

Joyce Vance:

Welcome back to #SistersInLaw. I'm Joyce Vance. This week we'll be looking at a federal judge's order that is highly critical of steps DOJ took while Bill Barr was the attorney general to conceal how he handled the release of the Mueller report and whether any misconduct occurred. Then we'll break down the odds of a successful appeal by the defense in the Chauvin case. And we'll discuss whether the military is finally doing what's necessary to crack down on sexual assault in the services. And as always, we'll be answering some of your questions at the end of the show. But before we get into this week's topics, someone had a birthday this week, didn't they?

Kimberly Atkins:

Yeah, Jill.

Joyce Vance:

Somebody did.

Barb McQuade:

Jill, happy birthday.

Jill Wine-Banks:

It was a wonderful birthday, and I'm starting to embrace getting older. I mean, first of all, you have no choice, but second of all, it is very liberating in so many ways. I feel like I can do things with more wisdom and more efficiently because I have the experience. And I feel freer to talk to strangers. I talk to people in elevators, well, in days when I was in elevators before COVID, but I'm sure I'm going to get back to that. And people really appreciate if you say, "That's a great coat on you. You look terrific." It makes their day and it makes mine. So I think getting older is good. What about you?

Joyce Vance:

I guess I've never had a real problem about getting older. I sort of feel like I earned all of these wrinkles, so I'm pretty proud of them. You have to have that sort of approach with four kids, I guess. But I find that there's a certain comfort in getting older. You don't really have to worry about people's expectations for you, you just get to be who you are. And that's a pretty wonderful feeling. What do you think, Barb?

Barb McQuade:

I agree with you, maybe it's making peace with where you are in life. But I will tell you that when I was a younger person, I sort of thought that older people must dread getting older and counting down their number of days. But I find that each passing year, I'm a little bit happier, a little more comfortable in my own skin. I've got a little more wisdom and a little more self-confidence.

And so I think aging has been a great thing. Of course, at some point you run out of birthdays, but as Jill said, there's not a happy alternative. And so I've enjoyed getting older. And I think that's the wisdom I would share with my younger self is don't fear dread getting older, embrace it. And every stage of life has brought new challenges, adventures, opportunities and wisdom. And Jill, I really appreciate some of the wisdom you've shared here. The experiences you've had as a pioneering woman lawyer has been really opening for all of us. How about you, Kim? How have you dealt with the inevitable?

Kimberly Atkins:

It's really something. I remember when I was a little younger and saying to my mom, "I really look forward to getting to an age where you don't care what people think about you. You can be comfortable in your own skin. And you can be secure in your own accomplishments and in who you are without having to constantly justify that." When you reach that level, enjoy it. And I realized, especially coming out of this pandemic, that I, more or less, have reached that level. I really do.

I don't worry about things as much as I used to do. At the beginning of the pandemic when we were all at home doing our TV hits, I would stress about my makeup and wonder if I had to do all these things different. I wear so much less makeup now for TV hits than I did at the start of it, because I realized that's not what's important. First of all, I think I look fine. I think I look great. And-

Joyce Vance:

You look great. You all do.

Barb McQuade:

And you do.

Kimberly Atkins:

... Thanks. Yeah, I am secure in what I am talking about, so I don't need false eyelashes to give this legal analysis on TV. These are the things that I spent so much time thinking about before. And I used to sometimes, even I will admit, even at the start of this podcast, I had a little bit of imposter syndrome. Like, you three are so amazing and I'm thinking, "What am I doing here?" And now I don't have that anymore.

I have worked very hard. I am in the place that I deserve to be, and that all comes with the wisdom of being a little bit older. I fully believe now when I was younger everyone says, "You live life. You don't live life until after you're 40." 100% true. I'm here to tell you all that, that's true. I feel great, and I look forward to every birthday. And I hope, Jill, you had a wonderful one this week.

Jill Wine-Banks:

I had a fabulous one. And I want to say to our audience that we see each other, we're looking right at each other. We're together. So when we say Kim looks great, it's because we can see her and we know it's true. So don't think we're making this up, it is absolutely true. And-

Barb McQuade:

You look great too, Jill. You really, really do. I love your outfit. I can't wait till we're back together because I want to like see your outfits-

Jill Wine-Banks:

... I know.

Barb McQuade:

... your pins, see everything.

Jill Wine-Banks:

Of course, this is my nice top with my blue jeans, but ...

Barb McQuade:

That's great, that's on trend.

Joyce Vance:

There's nothing like in-person to make it feel real. But Kim, I think you're dead on the money when you talk about imposter syndrome. I think everybody has a little bit of that, I know I still have it sometimes. And as we get older, I think we're just able to slough it off a little bit faster. Now we'll turn to someone who really was an imposter, Bill Barr, the former attorney general, who was supposed to be the people's lawyer, but really was the president's lawyer. Jill?

Jill Wine-Banks:

That is certainly true about the imposter syndrome for me as well as everybody else on this podcast, probably, and still sometimes suffering that. But I think being with all of you gives me so much more knowledge, it makes me feel better about myself too. But I feel pretty good about what a judge did in connection with Bill Barr. There was a Freedom of Information Act filed by crew. And the Department of Justice said they would not turn over the Office of Legal Counsel memorandum that, supposedly, Attorney General Barr used as a basis for making his decision.

In her opinion, Judge Jackson made it absolutely clear that it was written together with his opinion letter, that his opinion letter was incorrect and deceptive and disingenuous, that they now are ordered to turn it over, although the turnover has been delayed. She ruled that it was not covered by attorney client privilege, and that it wasn't pre-decisional because Barr had already made up his mind. He knew that he was going to say that there was no case against Donald Trump, there was no evidence for a criminal conviction.

On May 19th, the Department of Justice by that date has to decide whether they will appeal this. Now, of course the case started under the Trump administration is now proceeding under the Garland administration at the Department of Justice, so we're going to have to look at what's going to happen. But let's talk more specifically about the actual opinion, because the words used in the opinion suggest that Barr might have lied to Congress and that there could be consequences to Barr. They don't spell out any consequences, I'm adding that. But can you tell us more about what the opinion says, and what the criminal and possible disbarment consequences could be for Bill Barr based on what this opinion finds?

