

Barb McQuade:

Welcome back to #SistersInLaw. I'm Barb McQuade. This week, we'll be talking about the legal actions being taken against the Trump Organization, moving from civil to criminal, breaking down the possibilities for the January 6th Commission and looking at the role of stare decisis when the Supreme Court takes up abortion. And as always, we'll be answering some of your questions at the end of the show.

But first, big news for one of our sisters. Kimberly Atkins is getting married next week. Bravo. Congratulations. We're very excited about that. And so you won't be with us next week because you have something a little more important to do than record a podcast. But congratulations. And Kim, we thought we would begin this week by each of us giving you a little bit of advice about what it takes for a happy marriage.

Kim Atkins:

Oh, I love it. That's great. I love it. I love it. Thank you all so much. I respect you all so very much and so these words of wisdom is a lovely gift for me. I appreciate it.

Barb McQuade:

And I think these words of advice would apply regardless of the gender of your spouse, and so hopefully in addition to you, some of this advice can be useful to our listeners as well.

Kim Atkins:

Yes.

Barb McQuade:

Jill, how about... Let's start with you. You've been married the longest, I think, among the sisters. What advice do you have for Kim?

Jill Wine-Banks:

So I have been married for 41 years and it has been a delight, and I think my biggest advice is pick the right partner. You have to pick someone who is funny, and that's very important in a marriage, I think, is having a sense of humor and someone who's willing to be independent. That was an important one for me. And I'm sure, Kim, for you, it's going to be, is that you have your own life but then you come together and it enriches that part of your life.

But maybe the most important, the third piece, is to learn to listen, to really hear the other person. Sometimes you think you're listening but you're not really hearing what the real issue is. And it's sometimes hard to discern it, but it is a skill that you can develop and so really listening so that you're meeting the needs of the other person is really important.

Barb McQuade:

I'm sorry Jill, were you done? I wasn't paying attention.

Jill Wine-Banks:

Yes. Sorry about that.

Barb McQuade:

Jill and I should not be married to each other.

Jill Wine-Banks:

I was trying to be interesting but-

Barb McQuade:

You were very interesting, I just wasn't listening. Joyce, how about you? How long have you and Bob been married?

Joyce Vance:

Bob and I got married in October of 1988. I actually moved to Birmingham, Alabama for him.

Barb McQuade:

You're the Hillary Clinton of Alabama.

Joyce Vance:

I know. I guess it's sort of true, but Bob is very different from Bill Clinton.

Barb McQuade:

I hope so.

Joyce Vance:

And I've always been very grateful for his very even-tempered nature, and also the fact that Bob is not somebody who expected me to stay home and cook and clean for him, and that's a very good thing. He would have been disappointed had he expected me to clean. I'm a pretty good cook.

So we went out for Chinese food about a week before we got married and I got the greatest fortune cookie. And it's actually my advice to you, Kim. I've kept the fortune, it's still in my wallet. It said, "Keep your eyes wide open before marriage and half shut afterwards." And I love that. I try not to criticize. By nature I'm sort of a perfectionist and so it's important that for me to remember to let Bob be Bob, and if something is really bothering me for me to take care of it.

But marriage is... I think the most important thing, it's what Jill says, and for me it's just having a good friend. Especially after the last year, somebody that you're happy being stuck at home with for a year. And I suspect you've had a lot of that experience too, going into your marriage. That's what it's all about.

Kim Atkins:

Wow. That's great advice. It reminds me a little bit of what Justice Ruth Bader Ginsburg said, that sometimes in marriage it requires being just a little bit deaf.

Joyce Vance:

I think that's exactly right, yes.

Kim Atkins:

What about you Barb?

Barb McQuade:

Yeah, I'll share some advice with you, Kim. This is some advice I got from a law school classmate, Carla Brenham, who got married just a little before I did. And she said she got this advice from her mother, and I think it's great advice. You know that old line about never go to bed angry? She said, "Do the opposite. If you're angry and in a fight, don't stay up arguing about it. You're tired, you're emotional, you don't even remember what it is you're arguing about anymore. Just go to bed." Go to bed and chances are when you wake up in the morning, you're going to be looking at the problem with fresh eyes. You'll be rested. You'll be able to solve. If there's a real problem, you can attack it more rationally than just giving into the emotion and the fatigue, and chances are with a fresh perspective it might not seem like that big of a deal anymore anyway. And so go to bed angry is my advice to you, Kim. O even better, let's hope that you follow Joyce's advice and you don't get angry in the first place because you've got your eyes half closed and a little bit deaf.

Kim Atkins:

I was about to say, I need to find something to fight about so I can just start already going to bed angry and getting that in. I really appreciate this great advice from all of you and I am sad that I will miss an episode of #Sistersinlaw because it is a highlight of my week, but I am very happy that really about at the exact moment y'all will be taping, Greg and I will be saying our vows. And then when I return, I will be Kimberly Atkins Store. So we will look forward to that. I know I really am. And thank you all so much again.

