:

Yes. There are many in that category, though. But yes, he certainly is not known as computer-savvy or phone-savvy even. But I think what's important is that even if he tried to delete these, forensic people can get back threads of it. Some of it is designed to show that not only eliminate the underlying data but to show no eraser. So it's hard but I was assured that they can do that. The other thing in that my friend pointed out to me, was that it's equally possible that he used the time available to plant evidence favorable to him. That it isn't just that he could have eliminated all the evidence that they thought they would get. But that he would actually make it look harmless by having put stuff on there. So I thought that was quite interesting.

He also may have acted much like Richard Nixon did. Was I'll never have to give this up, I'm home free. So he didn't think about doing it. So maybe it is still there. We can certainly hope because it would be very disappointing after a high-profile search warrant, to find that there was nothing there that helped. But I think we should also point out that a search warrant would be the last phase of an investigation. Once you do that, you've announced your subject and there's no more surprise element. So you wouldn't do it early on. This may have been something of, well, let's just make sure we have everything we could possibly have by doing it now. We already have enough evidence for an indictment or it could be that we need more evidence to indict. We don't even know whether one of those is true. So it could be that there will be an indictment quickly or given how many records you would find on a phone, it could be a long way away. As they have to dig up an unencrypted information. That takes time.

Joyce Vance:

Yeah, I think that's right. You always do as much as you can without letting your subject know that you're investigating, for all of the obvious reasons. Then you only go over like this at the point where you've done everything else that you can do. I was always astonished by the number of people and I hope I'm not giving away state secrets here. But you would search their phone or their computer and they would have a file called passwords. Once you access the file called passwords, you can then get into

all of the accounts that you otherwise, didn't have access to. You'd send a subpoena to the provider and they'd say, well, we can't get you into the account without a password, sorry. Suddenly, you have that, and it can advance the evidence that you have. Jill, so you raised these interesting options, deleting evidence or planting evidence that makes you look innocent. Could that be obstruction of justice? What do you all think?

Jill Wine-Banks:

I think both would be obstruction of justice. Of course, it depends on the timing. Did he know? We can go back again to Watergate, which was when Butterfield testified that there were tapes, there were many people who said why didn't Nixon burn them right that minute? If he had before a subpoena was issued, it would not have been an obstruction. He would have gotten away with it. Once the subpoena was issued, that is clearly obstruction of justice. So somewhere in that line, again, we're talking going back to the cheerleader. Actually, I wanted to say when you first asked Barbara about Rudy Giuliani's comments. I wanted to say where is that Snapchat cheerleader when we need her? I would have answered your question using language similar to the Snapchat cheerleader.

Joyce Vance:

This is PG-rated podcast, right?

Jill Wine-Banks:

Well, that's why I'm not saying it, I'm just referring to a Supreme Court case that uses that word. I'm not using it but it would have been very tempting. In the meantime, I forgot what I was saying. What was your question, Joyce?

Joyce Vance:

So could this possibly be obstruction of justice?

Jill Wine-Banks:

Right. It's a question of where the line falls. Obviously, if he knew that they were investigating him but there was no subpoena, maybe he could get away with throwing the phone away. It would be gone forever and they couldn't have done anything with it. But at some point, it becomes obstruction. Certainly planting evidence, I think could be because you're doing that deliberately with the intent to throw off the investigation. So planting evidence, yes, I can't see a time in that slippery slope that it wouldn't be obstruction. But destroying evidence might be something that might not be prosecutable as obstruction.

Joyce Vance:

But even without a subpoena if you did it contemplating an investigation, I'm not saying it would be charged. I just think that it really raises that possibility and it may be something that investigators are looking for.

Barb McQuade:

Well, we know his colleagues, Lev Parnas and Igor Fruman had been charged in late 2019. So I think that could be used to demonstrate that Giuliani was on notice, at least as of that time, that he was under investigation.



Joyce Vance:

That's a really interesting case, we'll just have to watch this for the future. But in that case, the charges involve federal campaign finance charges. It seems to be the consensus of pundits that what the feds are searching for here with Rudy is his failure to register as a foreign agent. So lots and lots of interesting possibilities here. But Kim, before we leave this topic, Giuliani son, Andrew had some real harsh words to say about the search of his father's home and business. Among them, he said, "If this can happen to the former president's lawyer, this can happen to any American." So is Giuliani entitled to more protection because he's the former president's lawyer?