Barb McQuade:

The opinion comes in a case, as you mentioned, Jill, a lawsuit was filed by a group called Citizens for Responsibility and Ethics in Washington. And they sought some of the underlying documents in an effort to provide transparency to the public about this process. You'll remember that on a Friday, William Barr made an announcement that Robert Mueller had completed his report and turned it in. And then later that weekend in about 48 hours, William Barr turned it around and declared that there was no criminal conspiracy with Russia.

And the special counsel had declined to reach a prosecutorial decision with regard to obstruction of justice. And so because of his inability to decide, William Barr decided himself and found no obstruction of justice. And so it turns out that there is some underlying material, some of which has been withheld under various privileges, the deliberative process privilege and the attorney client

privilege. And Judge Jackson has said that one of these documents must be turned over, that is a memo from 2019 that specifically addresses this subject matter prepared by the Office of Legal Counsel.

And I think there's a lot of interest in seeing what that is, what Judge Jackson suggests in her opinion, she's read it, is that when William Barr made these statements that he got this report fresh on Friday and he read it all weekend, and then he reached this conclusion, that the conclusion had already been reached, and that he was very disingenuous when he reported to Congress the results of his own review of the report, and then to the public, which was a lie that Donald Trump was then able to repeat and to spin as total exoneration. And so the Department of Justice may appeal that decision, but unless they do, that document will be released. And it will be really interesting to see what that has to say.

Jill Wine-Banks:

And what do you think the consequences are in terms of could Barr be indicted for a false statement to Congress? Could it be grounds for disbarment that he was so disingenuous that a court had to call him out?

Barb McQuade:

Yeah, I think all of those are options. I know Joyce has been exploring this, criminal charges for obstruction of justice or a possibility disbarment referral to the Office of Professional Responsibility or even the inspector general. I don't know, Joyce, if you have any thoughts about that.

Joyce Vance:

I think it's hard to assess right now because we don't know what's in the memo itself. It seems like it's something pretty bad. Judge Jackson, as a respected jurist, and for her to go off like this is surprising. It's very rare to see an order like this. She apparently felt constrained to not discuss the contents of the memo too deeply because she wanted to preserve DOJ's ability to rule on her order.

I think I'm going to sit on the fence here and say I'm not certain what will happen. But because Judge Jackson also calls out, they're not affidavit, but it's an attestation that some of the folks in the Office of Legal Counsel have to sign in connection with a ruling like this that asserts deliberate of privilege, I think her ruling calls them out for misconduct.

That will go to DOJ's Office of Professional Responsibility, OPR, which is an internal watchdog that looks into whether or not DOJ attorneys have committed misconduct in the course of a case. And so implicitly, OPR, when it looks at what went on and how this motion was handled, is probably going to have to weight into the role that the former attorney general played. And that may start this whole role of dominoes. If they find, for instance, criminal conduct. We don't know that it's there, but if they find it, they would then refer it onto a division that had the ability to indict.

Jill Wine-Banks:

And Joyce, I have another question for you because you have a lot of appellate experience. And so I would like to ask whether you think that Garland's Department of Justice should just turn over the document or should they ... Is there any grounds that have been set forth? I mean, Judge Jackson was pretty harsh in saying none of them had merit, but do you see any merit in the arguments that were put forward by the old Department of Justice for withholding this document?

Joyce Vance:

Talking purely in terms of what DOJ should do here, they should release the memo. The American people deserve the truth. Bill Barr was, I'm going to be very kind and say, disingenuous when he characterized what Bob Mueller found in his investigation. In fact, he lied and he permitted the president to tell a lie, which was that he was fully exonerated by the report.

That's not right. And there's no way that the American people can regain confidence in DOJ unless there's an open airing of the truth here. But to your appellate question, Jill, I suspect that there will be folks inside of DOJ who will want to protect institutional interests, who will want to make sure that the deliberative privilege is not eroded.

And the deliberative privilege is important, that's what lets lawyers give the attorney general their candid advice on difficult questions without fear that down the road it will be disclosed and taken out of context. The deliberative privilege really is important. Judge Jackson, more or less, eviscerates the notion though, that this memo is cloaked in the deliberative privilege. She characterizes it as post-decisional strategic advice, not as legal advice. And that may well mean that DOJ may decide just to roll over and give the memo up.

Jill Wine-Banks:

And Kim, because of your political acumen, I wanted to ask you what you think about politically what would be appropriate for the Department of Justice to do in this case, both in terms of turning over a document that, as Joyce has pointed out, the judge has completely eviscerated any argument about privilege, neither attorney, client or decisional. And whether it also could have consequences for any of the people named in it, not just, well, even for Donald Trump, in terms of if this memo was so phony and the announcement was so phony, does that have consequences?

Kimberly Atkins:

Yes. I think when it comes to turning over of the document, certainly if it can be shown that it did not fall in any of these privileges, I don't think there's a political issue with that coming out. In fact, I think politically, that gives the Biden administration to say, "Look, in the interest of full transparency, we want to get this information out there."

And that in itself won't look very political. The big question is, what you do next. And I think even if, I think there's a big risk here, even if it is shown that the former attorney general acted completely out of pocket, completely in a way that he was being the president's lawyer, in a completely impermissible way that he lied, perhaps lied under oath. I think even still it will be a problem for the DOJ to try, in any way, to try to prosecute him, Bill Barr, let alone Donald Trump in the end of that.

I know there's already a drum beat in some of the circles that I have heard for that to happen, for an investigation to be open, maybe even some sort of special counsel situation. But I think at this point I am more concerned about rebuilding trust within the Justice Department. And it will be very difficult, even if it is warranted, I think it will be very difficult for most American people, not folks like us who are attorneys, to draw a line and make a difference between the Justice Department going after, say, Hunter Biden for political reasons and the Justice Department going after Donald Trump.

I will speak for myself. I excoriated Donald Trump for saying, "Lock her up." We don't live in a country where we prosecute our political enemies. I think it will be very difficult for the Biden administration to make the case. Even if it is, I can't say this enough, even if there is a legal basis, it would be very difficult for the Biden administration and Joe Biden to explain why this is not a case of him going after a political enemy.