Barb McQuade:

Well congratulations. We're very excited for you. Well, why don't we get into our first topic today? Kim, I think you were going to lead us through a conversation about the Trump organization and the news about the investigation that's going on there.

Kim Atkins:

Yes. So this week in big news, New York attorney general Latisha James announced that the civil investigation into the Trump organization had become a criminal investigation, which is big news. Now we know we've spoken about this before, that that investigation was looking into whether the Trump organization engaged in practices like essentially lying about their finances in order to procure loans or to get tax breaks or other things. So the news that it now also has a criminal aspect to it is in addition to the fact that the Manhattan district attorney Cy Vance has already been conducting an investigation into the Trump organization.

So Barb, I think it's a good place to start, is to explain the difference between civil investigations and criminal investigations and what this new chapter really means.

Barb McQuade:

Yeah, there are a number of differences between civil and criminal cases. And I'll start with perhaps the most significant one, which is the potential penalties in a civil case. If a person is found to be liable, then the penalties are limited to money damages or else something known as injunctive relief, which is an

order to do something or not do something. For example, it might be the dissolution of a corporation or something like that.

In criminal cases, on the other hand, the penalties could include monetary fines, but it could also include prison time for the individuals involved. So the stakes are much higher in a criminal case, although it depends on your perspective, and importantly you can have both civil and criminal cases going at the same time, it's known as parallel proceedings. So it could be that someone is convicted at trial and found guilty and has to pay money damages. We saw an example of that in the OJ Simpson case where he was acquitted criminally, but then found liable civilly.

Another important distinction between civil and criminal cases is the intent that is necessary. The big difference between a civil case and a criminal case is this idea of criminal intent. So it isn't something that was just a mistake or based on negligence or recklessness, it was done on purpose. In the context that we're talking about with the Trump organization involving various types of fraud, that there was an intent to defraud, a knowledge that they were making purposeful lies. There's an old quote by a judge that ends up in the criminal case books that says something like, "Even a dog knows the difference between being tripped over and being kicked," and so the kicking is the part that would make this criminal as opposed to civil.

And then finally, and this is, I think, something where you might read some tea leaves, the burden of proof in a civil case and a criminal case is different. In a criminal case, the standard of proof is guilt beyond a reasonable doubt, a very, very high standard, the highest standard that exists in the legal system. In a civil case, that standard is preponderance of the evidence, which is slightly more than 50%, a little more probable than not. And so the fact that attorney general James has converted this from a civil case also says to me that she believes she has sufficient factual predication to believe that there is evidence here that can overcome even that very high bar. Now of course no charges have been filed yet, but before one would go down that path they would need to believe that there is at least that factual predication of criminal behavior. So that's the difference between civil and criminal investigations.

Kim Atkins:

And because Barb's too modest to say. So she breaks this down in a great USA today piece that you can find in the show notes. So Joyce, tell us the difference between now what we have are two separate criminal investigations, one being lead by attorney general, James, another being lead by district attorney Vance. How are they different and where might they overlap?

Joyce Vance:

It's a really fascinating question, because at this point we have a lot more questions than answers about the relationship between these two investigations. Barb is always really nice so this may not apply to her, but typically prosecutors from different jurisdictions have a lot of territorial issues. And to see these two legendary prosecutors joining forces when they could just as easily be having a turf battle signifies that there's something really going on here.

I think we're actually getting a signal that the criminal investigations have joined, and instead of having two completely distinct investigations, Tish James, the New York attorney general, may have put some of her personnel into Cy Vance, the Manhattan DA's office, because an attorney general under New York law really has very little jurisdiction to engage in criminal investigations. Her jurisdiction is primarily civil. She can't do a criminal case for the most part, unless she's invited in, but New York does have a blue sky law that's designed to permit the attorney general to go after persistent fraudulent or

criminal behavior by a corporation that's a New York corporation, so that they can't have this persistent fraud being visited by corporations that they're responsible for.

We don't know when she wandered into some criminal evidence or what caused her to reach out to Vance, presumably, and convert their case, but we do know that her jurisdiction is very different from his. She can look at anything that happens statewide, he's limited to Manhattan. So we may have some hint there as to why they thought it made good sense for them to work together. It's also good, and Barb makes this point, I think, really well in her piece, one of the biggest advantages of having them work together, and I do perceive this as a joining of the forces rather than two separate cases, is they can share information and make sure that they don't step on each other's toes. Cy Vance really needs the Trump CFO, Allen Weisselberg to cooperate with him. That's a witness that he's got to have, and the signs are at least right now, if you're reading the tea leaves, that Weisselberg hasn't yet agreed to cooperate.