Kimberly Atkins:

No.

Joyce Vance:

Are you sure?

Kimberly Atkins:

He's not entitled to more or less protection, he is a citizen. Now, quite to the contrary if given the fact that he is a high-profile individual, being the attorney for the President, I always like to use that in quotation marks. Just attorney for the president, there's so much involved in that. But given the high-profile nature, you can be sure that federal prosecutors and those getting this search warrant, crossed every T and dotted every I in the procurement of this warrant and the execution of this warrant. They knew that it would be heavily scrutinized. So that only confirms to me that there was certainly a basis to bring this search warrant. But if there is a basis for anybody, nobody is above the law, we've heard that before. So no, this isn't some case about any... Suddenly, this means that anybody is able to have federal prosecutors raiding them. He used the word raid.

Barb McQuade:

May I add, Joyce? That because he's an attorney, there is actually additional scrutiny that-

Kimberly Atkins:

Correct because of privileges, I was about to get to that.

Barb McQuade:

Go ahead, Kim.

Kimberly Atkins:

Well, it's the fact that certain information that they find, whether it's work product that he did in the course of being the president's attorney. I still put that in quotation marks, I still don't know exactly what this attorney-client privilege was. He seemed to wave it left, right, and sideways in so many ways. So I think it'll be hard for him to assert. But if there is work product that is the result of his work as Donald Trump or anybody else's attorney, that is protected under law. That cannot be used in a case against him. If there were communications that were a part of the attorney-client privilege, that cannot be used either. They have to go through all of this with a fine-tooth comb when an attorney is involved.

So you can count this is not some willy-nilly overextension of this rule. If this was executed in this way, that really shows you that there was sufficient smoke there to support the execution of this warrant.

Barb McQuade:

Yeah. I would just add that the DOJ approval process is very stringent when it comes to searching an attorney's office, for all the reasons you just described, Kim. The really sacrosanct privilege of attorney-client communications. So because of that, unlike an ordinary search, where an Assistant US Attorney can just decide that they're going to go to a judge and seek approval for a warrant. They have to get the approval of either their component head, either the US Attorney or the Assistant Attorney General for their own component. Then they have to go up to a higher level, the Office of Enforcement Operations, which is part of the Criminal Division. Make out the case why they need to search this lawyer's office. In addition to showing that there's probable cause, you also have to show necessity. That we have looked for other avenues of investigation and we can't get what we need without executing the search warrant.

Through a December memo that was enacted in the last administration, it also requires the filing of an urgent report to the Deputy Attorney General. So that there's an opportunity to put the brakes on if they think that's appropriate. So an awful lot of scrutiny went into this. So I would say that not only does this mean that he's being held to the standard of anyone else. I think he is being given additional protections of anyone else because he is an attorney. That before this step has been taken, it has been given a lot of careful review by people at the highest levels of the Department of Justice.

Kimberly Atkins:

Absolutely.

Joyce Vance:

Well, I bet we'll be discussing Rudy Giuliani in the weeks ahead. I don't think we've heard the last of this.

Barb McQuade:

Joyce, have you tried that Magic Spoon cereal yet?

Joyce Vance:

I was excited to learn about Magic Spoon cereal because it doesn't have sugar in it. So that's really helpful to me and getting my eating habits back on track as we all start to slowly come out of the pandemic.

Barb McQuade:

Yeah, same here. I've been conscious of the pandemic five or 10 or 15, as the case might be. So sugar-free cereal is absolutely something that's high on my list. As you said, Magic Spoon has actually zero grams of sugar, 13 to 14 grams of protein, and only four net grams of carbs in each serving, and only 140 calories a serving. So it's keto-friendly, gluten-free, grain-free, soy-free, low-carb, and GMO-free.

Joyce Vance:

We can announce the launch of a delicious new flavor, Birthday Cake. Birthday Cake Magic Spoon will be available in a special five-pack for a limited time early so get it while you can.

Barb McQuade:

For a family favorite, you can build your own box that you can customize. You thought Birthday Cake sounded good, Joyce. You can add cocoa, fruity, frosted, peanut butter, and cinnamon. Don't forget if you're listening from Canada, Magic Spoon now ships there as well.

Joyce Vance:

This sounds really good, I can't wait to try it.

Barb McQuade:

Go to [magicspoon.com/sister](https://magicspoon.com/sister) to grab the new limited edition birthday cake or a custom bundle of cereal to try it today. Be sure to use our promo code sister at checkout, save \$5 off your order. This offer is good anywhere in the United States or Canada but only when you use our code at checkout.