I think they have to step very carefully here. If they do take that approach, they need to cross every T and dot, every I, and be very transparent about the law, about the procedure, about the precedent that they are following in order to do that. But I just think it runs the risk of starting a politically explosive case that could really backfire on them.

Jill Wine-Banks:

I have more faith in the American public, I think. And again, this is the Pollyanna side of me, but-

Kimberly Atkins:

I hope you're right.

Jill Wine-Banks:

... I believe the difference between, "Lock her up," where there was no crime committed-

Kimberly Atkins:

I agree.

Jill Wine-Banks:

... is completely different than saying Bill Barr lied to Congress, and that's a false statement that is criminally punishable. And it certainly doesn't stop anyone from bringing charges to disbar him for that sort of behavior, which is clearly contrary.

Kimberly Atkins:

Yeah, I think disbarment would be very warranted. I think disbarment wouldn't fall into that category. I think a prosecution by the federal government would, even if warranted, I think it really would ... Can you imagine what congressional Republicans would do with this? What the far right folks who are still claiming the big lie will do with this? What Republicans across the country who are still very much in Trump world would do with that?

And I'm not sure that the interest that the federal government has is great enough to risk that. Disbarment, absolutely. I think he should have his law license taken away. I think wherever he is, I actually don't even know where he's a bar member, if it's DC or elsewhere. But I worry about it. I'm not saying that I don't think that criminal charges are warranted, I just think that it would be a political morass.

Jill Wine-Banks:

Bill Barr is a District of Columbia lawyer. He's admitted there last summer, 57 of DC's leading lawyers actually filed a Barr grievance asking that his license be yanked. And I suspect that they might reactivate, based on Judge Jackson's order, and that ultimately, Kim, you might be right. I mean, I think DOJ might actually be willing to go ahead if there's a good case here.

But perjury cases are tough. You have to prove that the statement is an important one and that the perjury is clear, not that there's any imprecision about it. Disbarment, even for Bill Barr near the end of his career would be a significant, significant punishment.

Barb McQuade:

Hi, Joyce, those glasses that you wear, are those Warby Parkers?

Joyce Vance:

They are Warby Parkers. In fact, every time you see me in glasses, they're Warby Parkers because I have three pair, and I have sunglasses too. What about you?

Barb McQuade:

Well, I tend not to wear glasses, I wear contact lenses. But I recently bought a pair of Warby Parker sunglasses. I have been meaning to get some as an homage to Ms. Gloria Steinem, the oversize aviator glasses, and I have been enjoying them very much. One of the great things about Warby Parker, as you know, is that you have the great try on at home option. They'll send you up to five pair that you can try on at home. Did you do that?

Joyce Vance:

Yeah, I mean, I did and it was so much fun, right? I could take pictures of myself in the glasses. I could send a screenshot to my daughter and ask her which pair I should try on. And I didn't feel any of the pressure that you sometimes feel in the store when you're picking a pair out.

Barb McQuade:

Yeah, they have the best boutique quality eyewear at a revolutionary price point.

Joyce Vance:

The glasses start at \$95, including prescription lenses, sunglasses, progressives and even bright blue lenses.

Barb McQuade:

Try Warby Parkers free home Try-On Program. Order five pairs of glasses to try at home for free for five days. There's no obligation to buy. They ship free and it includes a prepaid return shipping label.

Joyce Vance:

So you can try five pairs of glasses on at home for free, just like Barb and I did, and pick the pairs that you want.

Barb McQuade:

Go to Warbyparker.com/sil. That's Warby spelled W-A-R-B-Y parker.com/sil, or look for the link in our show notes. Well, Derek Chauvin remained in the news this week. We saw his lawyer file a motion for a new trial. Of course, we all remember that Derek Chauvin was convicted last month of second degree murder for killing George Floyd in Minneapolis. And I think one thing that's important to note is that motions for new trial are routinely filed and rarely granted, though it is a necessary step to preserve some of these issues for appeal.

And now today, we have the news that the Department of Justice has filed civil rights charges against Derek Chauvin and his fellow officers involving that incident with George Floyd in Minneapolis last year, as well as a separate indictment filed just against Derek Chauvin for an incident that occurred in 2017, when he allegedly struck a teenager with a flashlight and put a knee in his back. Let's talk about

that, maybe starting with the motion first. Kim, let me ask you, what are the arguments that Derek Chauvin's lawyer is raising about why he should get a new trial?

Kimberly Atkins:

Yeah. Derek Chauvin's legal team filed a motion to impeach the verdict, that's basically legal speak to set aside this verdict. And they assert about a dozen different claims, everything from the fact that he was deprived a fair trial, a jury misconduct, error of law, and that the verdict was contrary to the law. But I want to sort of focus on two things that have gotten a little bit of attention. Now, this wasn't specifically mentioned in the motion, but the motion appears to hint at the fact that a photo began circulating on social media showing one of the jurors named Brandon Mitchell at a rally wearing a Black Lives Matter T-shirt that said, "Get your knee off our necks."

Now, the jurors when they were being questioned at the beginning of the trial were asked if they had participated in any protests, anti-police violence protests. And this juror, Brandon Mitchell, said that he had not. And afterwards in an interview he said he did not believe that, that qualified as that. That event that he was at, he believed was actually a pro-voting rights rally. And that he believed that he answered that question truthfully.

Now, keep in mind, all of the jurors had to say that they believed that they could rule in this case, they would vote on this case as jurors in accordance to the law and the evidence that they saw. So they all said that. And I don't think that it would be very easy in any of these claims to try to overturn this verdict, but in this one in particular, I think it will be tough.

The precedent, if you want to get into the legal weeds, the Supreme Court precedent, this falls under a 1984 case called McDonough Power Equipment versus Greenwood, and it essentially said, "To invalidate the results of a trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." So I don't think this case is going to rise to the level of reversible error that would be necessary to set this trial aside.