There's a strong sense that Tish James has a tax case on Weisselberg and that may be part of her criminal investigation here. If that's true, that could be very helpful to Vance's case, and so while they might be looking at very different sorts of criminal claims, she may have a tax case, he may be looking at something that has to do with Trump organization deflating and inflating the values of property to claim various types of financial advantage, whether it's related to insurance or taxes. By putting everything together, the merger gives them the potential to get the most bang for their buck in the criminal sense here.

Barb McQuade:

And Jill, talk a little bit more about this, the fact that James is investigating former Trump organization CFO Allen Weisselberg, that was reported this week. What does that mean to you about this investigation? And might we see a situation where there are other people who are investigating and might see people choosing to cooperate as opposed to facing heftier charges themselves?

Jill Wine-Banks:

This goes back to Grace's comment about slippers, that Allen Weisselberg could be a very significant and key witness. He knows all of the financial information that you could ever want, and he could make it a lot easier for either Cy Vance or Tish James to make their cases. Their working together means that Tish James now has access to all the financial records that were obtained through a Supreme Court case that Vance brought to get those financial records. And that helps her. Her jurisdiction being statewide helps because we know for sure that there is a piece of property in Westchester County that is at issue, and that would be beyond Cy Vance's jurisdiction, but would be well within Tish James'.

Barb McQuade:

And it's within the jurisdiction of friend of the podcast, Mimi Rocah, now the district attorney in Westchester.

Joyce Vance:

Oh, right.

Jill Wine-Banks:

Yes, indeed. Indeed. So maybe she gets the benefit of this as well. There's also a case that Tish James is looking at in my hometown in Chicago, where Trump Tower has done a lot of bad things, including illegal

COVID shots for its employees and polluting the Chicago river, but that's a different story, but it is part of what Tish James is looking at as well.

I think that this really gets to the pressure that can be put on Weisselberg to cooperate. His daughter-in-law, his former daughter-in-law, his son's ex-wife is certainly putting pressure on by reporting that he didn't report certain things, that his son didn't report certain income obtained from the Trump organization that should have been reported as income, for example a fabulously luxurious residence and school tuition. So I think all of this puts it together in a way that this could end up being a major finding of criminality.

And of course, Barb has made very clear the importance of the difference between a criminal case where Donald Trump or anybody from the Trump organization who is involved in these wrongdoings could go to jail, which is a very different consequence than just having to pay a financial penalty for having committed bank fraud, insurance fraud, tax fraud. And Tish James' jurisdiction does include an ability to bring a criminal tax case if she's asked to by the department agency within the state to do so, otherwise she is very limited to civil jurisdiction, and she has some other rights, labor law violations, which there've been a lot of complaints about the pay and benefits for employees of the Trump organization, particularly at their hotels. So that could be another area that she's looking at as well that now is part of Cy Vance's. So it's really powerful when prosecutors get together.

And not only was I a federal prosecutor, but I was a state prosecutor in the attorney general's office so I know very well, and I was on a special advisory panel for the state's attorney, which is the equivalent of a DA in New York, is Illinois state's attorneys. And seeing how we had trouble working together even though I was serving as an advisor to the state's attorney while I was the deputy attorney general of Illinois, it means that this is significant that they've been able to accomplish this. And there's also a timeframe because Cy Vance retires on December 31st of this year and I think that there will be a decision go or no-go before then, and given what's happened now, I'm guessing it's a go and that there will be some indictment.

Barb McQuade:

Well, we are going to have plenty to talk about in the episodes ahead.

You know what, sisters? I just love my new Jenni Kayne shoes. They are the signature mules. They feel like flippers, but they go with every outfit and they remind me of being in California, that cool California chic style. What do you guys think about it?

Jill Wine-Banks:

I love that you called them flippers since we will be possibly soon discussing flippers in a different way. I love all of the Jenni Kayne line. My favorite is a cashmere fisherman's hoodie that is just the most fabulously, luxurious feeling, great quality and just the perfect style for casual wear of today. It's perfect. What about everybody else?

Barb McQuade:

What about their home goods? Do you have any of those? I've got that Jenni Kayne throw. I love it. It's very cozy to wrap myself in when I'm sitting on the couch. We've got this little seat that we call the puppy seat. We don't have a dog, but if we did and if we had a puppy, it would sit in the seat and look down the street, waiting for its owner to come home. So we refer to that seat as the puppy seat, and that's a perfect place to sit with the Jenni Kayne throw, which is very cozy and a nice place to sit in the sun.

Joyce Vance:

Well, it sounds to me like the McQuades are going to get a dog at some point, Barb, but like all of y'all, I'm a huge fan of Jenni Kayne. I have more pieces from their line than I'm going to confess to right now. Something that I really love though is the cashmere hoodie. The detailing is so beautiful. And as a knitter you really appreciate, for instance, the flat knit, perfectly seamed ties instead of those thin ones that stretch out. It's the little details that make it for me. I feel like a much younger version of me could just be running off the beach and throwing that hoodie on when I go to get something to eat. It has that real California feel to it

Barb McQuade:

In our minds we're all younger and more beautiful, Joyce.