Joyce Vance:

Magic Spoon is so confident in their product, it's backed with a 100% happiness guarantee. So if you don't like it for any reason, they'll refund your money, no questions asked. Remember, get your next delicious bowl of guilt-free cereal and [magicspoon.com/sister](https://magicspoon.com/sister). Use the promo code sister to save \$5.

Jill Wine-Banks:

Let's go to some listener questions. If you have a question for us for next week, please email us at [sistersinlaw@politican.com](mailto:sistersinlaw@politican.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 as we will answer as many as we can there. Today, we have some very interesting questions. The first one is from Maureen. I'm going to address this to Joyce and Barbara. How does one get appointed as a US attorney? Do you have aspirations to return to that office or any other? Barb, do you want to start?

Barb McQuade:

Sure, I'll start. It really varies by the Judicial District but typically, the home state senators will recommend candidates to the President. The President will nominate that person to be the US Attorney. In each Judicial District, there are 94 of them around the country. Then the Senate will confirm those people. But now, how do you get your name into consideration? So in my state, the US senators actually post on their websites, a written application, and candidates may apply. From that list, they narrow it down to five to 10 candidates, who then get interviewed by a merit selection committee. They're about 25 people on the committee, they're all lawyers from throughout the Eastern District of Michigan, with a variety of practice types. They go through an interview process and then that group recommends to the senators who they should recommend to the President.

So I went through that process and I loved being the US Attorney. I would put my name back into consideration in a heartbeat. Except for the fact that I have a husband, who is an Assistant US Attorney. The last time around, he took a detail to the Northern District of Ohio and became what he referred to as a political prisoner in exile for eight years. I appreciated that support as a teammate but I could never ask him to do that for me again. So I don't have any plans to go back while he's still there but I loved that job. It was a really incredible opportunity to serve the people of the Eastern District of Michigan.

Jill Wine-Banks:

Joyce, can you give us your experience?

Joyce Vance:

So my process was remarkably like Barb's, which is really interesting. In North Alabama, we also had a merits committee that met. There were distinguished former judges, former US attorneys, and lawyers. It was a little bit like I would think a Supreme Court argument would be. They were firing questions at me from all directions, both on substantive law but also on issues of processing. Particularly of interest to them was how do you separate politics from prosecution? So we had a really fabulous and interesting exchange. They were interviewing me but also, some of my friends and colleagues at the same time. So rather than a sense of competition, which could have been an unfortunate part of the process there, we were all pretty supportive of each other. We knew that no matter which one of us was chosen, that the office would continue to be in good hands. That we would all continue to be there and work as a team.

But because unlike Michigan, Alabama did not have a Democratic senator at that point in time. Our nomination was actually made by the only elected official, who was a Democrat in the state of Alabama at that point in time, a congressman. That meant I also got to go and sit down with a couple of different groups of Democrats to talk about who I was. In each of those meetings, I was always very clear to tell people that I appreciated the fabulous food that they fed me. I ate a lot of fried chicken, a lot of really, really good Southern cooking. I would tell them as much as I appreciated the food and the fellowship, that they needed to understand that as a US Attorney, that I would commit to deciding cases based solely on the law and the fact. That I wouldn't be there to take calls from folks or do anybody favors.

Something that I really liked about the process was that people really understood that and that was actually what they wanted. They didn't want to try to curry favor with a future US Attorney. They wanted you to commit to being fair. They wanted to understand that you were about enforcing the law. Like Barb, I thought it was the best job that you could possibly have as a lawyer. Getting to be the US Attorney was something that was remarkably special, remarkably important. I have not put my name back in for the job because I am really excited about seeing one of the lawyers in the next generation of lawyers. The folks that we spent a lot of time in our office training and bringing those folks along. I'm looking forward to seeing one of them take over the office and run the US Attorney's Office for this administration.

Jill Wine-Banks:

Our next question comes from Teriyaki Rocky. She or he says I have a question about the census and gerrymandering. How exactly do these two things affect each other? How did the Trump Administration and the pandemic affect the process? Who wants to tackle that one?