Also, the attorneys for Chauvin claimed that the court failed to sequester the jury during the entire trial, which resulted in quote, "exposure to prejudicial publicity regarding the trial during the proceedings, as well as jury intimidation and potential fear of retribution among jurors." Now, this seems to me aimed at the comments that Judge Cahill made at the end regarding what Congresswoman Maxine Waters said at an event outside the trial, a completely different, saying that people would stay in the streets and they would continue to fight if there was not a guilty verdict.

We remember Judge Cahill admonished her in the court and hinted, and I thought really inappropriately saying that this may give the defense something on appeal. I don't think that it did, and I think that it was actually more prejudicial that he said that than whatever Congresswoman Waters said. But clearly the attorneys heard that, they picked up on that and they've put that in this. Again, it's very, very difficult, unless you can prove that a juror really fear for their lives, that they had been intimidated.

This usually happens on the defense side when maybe a defendant or a cohort of a defendant shows up at someone's house or sends them a letter and saying, "Hey, we know where you live and we're watching you," and really tries to intimidate them in their vote in a verdict. Nothing like that is shown to have happen here, so I doubt that this will amount to anything.

Barb McQuade:

Yeah, I remember watching when Judge Cahill gave that warning about the comments by Congresswoman waters. And I got the sense when he said that, that it was really more of a warning shot

to any others who might say other things than a genuine flagging of an issue for appeal, but an effort to deter maybe other people from making public comments. Jill, what do you think about these arguments? There is one other argument, I think, that they've raised on this motion for new trial, and that is the judge's refusal to force the passenger who was with George Floyd at the time, his friend, force him to testify or grant him immunity from testifying.

And he had invoked his fifth amendment right against self-incrimination and declined to testify. And the judge did not force him nor did he force the government to give him immunity to testify. That's another issue. What do you think is the likelihood of success of any of these issues, either in this motion for new trial or down the road on appeal?

Jill Wine-Banks:

Well, there are so many issues that are raised here, but they are all ... Kim used a word, she said, "Hinted at." And I think all of the issues raised are only hinted at, there is no specificity at all. Some of them seem like they are totally lacking in any supporting evidence or proof. There's no specifics. Some of them seem like they are a fishing expedition and speculation at best.

I would say that's one negative for them. The other negative is this is a motion for a new trial where the accusations are against, some against the prosecution, but mostly against the judge. That means that they're asking the judge to say, "I made big mistakes and I'm going to give you a new trial." Anybody in this audience listening knows it's not likely to happen. Will any of these issues rise to the level of an appellate case where once this motion is denied, they will appeal the verdict and the denial of the motion?

And will it be likely to be reversed? Will the judgment be reversed, the conviction? And I would say this is one case where I would feel pretty sure that the evidence is so overwhelming that the witness, the juror who says, "I was being honest. This was not a protest. It was for voting rights. It was a Martin Luther King celebration," I think that no appellate court is going to throw out this judgment.

So I feel pretty good about how this will turn out, whether it's on the issue of the circumstances surrounding it, the shepherd issue of publicity. First of all, the publicity here was all stuff that was actually admitted into evidence in the court. With the exception of perhaps the verdict, the award to the Floyd family from the city for damages, that wasn't in it.

But other than that, there was very little that was in the newspapers that wasn't introduced into the court. And unless they can show, I think Kim mentioned this as well, that unless they can show some specific juror was really changed his vote because of something he saw outside of the courtroom or because of some fear that was engendered by the prosecution, or by anything else that happened to affect them during the trial, this is going nowhere. I feel very good reassuring our listeners that this is a verdict that was bound to last.

Barb McQuade:

And Jill, just to emphasize the point you made about the juror, there is a right to a jury that is not biased against you. And the way we achieve that is through voir dire questioning. If a juror is to lie during that questioning, one could argue that a defendant has been denied a bias-free jury, and that could be structural error, which means reversal if it happened.

In the same way you can't be a little bit pregnant, you can't be a little bit biased. If a juror is biased, that can be a problem. But the question that he was asked was, "Did you," this is from the jury questionnaire, "Did you or someone close to you participate in any of the demonstrations or marches against police brutality that took place in Minneapolis after George Floyd's death? Yes or no?"

And he answered no, which is truthful. He did participate in a celebration of Martin Luther King's 1963 I have a Dream Speech in Washington, DC. And I think at that event, he happened to wear that T-shirt against police brutality. He didn't lie, he truthfully answered the questions. And so I don't think there's anything even misleading about that answer.

If they wanted to know about whether you participated in anything relating to the black experience, that's a different question, but I think that would have been dismissed by this judge as overly broad. That's not what this question is about. The question is about this case, George Floyd. And so I agree with you that I think that issue is unlikely to prevail. Well, let's pivot to the new development, which is the charges filed by the Department of Justice, federal civil rights charges.

And Joyce, let me ask you about that. Did it surprise you to see the federal government file charges after we have the conviction of Derek Chauvin? And we are awaiting the trial for his three officers, we get these additional charges today. What do you think is going on there?

Joyce Vance:

It did really surprise me, Barb. DOJ has a policy called the Petite Policy. And under Petite, DOJ typically will not prosecute a case behind the state government if it comes from the same sort of ball of wax. There is an exception. You can get a petite waiver if you feel like the state prosecution didn't fully vindicate the federal interest. But in this situation where there's a murder, a conviction and presumably a relatively long sentence that will follow, this was a surprising move to a lot of people who've done civil rights work in the department over the years.

And it's also interesting because of what's in the indictment, which we're all just reading fresh today. There are actually two different indictments. One is of Chauvin and the other three police officers, and it regards George Floyd's death. There's a separate indictment involving an incident that Chauvin was involved in 2017 involving a 14-year-old juvenile, who he hit. He did the same routine, putting his knee on his neck, and he's charged there.

But in the federal system, this isn't a murder charge, it's a civil rights charge under 18 U.S. code 242. I think Barb we've talked about this before, you did this too. I went straight to the jury instructions to see how in the Eighth Circuit, where Minnesota is, how they charge these sorts of cases. And what the government is going to have to prove is that the defendants deprived the victims of a right or a privilege secured to them by the constitution.

And that they did it willfully, that the defendant committed that act with a bad purpose or an improper motive. And it's a really interesting sort of inside of baseball conversation here about what the government has to prove. They have to prove that the defendant in essence intended to deprive the victim of an important constitutional right.