Joyce Vance:

Isn't that true? And Jenni Kayne actually makes me feel that way. I'll tell y'all something else that I have, I've got the gray alpaca sweat pants. And they were the only thing that I wore all winter. I mean, it was embarrassing. I would put them on more than one day in a row, I'm not too proud to mention that, because like wool, it wears well like that, and they look great. No pilling, they've held their shape, just outperforming what you can normally expect from knitwear.

Kim Atkins:

Yeah, that's one of the things I love about it too. It's just you can tell it's made well and so it's a good investment piece. It's not part of this fast fashion that is very wasteful. I'm going to have these shoes for a long time, I'll tell you that. And Jenni Kayne believes that getting dressed or making your home as cozy as a puppy should be the easiest part of your routine. With polished basics that will never go out of style, they make everyday moments a breeze.

Joyce Vance:

Find your forever pieces like we have at jennikayne.com, and get 15% off your first order when you use code sisters at checkout.

Kim Atkins:

That's J-E-N-N-I-K-A-Y-N-E.com with the promo code sisters. And look for the link in our show notes.

Joyce Vance:

Do we get to use that coupon too?

Kim Atkins:

I'm using it.

Joyce Vance:

I could do some damage.

Barb McQuade:

All right, well, let's move on to our next topic. Jill, I think you were going to walk us through this. We've had some news this week on the January 6th investigation and the convening of a commission to investigate the events of January 6th. What do you know about that?

Jill Wine-Banks:

It's a great topic. I'm very, very concerned about this and what we do with the information we could possibly get. We all witnessed a violent mob breach the doors of the Capitol, overwhelmed the Capitol police, chant, "Hang Pence," and, "Where's Nancy?" Deface the buildings, steal a podium and a computer and seriously injure dozens and kill five. Their purpose was to stop the final certification of the winner of the 2020 election.

In other words, they wanted to defeat democracy and the results of a free and fair election. Yet now, after a rare bipartisan effort negotiated by Republican John Katko of New York and Democrat Bennie Thompson of Mississippi, even though they negotiated what was a very favorable outcome of a bipartisan independent commission that would be equally representative of Democrats and Republicans, the Republicans have now turned against it. Republican leaders McCarthy and McConnell have spoken out against it as have many other Republicans who are ignoring facts and saying there wasn't even an insurrection.

They do not want the truth to come out, in my opinion, and McCarthy doesn't want to be subpoenaed to testify about his call to President Nixon during the ongoing violence. And so that's, I think, why they're opposing it, but they also don't want a political impediment to the elections coming up. They don't want the president's conduct, the former president's conduct to be at the heart of what's in the news. So they know the facts will hurt them in that midterm. So let's talk about whether a 9/11 style commission is necessary, or whether there are other ways we can get the facts before the American people. And I want to start by asking you, Joyce, what are the options for public disclosure of what happened and what needs to be done to prevent a recurrence?

Joyce Vance:

Like you say, Jill, everyone knows what happened. Most of us watched it in real time. What we don't know is why. Was it spontaneous combustion, organized leadership or something in between? And that's what we need to understand to prevent it. So there are probably, I would say, at least four options for getting to the truth. The first, and we see it in progress now is the criminal investigations that are being conducted by the Justice Department. They've now indicted more than 400 participants. Some of these are relatively what I'd characterize as low level participants, people who are being prosecuted for something that's tantamount to trespassing in a federal building, but it's possible that this could work higher up the food chain.

And at the point where we get to criminal sentencing in these cases, there's the possibility that we might learn a whole lot, because at sentencing, prosecutors often rely on something called relevant conduct. That's conduct that defendants have engaged in that goes beyond the charges against them, and often that gives us the opportunity to learn more about the context of a crime and for prosecutors to tell us more about what their investigation has revealed. So that's number one.

Number two is civil lawsuits. We've seen a number of these. Congressman Eric Swalwell has brought one, Congressman Bennie Thompson from Mississippi has brought another. There's also a case being brought by members of the Capitol Police. And in these cases there's the option for civil discovery, which is broad and expansive. The plaintiffs can send series of questions to people who are defendants and they're required to respond. There could be depositions. Erik Swalwell, for instance, has indicated

that he would intend to depose people who are very close to President Trump and perhaps former president Trump and that could be quite an interesting process, even if that happened under seal. When dispositive motions are filed in those civil cases, some of that discovery will bleed out, and that could form a rich narrative that helps us understand who was involved, what they did, what for instance went on at the White House after the former president returned there from his rally on The Ellipse.