Kimberly Atkins:

Yeah, I can start with that. It absolutely affected it, the pandemic affected everything. It really made it more difficult for people who didn't fill out census forms, to have... Usually, you have census workers or people contracted by the Commerce Department go out, go door to door. Try to get that information so that you can get the most accurate count, Certainly in a pandemic, with COVID, that was harder to do. So that affected the response rate, which affects the accuracy of the count. But much more importantly, the Trump Administration really engaged in a concerted effort to suppress the participation of immigrants in America and their families. In an effort to first try to put a question on the census. That ask people what their citizenship was, which not only would scare people who were in the country illegally, who under the Constitution need to be counted too. The Constitution provides that the census

is a total number of persons living in the country. This says nothing about citizenship. But an effort to... But if you are in the country illegally, filling out a government form would be scary, particularly if there's a question identifying you as being in the country as illegally. That was by design.

Then you also had an effort to exclude non-citizens from the census count by using data, which would further discourage people. Who were not only people who are in the country illegally but people in mixed households. Illegal immigrants, citizens, and people who are not of legal status often live in the same household. So that would discourage everyone in that household from participating in the census for fear that they would essentially be ratting out their family members and potentially getting them in trouble. This was by design, there's a couple of Supreme Court cases that the Trump Administration lost in their efforts to do this. In the facts, in the records of those cases, it was shown how the administration basically admitted that that was the idea.

The reason is congressional lines, which are beginning to be redrawn right now, are based on the census. So the fewer people who they think might give greater protection, give greater representation in districts that might go Democratic. They see that as a political advantage for Republicans. So they want to suppress those numbers, in order to draw districts that are more advantageous to Republicans. Remember right now, the House of Representatives is about as closely divided as you can get. We talked about the Senate. But it only takes a handful of seats in the next election to flip the House. So this was a really big issue for Republicans. That's why you're seeing that this has happened. So it's both political and an effect of the pandemic.

Joyce Vance:

There was a lot of litigation... Go ahead, Barb.

Barb McQuade:

I was just going to say one note of hopefulness on this town is in Michigan, wherein 2018, a ballot initiative was passed, an initiative called Voters Not Politicians. To require an independent commission to draw those lines. So in the last census, the results just came in, Michigan is going to lose one house seat. Which means all those Congressional Districts are going to have to be redrawn. We currently have some districts that are really ridiculous. No one would draw if writing from a clean slate that snakes through certain communities. To cabin black voters all within one district. So by pushing them all there, you can say, well, we're going to give them that district. But then they're going to be disempowered in every other district because they won't be part of it.

So I am hopeful that this new commission, which is a bipartisan commission. Will actually do things like they're supposed to be contiguous and honor county lines and natural boundaries and other kinds of things. So that you don't have these salamander-shaped districts. So there's some hope.

Kimberly Atkins:

This is particularly important since the Supreme Court declined to say that political gerrymandering was unconstitutional, racial gerrymandering is. But gerrymandering for the purpose of political advantage, the Supreme Court declined to give people a way to challenge that in federal court. So it's really important to have those independent commissions. The Boston Globe wrote an editorial advocating for that in Massachusetts and every state that they should follow the same approach that Michigan did.

Joyce Vance:

There's going to be an enormous...

Kimberly Atkins:

Go ahead, Joyce.

Joyce Vance:

Sorry. There's about to be an enormous tidal wave of gerrymandering litigation, a lot of it in state courts. In fact, the same day that the census was released, three lawsuits were filed. Minnesota, Pennsylvania, Louisiana. Based on the census data, new lines have to be drawn. So it's interesting, Kim, talking about litigation and the Supreme Court, which had really declined to rule in favor of the Trump administration on this. The final lawsuit was filed in Alabama. It was filed by the State of Alabama and by Representative Mo Brooks. You may remember him from the Trump rally on the [ellipse 01:15:32], the morning of January 6th. But essentially, the concern was that Alabama was going to lose a congressional seat. That actually didn't happen in the census. Some of the results were not what people expected.

But Brooks and Alabama sued the Commerce Department and said, "You can't count people who aren't in the country legally." That case wasn't decided before the election. Now, much of this litigation is moot. The litigation that's going to happen is going to happen on a state-by-state or maybe even a district-by-district basis. To determine how these lines get drawn. Make no mistake about it, it's going to be a political battle. Michigan is the dream state, where a citizen commission is at work. That's not the case in big parts of the country. I think we'll be watching this litigation like we've watched the litigation over the outcome of the election in a lot of states after the 2020 count.