They don't have to prove that the defendant knew that it was a constitutional right, it's just that they intended to do the conduct that they were engaged in. If you think that sounds confusing as I try to explain it, it gets even more confusing when you're sitting in the jury box, and DOJ bears that burden of proof of guilt beyond a reasonable doubt. This indictment seems to signify that DOJ feels really good about its ability to prove that level of willfulness.

But I have a really hot take here. I could be completely wrong. Here's my hot take. I'd love to know what you all think. I suspect that this means that Chauvin's co-defendants, having seen what happened in his trial, believe that they will be convicted if they go to trial in Minnesota. They would much rather prefer to serve their time in federal prison than in state prison.

Federal prison is certainly not a luxury hotel, but conditions and programming is better in BOP than it is in most of the state systems. And I think that these indictments may signify a willingness on the

part of all of these folks to go ahead and plead guilty for a deal that permits the sentences to run concurrent, that means they could serve their state time and their federal time at the same time, but in federal prison. What do you all think? Am I all spaced?

Jill Wine-Banks:

Well, it certainly fits with what we heard about Chauvin considering a plea to a federal charge in order to serve his time in federal prison, but while turning down that option and letting the murder trial go ahead at the states, so that definitely would confirm your theory.

Joyce Vance:

I guess we'll just have to wait and see.

Barb McQuade:

If that was what was happening here, why not just have him plead to an information? Why go through the steps of filing an indictment? I'm not certain that your theory is accurate. It's certainly a plausible possibility. I think it's also possible that DOJ is just trying to go belt and suspenders on this. Kim raised when we were talking earlier about Dylann Roof.

In cases of extreme importance, Joyce you've mentioned the Petite Policy. There is an opportunity to waive the Petite Policy when there is some federal interest that has not been vindicated. And although some of this is the same conduct as the state court case, it's a different charge, and that is this violation of civil rights, which is different from the homicide charges that were handled in the state court system.

And so it could be that DOJ has at least hypothetical concerns about whether these cases stand on appeal, about the kind of sentence that Derek Chauvin and the other officers might get in the state system where the guidelines are something around 12 years. And in this way, they can ensure that there is a just outcome in the end for all four of these officers.

Joyce Vance:

Yeah. it's possible that all of these things are true simultaneously, and that by indicting like this, and I think DOJ's press release says that they obtained these indictments at some point, we don't know exactly when, back because they were actually unsealed today, which is why we're learning about them now. And so it may well be that DOJ is sending a signal to police officers across the country, and that would be an important development.

Jill Wine-Banks:

Kim, I have become a real fan of HelloFresh. It started because I wanted to save some time and not go to the grocery store during COVID, but it tastes so good that I am now a regular fan and will never give it up. What about you? Have you tried it? I

Kimberly Atkins:

I have and I think I am a convert as well, Jill, as well as everyone else in my household. I was a little skeptical at first, not everybody in my household eats a lot of meat, for example. But we recently tried the pork burgers and I thought, "Ah, that's going to be so heavy and it's hot out," they were delicious. They were late, they were flavorful. It was really a lot of fun, and the whole family, and I have a blended family of picky eaters, all really loved it. It's been really great.

And one really cool thing about it, Jill, is they offer over 25 recipes to choose from each week, from vegetarian meals to burgers like the pork burger, try those, and extra special gourmet options. But there's really something for everyone to enjoy. And all the recipes are designed and tested by professional chefs and nutritional experts to ensure deliciousness and simplicity.

Jill Wine-Banks:

And when you mentioned tested by professional chefs, cooking them makes you feel like a professional chef. It's very much loved in my family. And one of the best things about HelloFresh is that the meals are ready in 20 or 30 minutes or less, which means super fast prep, quick breakfast and lunches. I've tried one of their breakfast as well as their dinners. So it's perfect for your busy schedule, try it today.

Kimberly Atkins:

Go to [Hellofresh.com/sisters12](https://www.hellofresh.com/sisters12) and use code [sisters12](https://www.hellofresh.com/sisters12) for 12 free meals, including free shipping.

Jill Wine-Banks:

That's amazing. That's [hellofresh.com/sisters12](https://www.hellofresh.com/sisters12). That's [sisters 12](https://www.hellofresh.com/sisters12) and use code [sisters12](https://www.hellofresh.com/sisters12) for 12 free meals, including free shipping. HelloFresh, America's number one meal kit. Look for the link in our show notes.

Barb McQuade:

So there was big legal news in the military this week. General Mark Milley, Chairman of the Joint Chiefs of Staff said he no longer opposed recommendations by an independent panel and how the military handles sexual assault claims. The panel had recommended that they would designate independent judge advocates who would report to the chief special victim prosecutor in order to decide two key legal questions when these cases arise, whether to charge someone and ultimately, if that charge should go to a court martial, that would take it out of the chain of command within the military, which is what happens now.

Milley said, quote, "I was adamantly opposed to that for years, but I haven't seen the needle move." And he was referring to the really big problem of sexual assault claims in the military that for years and years nothing seems to have been done about it. And the fact that these claims had to have been made within the chain of command often involving the very people who were accused of it or are close allies of the very people who were accused made it very difficult for people to assert these claims.

I want to start out with Joyce. Explain to our listeners who may not understand this what this panel is suggesting, how to change the way sexual assault claims are handled in the future, how it's different from the way that they're handled now.

Joyce Vance:

This has the potential to be a real game changer in terms of the military culture and the tolerance of sexual assault. This is, I think, one of the most important developments that's happening for women in this area right now, because the military is so often a leader in society, pushing change, acceptance of trans people, permitting women into the military, but they've lagged in sexual assault.

Frankly, they've had a generational failure in this area and now there's a reckoning. Nothing is certain yet, the military is still waiting on input from the service chiefs. But if the proposed measure gets adopted, essentially what it means is that sexual assault prosecutions will get removed from the chain of command. If you're the victim, you no longer have to go straight to your commanding officer in a

situation where you're assaulted, and it will allow, it will establish, in fact, independent prosecutor's offices outside of the chain of command that would handle these sort of sexual assault allegations.