Third, to your point, Jill, the bipartisan commission, which now seems dead on arrival in the Senate. Maybe it'll get a little bit of resuscitation, perhaps it will simply die there, but it's an interesting prospect because Republicans may face a serious payback if they don't pass the bipartisan commission. That's the fourth option for getting at the truth, and that would be some kind of a partisan investigation on the hill, an investigation conducted only by the Democrats, perhaps in democratic committees. Think back to Benghazi style hearings. And this could potentially be politically damaging to Republicans. At the same time it could help the country understand what really went on. It would keep the January 6th insurrection on the public radar screen well into the next election cycle.

And it would also, I think, in many ways, help to focus Americans on the truth as they head into that election cycle. Probably something that Republicans are desperate to avoid given their behavior. So those, I think, are the options. But look, the reality here is it's reprehensible that we've been through one of the most serious incursions against our democracy that the country's ever seen. And we have a political party, one of the two parties in our country that adamantly refuses to let the truth come out, and it's increasingly clear that you can't support Trump and the truth, something here is going to have to change.

Jill Wine-Banks:

So well said, Joyce. And Barb, let's talk about some of the arguments that are being made on both sides for these different options, but particularly let's focus on the commission idea, which is one that I favor because I'm worried about something that Joyce alluded to, but I'm worried about whether people will accept the truth if it comes from a partisan democratic committee as opposed to what was set up under this proposed legislation as being bipartisan and not political. This would be outside investigators, people with experience in prosecution, et cetera.

So I'm worried that if we have to rely on, and it is a good fallback, it may be the only thing that can be done. But I want to talk about the arguments that are being made about why there shouldn't be a commission. Is there any legitimate answer to any of, or is there any legitimate complaint that's being made and the argument that you would say, "Yeah, I'd have to think about that one?"

Barb McQuade:

No, I don't think there is any legitimate argument at all. In fact, to the contrary, I think it's really critically important that we do have a 9/11 commission style investigative body, as you said, that's nonpartisan or bipartisan so that we can strip the politics out of it and have decision-makers or fact-finders who are neutral and independent. I think we owe it to history to find out what happened there.

As Joyce said, there are criminal investigations going on through DOJ and civil investigations going on through private parties, but the scope of those cases are all very limited by their own nature. In a criminal case, for example, the investigators are limited to investigating crimes on the books by Congress. So things like entering a restricted area or obstructing an official proceeding, those are the kinds of things where they can charge people with crimes.

The grand jury process in those investigations is secret. As Joyce said, at sentencing there may be some public things that are shared, but I think it will be very limited in scope and in nature. And in

addition, because 95% of all criminal cases eventually plead out, we wouldn't have a lot of trials to go on the public record. So I think that serves an important purpose, but not the full purpose that's needed for a full accounting for history here.

Same thing with civil cases. I think we may get dribs and drabs of pieces about things that happened that day, but it will really miss the bigger picture. I think having hearings before the house or the Senate alone are inadequate because of the political posturing that occurs in those settings, as we've all seen at various congressional hearings, when members of Congress have an opportunity to ask questions. So often it just becomes a recitation of their own political agenda, asking questions to make a point or play gotcha with the witness. So I think a commission could do some really important things that would be missing from those other three possibilities.

I mean, number one, studying the motives of what caused this attack. To what extent did president Trump's big lie about the stolen election play in this? And to what extent was other domestic extremism viewpoints a factor in all of this with groups like the Proud Boys and the Oathkeepers who exist apart from the 2020 presidential election? What is their motivation? And do they have a remaining threat to our national security that is ongoing? I think we need to look at that. I think we need to understand how we had such a failure of intelligence that day and are there changes necessary in how we collect intelligence on domestic actors?

Was there some sort of complacency because these were white people who live in the United States? Why did we have so few officers on duty that day to protect against this mob? Was there a failure of information sharing between those who collected this information and passing it on to the officers who were on duty that day? Why did it take so long to get the National Guard there for reinforcements?

So with subpoena power to call witnesses and to obtain documents like phone records and videos, I think we need to do all of these things to document for history what happened here while memories are fresh and records and videos are available? I think the resistance that we're seeing to this is coming from people who have a conflict of interest in having a 9/11 commission like Kevin McCarthy, who reportedly had a phone conversation with President Trump that day, talking about the delay in trying to help and do something about it. It is perhaps contrary to his own political fortunes to have to revisit this, but I think that's one of the reasons, his own conflict of interest, his own resistance to it is the very reason we need to have it to find out what really happened there so that we don't get this whitewashing of history.

Joyce Vance:

Doesn't this boil down to everything that was wrong during the Trump administration, this emphasis on putting party over country? And now we're seeing it play out again in this forum.