Jill Wine-Banks:

I think both politically and legally, you are correct. In Illinois, our districts are drawn as snakes, as Us, as umbrellas. They are ridiculously drawn and the Better Government Association has spent a lot looking at what a fair map would look like if communities were recognized and drawn? It's really hard. As we discovered, you will end up having your favorite congressman lose their district. So it's a tough job to do but it does need to be done. We need to do it through independent means, not through politicians making these judgments.

But let's move on to our third and final question. I hope we have enough time to at least give a little brief answer to this. That comes from I Bring Receipts. If you could sit down with a SCOTUS justice, living or deceased, and discuss a certain case, who would it be and what case, and why? Barb, you want to start?

Barb McQuade:

Yeah, I would choose Frank Murphy, in part because he hails from Michigan. He was a graduate of the University of Michigan Law School. I was once an Assistant US Attorney in the Eastern District of Michigan, so I'm already quite fond of him. But I would want to talk with him, I find him a fascinating person. He was the Governor of Michigan, Mayor of Detroit, he had a lot of prominent jobs in Michigan. But most importantly, because he was the dissenting justice in the Korematsu Opinion. That was the case that upheld the internment of Japanese-Americans during World War Two. Such an interesting case. The idea was that there was a potential danger from Japanese-Americans while we were at war with Japan. Meanwhile, no such worry about Germans, right, or people of German descent, who look like us. Just the people who looked different.

He was the one who called it out in a dissent and said this is racist. What on earth are you talking about? This is an absolute violation of equal protection of the laws. At the time, it was a dissenting voice, a lone voice. I think we have come around to see that the foolishness of this opinion. In

fact, it was overruled in the Trump V. Hawaii case of just a few terms ago but it was on the books for a very, very long time. So I have read that one of the things that gave him insight into this issue was that he had once taught night school to immigrants in Detroit when he was a young lawyer. So he had an appreciation for the plight of the immigrant.

But I would love to just talk with Frank Murphy about all of his service. He was someone who said when asked, what he wanted his legacy to be? It was just that he worked and made government competent. I think that is a wonderful legacy for a public servant.

Jill Wine-Banks:

Joyce, do you want to give us your favorite?

Joyce Vance:

Well, like Barb, I have another case in mind, that's an abomination like Korematsu. That's Shelby County versus Holder. I live in Jefferson County, Alabama. Shelby County is just to the south of me. That's the case from which we have the ruling from the Supreme Court that eviscerated the Voting Rights Act. Really cut its entire teeth out and led to a situation where we have these new state laws, these new state practices. No longer subject to pre-clearance by the Justice Department, which means all sorts of voter suppression is going on unchecked. Ruth Bader Ginsburg wrote a really powerful dissent in Shelby County. We've talked about it before. She used what I think is the single best image that a judge has ever used to explain why a judicial ruling is wrong. She said, "Getting rid of the Voting Rights Act is like shutting your umbrella. Giving your umbrella away in the middle of a rainstorm because you're not wet yet." This notion we don't need the voting rights act because it's working so well.

What's striking to me in Shelby County, as the Chief Justice Roberts writing for the majority, maintain that we no longer lived in an era of voting rights discrimination. Those battle days in the deep south, where people were forced to guess at the number of bubbles on a bar of soap. If they guessed wrong, they couldn't register to vote. Those days were a thing of the past, according to the Chief Justice. I would love to sit down and talk with Justice Ginsburg, about whether she ever looked him in the eye and said, "Really, that's what you're going to hinge this opinion on?" I'd love to know what the exchange was like between the members of the court, as they were in negotiating the decision in that case. Certainly, the Chief Justice would have loved to have had a unanimous majority opinion. He did not get that. But what I'd really like to know is whether anyone ever called BS on what was so clearly an allegation and assertion in the majority opinion. That discrimination in voting was long gone. Whether there was ever a frank conversation about what was really happening.

Jill Wine-Banks:

Kim, who would you pick?

Kimberly Atkins:

Those are all great. For me, I would love to talk to RBG about so many things. But I'm going to go back a few decades prior and talk about the decision in Loving V. Virginia, which ruled that the law in Virginia banning miscegenation. A horrible word but interracial marriage was unconstitutional. It was a unanimous decision in favor of the Loving's, an interracial couple. But I would like to talk to Potter Stewart, who was the author of a concurrence in that case. No disrespect to Chief Justice Earl Warren who went through and determined that such a claim to deserve the highest level of constitutional scrutiny. That it was a violation of equal protection. I concur with everything that he said. But Potter

Stewart just got to the nub at it with a really short concurrence that said and I paraphrase greatly. You know what? This is essentially a law that says it's legal for one person to do this thing, which is, for example, marry a black woman. Illegal for another person to do this, to marry a black woman and the only reason is because of their race? You had me right there. That's de facto violation of the 14th Amendment. It felt I choose to read between the lines to say we didn't even have to go all the way through this. It should have been facially evident to anyone that this is contrary to our Constitution.