As with anything else, the devil is going to be in the details. The mechanics that are involved will really matter here. For example, does the victim still have to report directly inside of her chain of command or does she go to the outside party? And then when is her chain of command notified? It will be important to the military to put a process in place where they can still maintain good order and discipline while they're enforcing the rights of victims in this area.

I think that this is an important change. It makes it easier for victims to report without fear of retaliation or retribution. And what we're seeing, as you said, with the statement from so many military leaders, indicating that they've had a change of heart on how these issues should be reported and handled, we may be at a moment where the military can actually have a productive change here and maybe influenced the rest of society.

Kimberly Atkins:

Yeah, I think that's right. Jill was the first person I thought of when I heard this news and the statement that General Milley made. And I'm so glad that we have her here as the first woman to serve as US General Counsel of the Army to weigh in on this conversation. Jill, explain to us why this is so important.

Jill Wine-Banks:

There's a whole lot of background that I think needs to be put in place before we have a full discussion of this, because context does matter. And Joyce has already pointed out how much the military does make a difference in society. In terms of racial integration, they were really leaders. And so treatment of women is another area where they can and will be leaders, and set tones for how the rest of society deals with it.

This is a big difference because there has been ... I was on a Pentagon committee looking at sexual assault in the military during the Obama administration. And our jurisdiction specifically and vociferously excluded any consideration of taking this out of the chain of command. That was not something we could even look at. The fact that they are considering this is a major change. But I want to, first before I answer your question, talk a little bit about some of the really good things that the military has done, because it's not all bad.

There was a time when generals or commanders, not necessarily generals, but whoever the commanding officer of that unit was, was viewed as, "If I let this go forward, it's going to look bad for me because I didn't control my troops." And so there was a very much pressure on anybody reporting a sexual assault to not actually pursue it. The military developed a system then of restricted and unrestricted reporting.

You could make an unrestricted report, which meant it would go to consideration for a court martial, but you could also get help by making a restricted report. And you could get counseling, you could get moved to another base if you didn't want to be where your attacker was. There were a lot of options available. The military also developed a system of having victim advocates who helped the victim with everything from if they needed to go to a hospital for a rape test, they would accompany them.

They would get them new bedding if it had happened in their own quarters so that they wouldn't have to sleep there. They would help them get transferred if they want or help transfer the attacker, if that was what was desired. They also assigned a victims legal advocate. Because in the

military, so often alcohol is involved in these incidents, and the victim and the defendant are both drunk. And that is grounds for being dismissed from the service for conduct unbecoming.

So they have a lawyer who will advise the victim that if you testify, this is what could happen, and that's really going above and beyond. Of course the prosecutor is also the victim's lawyer because that's who's going to take charge of it. The recommendations that have been partially leaked, it is not final because it has been submitted to the secretary of defense. He has put it out for a 90-day period for military chiefs of each of the services to comment on it.

There's also been some misreporting. This is not taking it out of the chain of command and giving it to civilian authorities, it's giving it to another military authority, but not in the chain of command. It would probably be from the best I can determine from talking to people at the Pentagon, that it would be a separate and independent staff judge advocate who would hear these and make decisions about whether to prosecute.

And on prosecution, it's important to note that because of the publicity around this, because of congressional pressure and public pressure, generals are now authorizing court marshals for cases that the staff judge advocate has said are really not winnable cases. The acquittal rate on these trials has skyrocketed. That is bad for the victim who feels revictimized by having had a trial that results in an acquittal. "Why didn't they believe me?" the victim will often think.

And so we have to keep that in mind that it hasn't really been so bad. The reason for the change is that there is a perception that it hasn't been fair and the needle hasn't been moved. As a Secretary of Defense Austin said, "We haven't moved the needle at all." At one point, we, during my time on this committee, thought that the increased number of reports was actually a good thing because it meant that victims trusted the system enough to report it.

Now it's viewed as these numbers keep going up, there must be more rapes than we thought as opposed to that more rapes are being reported, and so they want to try to stop this. The big issue they have to deal with is things like what does consent mean and defining that in a way that matters to people. I think there's a lot that can be accomplished by changing the rules and trying a new way. It hasn't worked the old way, so trying a new way is something that Senator Gillibrand, Representative Speier and now Senator Ernst have been very supportive of, and I think that this could be the time when this happens.

Kimberly Atkins:

Yes. And that bill, which has bipartisan support, would take sexual assault claims out of the chain of command and they would instead be handled by criminal justice attorneys with relevant expertise rather than commanders who would often lack that kind of specific training. And Barb, I want to go to you. As a former prosecutor, talk about the importance of having that kind of expertise when you were prosecuting a case like a sexual assault case.

Barb McQuade:

Yeah. You want to have people who are familiar with the topic that is under investigation, especially when it comes to sexual assault. There are best practices and techniques for interviewing survivors, for example, so as not to revictimize them. There's a great book on sexual assault in institutions called *Missoula*, that was written by Jon Krakauer. And it's about the treatment of sexual assault on-campus at the University of Montana, and the way that the, everything from the university to the local police department and campus police, to the local prosecutor revictimized all of the survivors in that instance by assuming they were making it up.

So many of our rape laws are originated by men for men to protect men from false accusations of rape. And I think that our society is very slowly evolving toward a place of, in the first instance, when someone reports a crime, like every other crime, "My purse was snatched. My car was stolen," or, "I was sexually assaulted," we believe them and then we investigate, and we try to find corroborating evidence to understand what happened in that instance.

And so I think having that expertise and understanding those dynamics about the involvement of alcohol, and what is consent and other things is critically important. And Kim, I think the other part of this that is so important is the independence. As we heard Joyce and Jill talk about, when you've got somebody in your own command complaining about this kind of thing, there are some incentives to make it go away. It looks bad on the commanding officer.

And so to have someone outside of that chain of command independently looking at it, I think gives the objectivity that is necessary to go neither too leniently or too harshly on the person under investigation. It's the same kind of thing you see when there is, for example, public corruption in a municipality or police brutality. In the case of Derek, it was the attorney general who came in and investigated that case, or sometimes it's the federal government who comes in.