Jill Wine-Banks:

Absolutely. And I think Barb, you've set forth significant questions that need to be answered that America needs the answers to. But I also want to point out that one of the things that could come of this as recommendations for legislative action that might help to prevent this from occurring again. And I would add to your list, I want to know more about the role of the Pentagon and why they were so delayed in authorizing the National Guard.

But I want to follow up a little bit, Kim, on a couple of things that have been mentioned and one that hasn't, which is analyzing whether it's going to pass the Senate, but also whether in terms of the arguments that have been made, there are two that at least sound plausible more than the ones that

are being made. That if there was no insurrection, you've heard that said, so we don't need it. But there is one saying, "Well, it was just a normal tour group so we don't need an investigation." Okay, I can reject that as totally ridiculous, but there's an argument being made that there are some other investigations going on and so therefore it's not necessary. So do you know of any other investigations and what are they? Does that really interfere? And also is there any chance, what is the likelihood there were more than 30 representatives who voted in the house for this? Are there 10 Republicans who might join with the Democrats and voting to have this commission?

Kim Atkins:

Yeah, so the argument that there other committees investigating this, that came from one Senate minority leader, Mitch McConnell, who found very conveniently that argument in the 11th hour after he had initially signaled that he was open to considering whether or not to support the creation of this commission. At the very last minute he did a 180. What he says matters to his caucus and so I think that move made it very unlikely, made it very difficult for this commission to pass in the Senate, unfortunately, because he as we've seen before, seems to be taking his marching orders still like other members of Republican leadership from Donald Trump.

And Donald Trump certainly does not want this commission established because he is a key and central player in it, having spent weeks just stoking the anger of his base with a lie about election fraud, summoning his supporters to Washington, DC, holding a rally and essentially siccing them on the US Capitol directing them to stop the steal. And we saw what happened after that. So if he is against it, and if the Republicans are going to try to please him, this is what we saw happen. 35 Republicans in the house, as you said, did vote in favor of it, allowing it to pass the house. But I think that's as far as it goes, as far as what could come of this.

Now, I mean, the point about these other investigations is what you asked. There are other committees, obviously there are lots of committees in the house under which this falls under the jurisdiction of their oversight. And there have been hearings held, but that's like saying that just because there were other hearings taking place after Russia interfered with the election, that for some reason that meant that Robert Mueller's investigation wasn't necessary. Of course it is, it's something entirely different. As we talked about, it would be bipartisan. It would have rules, both sides would be able to implement rules, and really conduct it in a way that would give Americans some sense of what happened.

Another thing this independent commission would do, that I would trust for it to do that I probably don't expect to see really happen in Congress' other committees, is to really get to the bottom of who these folks are, who these groups are that organized to come to Washington, who these groups were trying to stop the democratic process in a fair and free election. Many of them as we've seen just from the insignia from that day are from far right, white nationalist groups.

And I think it is definitely in the public's interest to get a deeper understanding about how they operate, about how they organized and the role that they played. I mean, just in pictures we saw insignia from the Proud Boys, we saw people are holding up the OK White Power sign, we saw Betsy Ross' flag which has been co-opted by white supremacist groups to signal a time before Black folks had any rights or power in the country, we have seen things like 1776 memorabilia. all of these things, the Confederate flag, these were the markings of that insurrection and it's extremely important that the American people understand that element of the population, that element of the support for this insurrection that existed.

And it's really enraging that Republicans, in order to please Donald Trump, in order to try to suppress their own roles in this, and in order to essentially try to make this go away, because they think

that that's better for their political futures would be willing to whitewash that aspect of it. I think that is just unforgivable for me, especially since... Recall that everything about this "Stop the steal" lie was really trying to stop folks from being counted in places where lots and lots of Black and brown folks voted, places like Detroit and Milwaukee and Atlanta and Philadelphia.

So there's a really core racial element about that, I wrote about it this week in a column for the Boston Globe, that is really important here, as well as how it relates to the ongoing effort to pass restrictive voting laws in states where we saw large numbers of Black and brown folks get out and vote and lead to Joe Biden's victory and lead to two senators from Georgia, two democratic senators from Georgia being elected. Republicans are really incentivized to stop that, and even if that means turning a deaf ear to some of the most dangerous aspects of dangerous domestic terrorists, frankly, that were right at the Capitol that day is really, really... It's an awful thing.

Jill Wine-Banks:

Unfortunately, we're out of time on this subject, although I think we could go on for a long time. We're here to inform our audience, and I hope that you've learned a lot from this episode. If you agree with what we're saying, and I think all of us are saying how important a 9/11 style commission would be to investigate the facts of January 6th, it's not too late to write to your representatives, your senators now, to your senators and encourage them to vote to allow the facts to be known and to hold them accountable if they don't.

Barb McQuade:

Well, I've been listening to a lot of books on Audible. In fact, I've got my husband hooked now. He's listening to Trevor Noah's Born a Crime, which he loves because it's told in the voice of Trevor Noah himself. But I think one great book for people to listen to on Audible, Jill, would be your book, the Watergate Girl. Are you on audible?