As a woman, a black woman, who was about to marry a white man next month and somebody who I just moved out of Virginia. This opinion, I've thought about a lot in recent weeks, especially given how recent it was. 1967, that was during my fiance's lifetime. Just to think that during his lifetime, he's about to do something that it was just until then, illegal to do. It shows that we've come a long way but we really haven't gotten here fast enough.

Jill Wine-Banks:

So for me, first of all, you have all set a very high bar of answers. I'm picking a positive case. I think Joyce and Barb, yours were both horrendous decisions.

Kimberly Atkins:

Mime was positive.

Jill Wine-Banks:

That we should be... No, I said Joyce and Barb, I'm going with Kim, I'm going with you on a positive good decision. That was Brown versus Board of Education. But the person I want to talk to is actually, a man who became a justice but who was a litigant in the case. That is Justice Marshall. I, of course, would like to talk to him because I think he is just an extraordinary figure in our legal history. I have met him at an American Bar Association event and his remarks were so moving, that I literally was at the dais crying, I teared up.

In that case, it was separate is not equal. Something that again today seems so self-evident, although there seems to be a push against that again now. I would love to be able to talk to him about how he developed his strategy for approaching that, in the same way, that you'd want to talk to Justice Ginsburg about how she developed her strategy for women's rights. I think he would be a fascinating and wonderful person to talk to about that case and others that are so important in bringing civil rights and liberties to all Americans.

Thank you for listening to #SistersInLaw with Kimberly Atkins, Barb McQuade, Joyce Vance, and me, Jill Wine-Banks. Don't forget to send in your questions by email to [sistersinlaw@politican.com](mailto:sistersinlaw@politican.com) or tweet them for next week's show using #sistersinlaw. Please support this week's sponsors, Headspace and Magic Spoon. You can find their links in the show notes, along with Kim's pictures of being a cheerleader. To keep up with us every week, follow #SistersInLaw on Apple Podcasts, Spotify or wherever you listen. Please give us a five-star rating, we love to read your comments. See you next week with another episode of #SistersInLaw.

Kimberly Atkins:

Yes, I was a cheerleader in high school. I probably should have disclosed that before we had this discussion about...

Joyce Vance:



Are you kidding? You should have disclosed that before we agreed to do the podcast, Kim.

Barb McQuade:

Like poms-poms and the whole deck, Kim?

Kimberly Atkins:

There were no pom-poms, we did not have pom-poms but we competed. Listen, we had to fight to be a sport, to be recognized as a sport. So I actually have a leather jacket because I did unlike our poor litigant in the Supreme Court case, I did make varsity. I have a leather jacket and we got some blow-back over that. In my school, it was not popular to be a cheerleader, we kind of got made fun of but it was a lot of hard work. We cheered for both women and men sports, which I thought was great. We competed, it was a year-round sport. I broke my tailbone.

I was doing a dive roll and I didn't tack in quite enough and I actually fractured my tailbone. I had to go to school with a doughnut. Talk about embarrassment, I had to go to high school carrying a doughnut to sit on for a month or so. So yeah, I was committed.

Jill Wine-Banks:

But everyone looks at your pictures because you're totally adorable in them.

Barb McQuade:

Hey, what was the best trick that you did, Kim? Did you have like a gymnastics routine or something that was your specialty?

Kimberly Atkins:

I was pretty good at jumping but all the other girls... I was in the one of the last years, they outlawed, they banned mounting, doing pyramids and stuff because of injury. But I was in one of the last years before they banned that. But because I was a little bigger than the other girls on the team, I served the crucial role at being on the base. So I was at the bottom of the pyramids when we were able to pyramid. But I was good at jumping and I was also the choreographer for our dance routines by the end.

Barb McQuade:

When they outlawed the tricks and the pyramids, Kim was quoted as saying F-cheer.

Jill Wine-Banks:

Which brings us full circle.

Kimberly Atkins:

Yes.