Because these aren't people we're working with every day, there can be that level of separation so that they can be reviewed objectively, and matters can be decided based on facts and law and not on prior relationships or how it might impact the operations of the organization.

Kimberly Atkins:

Jill, do you think this will be enough? I mean, the problem with sexual assault in the military, which is rampant and the problem with how to prosecute it has gone on for years and years, do you think that this change is enough?

Jill Wine-Banks:

I don't think this changes enough. I think the training is one of the issues that needs to really be addressed. There is now training fatigue in the military because they are trained at every step of the way. And at some point, according to our research when I was on the committee, people tune out. They're just hearing it too much. And they're also hearing things like one beer means you cannot consent.

So if you sleep with someone after one beer and wake up in the morning and regret it, you are encouraged to report that as a rape, because you couldn't consent because you had one beer. And as long as there are rules like that, it won't be taken seriously. I think there are a number of things that have to be done. There is a thing called the Sexual Assault Prevention and Response Office, SAPRO. And they do a lot of really good work dealing partly with just the trauma of what's happened, which is why they invented this restricted reporting.

My husband and I watched a series over the last few days called Unbelievable, which deal with this business of not being believed. I recommend the series, it's on Netflix. Terrific. And there's a book called I Will Find You by a friend of mine, Joanna Connors, that deals with the trauma of sexual assault, that we probably all underestimate what it means.

And her book is about a journalist who got raped while on an assignment. And someone who's highly educated and terrific, and you would think, "Okay, I can shake this off." Well, it's not so easy. And that's what the military has to deal with. Their age bracket is such, it's much like a college campus. There's going to be sexual misconduct. And so prevention is key, and that's why I say training is also an essential part in addition to making it easier to report.

Kimberly Atkins:

Couldn't we just all agree that there is no consent unless there is an enthusiastic yes?

Joyce Vance:

Jill, you're hair always looks really great when I see you on TV. And I know that like me, you've trying out Function of Beauty's product. How do you feel about them?

Jill Wine-Banks:

I love it. First of all, I took the quiz to get the right ingredients for what I wanted out of my shampoo. So they customize every order. And not only do you pick the ingredients if you ... For example, I wanted to avoid frizz and allow hair shine, but I also was able to pick a color and a fragrance. I picked no fragrance because I didn't want any, but I also was able to pick a color for the shampoo and not for the conditioner, so I can tell the difference in the shower. I don't have to guess what's in the bottle. I love that.

Joyce Vance:

That's one of my favorite features too. And I have to say, your hair really does look great. I'm looking at you right now and it looks fabulous. And I feel the same way. I really want my hair to be shiny and easy to blow dry without frizz. And I feel like Function of Beauty lets me do that. So if you don't love your hair, you should break up with your current hair care routine right now and try Function of Beauty instead.

Jill Wine-Banks:

Every ingredient Function of Beauty uses is vegan and cruelty-free, and they never use sulfates or parabens. You can also go completely Silicon-free.

Joyce Vance:

That matters a lot to me in my hair care product, and you can have it too. Don't buy off the shelf just to be disappointed ever again, go to [Functionofbeauty.com/sisters](https://functionofbeauty.com/sisters) to take your quiz and save 20% on your first order. That applies to their full range of customized hair, skin and body products.

Jill Wine-Banks:

That's [Functionofbeauty.com/sisters](https://functionofbeauty.com/sisters), to let them know we sent you and to get 20% off your order. That's [Functionofbeauty.com/sisters](https://functionofbeauty.com/sisters), or look for the link in our show notes.

Joyce Vance:

Let's go to some listener questions. If you have a question for us, please email us at sistersinlaw@politicon.com or tweet using the hashtag SistersInLaw. If we don't get to your question during the show, keep an eye on our Twitter feeds during the week, because we'll answer as many of your questions as we can. And make sure that you let us know where you're from. We're really enjoying seeing listener questions from as far away as Jerusalem and all over the United States.

It's really nice to know that you all are engaged with the podcast and are willing to share your questions with us. Our first question today comes from Donna, she asks, "Are we doomed forever in this

country because of the First Amendment to living with media outlets that broadcast verifiable laws packaged to look like news, or is there some legal remedy? What do you all think?"

Barb McQuade:

Yeah, I'll just start out by noting that the First Amendment doesn't protect lying as a flat matter. And we have seen that, I think, in a very interesting way in terms of legal remedies with some of the defamation suits that have been filed against media outlets, who reported lies about voting equipment, from some of these makers of this voting equipment like Dominion.

Claiming that fraud was a foot and they through filing civil defamation claims could force some of these media outlets, not only to pay damages, but more importantly we've seen some of them, Newsmax, Fox News and others have to issue on air retractions of the false reporting that was done. That is one interesting way. I don't think I would have thought of that or expected that before this, but it has shown a really effective way to really fight back, by private companies to fight back when their name is invoked in some of these lies that have been reported in the media, so I think that's a good example.

Jill Wine-Banks:

And it's not just retractions that have happened, Lou Dobbs was fired after the lawsuit was filed. I can't say for sure that it was directly a result, but it seemed to be timed exactly. He was one of the named defendants along with Fox, and Fox was sued for its annual profits, which is an amazing amount to be sued for, and really gets a defendant's attention when that's the amount. There have been a motion to dismiss files in the Dominion case, claiming that there was no damages, that they didn't prove that they were hurt. Based on the pleadings that I saw reading the complaint, I think they did state a good case and it's not going to be dismissed without a trial.

Barb McQuade:

And then of course, there's the whole social media angle of all of this, which is not governed by the First Amendment because platforms like Facebook and Twitter are all private entities, but we saw this week the Facebook Oversight Board ruled that it had properly banned Donald Trump when he was thrown off the platform. We'll see if that decision sticks. But there are different ways that people are responding to these lies.

Jill Wine-Banks:

There's another option, if I could just mention one more, which is the fairness doctrine. Many people say that should be brought back. The FCC, the Federal Communications Commission used to have a fairness rule, which meant that you had to give equal time and equal space to controversial issues. And that was done away with because it was viewed as interfering in the First Amendment rights of the broadcasters. But now you have one-sided reporting and lies, as we have seen, be perpetrated. There is some movement toward that, but the First Amendment may be an impediment to bringing it back.