Jill Wine-Banks:

I am. And it's sort of embarrassing to promote my own book, but yeah, why not? It is, it is. I read the beginning and the end, and a professional reads everything in between, but I auditioned people for it, they let you do that, and I found someone who sounded enough like me that I felt like it was comfortable and people seem to love it. I've gotten great responses on Twitter and other social media from people who have been listening to the book. So I hope other people will enjoy it.

It's a good thing to do while you're jogging and getting back out into public now that we can all go out again, so Audible's just been a terrific thing. And I listen to lots of things on Audible including the book that you're now having your husband read by Trevor Noah. Love that. And recently I interviewed Susan Page and so I listened to her book, her new one about Madam speaker, which is a terrific book.

Kim Atkins:

Yeah. I listened to the Watergate girl on Audible too, It was great. I listened to it when I was walking my dog. It went by so fast actually, I was sad when it was over. I'm also listening The Sum of Us by Heather McGee and I listen to my news headlines in the digest from The New York Times and The Washington Post and The Wall Street Journal every single morning. Audible's just a great constant companion, whether I'm out walking my dog on a hike or just getting ready to start my day.

Joyce Vance:

You know, I do that too, Kim. I tend to stick my ear pods in and listen to the news on Audible when I'm down with my chickens first thing in the morning. But I also like to listen to fiction. It's my guilty pleasure. We all do a lot of serious reading during the day and so I like to read a lot of science fiction and science fantasy. Right now I'm listening to a book by one of my favorite authors, Kate Elliott, and that's one of those nice moments where you can go out for a walk and just have some time where you're alone, which has been a pretty scarce commodity over the last year. I've been living in a pretty full house though. Audible has been a lifesaver in so many regards.

Jill Wine-Banks:

They have an amazing service. Audible Plus is all about giving members a chance to listen and discover new favorites and explore different formats like the exclusive Words Plus Music series or a podcast you never considered before, like maybe putting ours on Audible.

Barb McQuade:

Just visit audible.com/sistersinlaw, that's all one word, or text S-I-S-T-E-R-S-I-N-L-A-W to 500500. Please go to audible.com/sistersinlaw or text [sistersinlaw](https://audible.com/sistersinlaw) to 500500 or use the link in our show notes to start your free trial today.

But our third topic, not to be minimized, is this week at the Supreme Court we saw some interesting things going on. The court said was going to take up a new abortion case out of Mississippi, but there's also some really interesting subtext going on in the court this week and in recent years regarding stare decisis. So we thought we would talk about stare decisis in that context of that abortion case. And Joyce, as our appellate master, we thought we'd let you lead this one.

Joyce Vance:

So you're right, Barb, there's a lot going on at the Supreme Court and it's not just about Dobbs, which is the Mississippi abortion case you mention. We all know that there's been change on the court, Trump got to add three new justices. Brett Kavanaugh seems to have emerged as the ideological center of the court, the new swing vote with the power to decide cases. He's been in the majority for most cases since his elevation to the court. And to understand what's happening we'll start with some Latin, which I know is one of Jill Wine-Banks' favorite things and a legal doctrine called stare decisis. Jill, talk for us about what stare decisis means to lawyers and why it's important, if you would.

Jill Wine-Banks:

Absolutely. And you're right, I do love being able to use Latin on broadcast media. It's something I never thought would ever come up in my life again, and stare decisis is a very important concept that everyone should know about because basically what it means is it's standing on the precedent of the past. And it means that the courts look at their prior decisions and that guides them. It also means that lawyers can advise clients and clients can act on what they believe the law is based on how it's been interpreted.

But if it keeps getting overturned, there's no way of predicting what will be legal and not legal, what will be proper and not proper. So it's an important concept in our law, and we're now having a debate, and I'll try to make this quick so that we don't run too overtime, between whether there is any value to precedent. And we have some conservative justices saying the original intent of the constitution is all that a judge needs to look at. And if someone interpreted it in a way that they don't

think fits the original intent, then you don't get to pay attention to that precedent. You can just ignore it and overrule it and move on to what you think the right interpretation is.

Of course that comes up in the case of *Roe vs. Wade*, which is the principle foundation for what might be the next decision in *Dobbs* or in any other of the many pending new laws that have been passed to restrict abortion in various states. And that's how it comes into play, is both in terms of how do you conduct yourself if you don't know what the law is, and if it could just be overturned by anybody thinking, "Well, I know better than prior decisions what the original intent of the constitution is," as opposed to, "I'm paying attention to how people have lived with this decision, how they have interpreted it and using that as precedent."