Joyce Vance:

This is really a perplexing problem because anything that government does will be perceived as political. And although I think we're all objective, right? We have our own politics, but we can set them aside to look at a legal issue. And everybody knows that a lot of what's being peddled on Fox News can be backed. You don't have to look any further than Tucker Carlson going anti-vax at the time when the vaccine is so important to our country's interests.

But any effort by government to shut that down would be perceived as political and violative of the First Amendment. And ultimately, like so many problems in a democracy, this comes down to how well the public is educated about issues and how they react to misinformation. And we're living in this age where we're not very sophisticated consumers of the truth, and it'll be really important to focus on this as we look down the road by educating people to be more critical consumers of news.

Jill, I think I'm joining you in the Pollyanna club by saying that, that's a possibility because we are living in a dark time, and it's good to know that at least the defamation lawsuits present us with some form of remedy. Our next question comes from Mike. Mike asks, "Can you talk about the role that paid witnesses play in jury trials? Can someone make a career out of being a paid witness and testifying from trial to trial?"

Jill Wine-Banks:

I'll take a stab at that. Mike refers to them as paid witnesses, we in the industry refer to them as expert witnesses. And yes, there are many people who, I don't know if it's their primary source of income, but can make some lucrative earnings as an expert witness. But the reason that people are paid isn't so that they can deliver a particular opinion that's either favorable or not favorable to one side, but to provide their time in reviewing the material and forming an opinion, and then coming to court to testify, which can take dozens of hours to do so.

In many kinds of cases, you might see as we saw in the Derek Chauvin case, for example, we saw people who are experts on police practices who do training. We saw doctors and medical examiners. Now, sometimes it's people's jobs, but when it's an outside independent expert, they would testify and be paid. Now, if you're a prosecutor, you have an obligation to share that information with the defense so that they can cross-examine the witness about that.

And in fact, a savvy prosecutor will bring that out in the direct examination so that it doesn't come as a surprise to the jury and say, "Are you being paid to be here today?" And the expert will probably say something along the lines, "I'm being paid for my time. My rate is \$200 an hour," or whatever it is. "And I expect at the end of this, I will have earned \$20,000," or whatever it is. So it can be a fairly large amount of money. But their expertise, their time is a value. And I think in the court system, we recognize that. And as long as the jury knows that, I don't think there's any problem with it.

Barb McQuade:

Right. And there are legal rules in place to establish that someone is an expert. It is not the case that someone in a criminal trial or even in civil trials where I've used expert witnesses can just be bought off and paid to come in and say any certain thing. They have to establish their expertise in a matter.

I know in trials I've used them, people like forensic accountants in a case that involves claims of securities fraud or certainly medical experts in medical malpractice or other cases, where the details are very specific and you need someone with specific knowledge to come in and be able to look at the record, look at the evidence and give their opinion about what happened. I wouldn't look at an expert who is being paid suspect in any way, their expertise is valuable and that's why it's paid.

Joyce Vance:

For our last question, I've actually amalgamated questions that came to us from a lot of people, from Mark in Jerusalem, Israel, Janet in Amherst, Massachusetts, and Sally C.J. too. Let me ask the question this way to you all. What's the possibility that Rudy Giuliani, who now seems to be facing a whole host of

problems, got a pocket pardon from Trump? There's been a lot of speculation on Twitter about pocket pardons. Is that a thing? Could Giuliani really be sitting on top of a pardon?

Barb McQuade:

No, I'm just going to say before we get to the answers to that question, I know you'll probably hear it so I will say it now. It's Amherst, Massachusetts. The H is silent.

Joyce Vance:

Amherst. I stand corrected. Thank you.

Barb McQuade:

Go ahead, Jill.

Jill Wine-Banks:

I would have said it wrongly. What I was going to say is that I was very curious about that because I got a lot of Twitter questions about that from my followers as to whether there was a secret pardon of Trump, of Giuliani, of Trump's children. And I actually went on the website of the pardon attorney and communicated, and the bottom line is that it would be in a public document in their office files.

And I cannot believe that a reporter has not gone through that list. And if there was a pardon filed, it doesn't have to be publicly announced, but if it was there, it would have been found. So the answer is there's no secret pardon in advance for Giuliani or Trump or any of his children that we know of. And he no longer has the power to do it, it's just too late.

Joyce Vance:

Thank you for listening to #SistersInLaw with Kimberly Atkins, Barb McQuade, Jill Wine-Banks and me, Joyce Vance. Don't forget to send in your questions by email to Sistersinlaw@politicon.com or tweet them for next week show using hashtag SistersInLaw. And please support this week sponsors, Warby Parker, HelloFresh and Function of Beauty. You can find their links in our show notes. To keep up with us every week, follow #SistersInLaw on Apple Podcasts, Spotify or wherever you listen. And please give us a five star review, we love to read your comments. See you next week with another episode #SistersInLaw.

Jill Wine-Banks:

That is a great picture of you, Barb. Fabulous.

Barb McQuade:

Thank you. Well, I've come late to my admiration for Gloria Steinem. I certainly remember her from the '70s. But I was a little too young to appreciate her work in the women's liberation movement in real time, but I have since come to appreciate her work with Ms. Magazine and all of her efforts. And so as a tribute to Gloria Steinem, I choose to wear the oversize aviator glasses. I would love to invite her to come on the podcast anytime.

Kimberly Atkins:

Oh my God, that would be great.

This transcript was exported on May 10, 2021 - view latest version [here](#).

Jill Wine-Banks:

I think that would be interesting, why not?

Barb McQuade:

Anytime Ms. Steinem.

Joyce Vance:

That would be awesome. That would be great.

Barb McQuade:

It's an invitation to join us.

Joyce Vance:

And Barb, you look fantastic in those glasses. They are just-

Barb McQuade:

I feel very empowered. I feel very empowered with these glasses.

Joyce Vance:

... They're great.

Jill Wine-Banks:

So what are you going to do with them now that you've got them? I mean, you do look great.

Joyce Vance:

I think to be even more comfortable.

Jill Wine-Banks:

I don't know, walk around and boss people around.