Joyce Vance:

In my circuit, the 11th circuit, we have something called the prior panel rule, and that means that a three judge panel in the 11th circuit can't reverse a decision that was made by an earlier three judge panel. You actually have to put the full court together to do that. That's called en bancing and it happens rarely, I think a little bit less rarely these days than it used to, but I mean, we are very serious about stare decisis down here.

And as you point out, the emergence of originalism has to some extent diminished the value that's placed on precedent and stare decisis. This played out recently in a case involving juveniles and whether they can be sentenced to life in prison without the possibility of parole. In *Jones vs Mississippi* where Justice Sotomayor ripped off any veneer of civility she had with her colleagues and talked about the majority conflating, exaggerating, twisting, and essentially gutting two foundational opinions in order to uphold the juvenile life sentence in *Jones*. So what's our takeaway? What do we learn from *Jones* about what's going on with stare decisis?

Barb McQuade:

Yeah, this is where we see some of the subtext of what's going on with this erosion of stare decisis, which is an important, not just tradition in our system, but it's really an essential part of it to ensure that there is a consistent, predictable, evenhanded development of the law, reliance on past decisions and the perception of integrity and the judicial process, that it isn't just because a few justices on the court have changed that the law is going to change. That shouldn't be the case. And so in the *Jones* case the court recently held that a state did not need to determine whether a juvenile had any likelihood of rehabilitation before sentencing him to life in prison without parole.

And this came in the face of a series of other cases that we've seen in recent years moving toward more lenience for juvenile offenders. A 2005 case that said that there can be no death penalty for juveniles, a 2010 case that said there can be no mandatory life for juveniles, another case the next year saying that that case would be retroactive, and then another one that banned the use of life without parole for juveniles who were not convicted of homicide. So in light of this backdrop Justice Sotomayor expressed surprise that the majority of this court would ignore all of that precedent in its ruling in *Jones*, holding that there's no need to look at this idea of rehabilitation before sentencing to life without parole, sort of this automatic idea that has been gutted by these other four cases.

And so she said, and quoting from her dissenting opinion, "How low this court's respect for stare decisis has sunk. Now it seems the court is willing to overrule precedent without even acknowledging it is doing so, much less providing any special justification." So instead of looking at those things that courts typically do when they are going to overrule precedent, which does happen from time to time,

and there are a number of factors that courts traditionally look at, and one is whether the opinion was well-reasoned.

But in addition to that, whether that opinion has turned out to be impractical in practice, whether people have relied on that prior decision, whether that prior decision still makes sense in light of other changes in the law, ordinarily it would go through an analysis of all of those factors and then announce that it is going to make a decision that contradicts, either overrules or is different from the precedent that is on the books.

And she said, in this case, in her dissent, again, "Such an abrupt break from precedent demands special justification, but the court didn't provide one and the court is fooling no one," is what she wrote. So this little battle that is brewing, I think, on the court regarding stare decisis is one to look at, especially now in the context of abortion as Roe vs. Wade might be falling on some shaky legal ground.

Joyce Vance:

It's a fascinating conversation because I think we all expected that there would be a liberal versus conservative split on the court, but this is really something more, this is in some ways doctrinal and as Barb intimates, in some ways it may be heading towards a results-oriented way of backing into the whole abortion controversy. But Kim, recently the Supreme court decided Edwards versus Vannoy. That's the case where they declined to make last term's Ramos decision retroactive, and Ramos had affirmed that criminal jury verdicts had to be unanimous. This might seem like a legalistic dispute, but does it lead to more concern about how the Supreme Court views long standing and seemingly bedrock principles and is willing to do away with them?

Kim Atkins:

It absolutely does. It's a really important case. And also usually the Supreme court is a pretty genteel place, but every now and again, you can tell when the justices really start getting on each other's nerves, and this is one of those cases where you could tell that.

So as you said, in Ramos V Louisiana that was a decision that said that that criminal convictions have to be unanimous. It threw out non-unanimous criminal convictions, and it was only happening in two states but part of the reason for that ruling and the reasoning by Justice Neil Gorsuch, who was the author of that opinion was that it allowed certain things such as like in the Jim Crow south, when there was an all-white jury or a nearly all-white jury it still allowed them to convict Black defendants, for example. If there were a defendant, a juror or two who could see that it was an improper conviction, that wouldn't be enough to stop it. It just showed how wrongheaded the idea of non-unanimous jury verdicts were and so they threw it out.

And so this term, the court considered whether that ruling would be retroactive, whether it would just apply at the Ramos decision, applies to anyone who would be convicted from this point forward, anyone who had a pending appeal already in the court system, it would apply to them. So they would need an unanimous verdict, but anyone convicted before that, their verdicts would stand. And this case sought to get the court to say, no, if it's wrong now, it was wrong then. And in a decision by Justice Kavanaugh, the court declined to extend that in the six three decision. Kavanaugh reasoned that they couldn't overturn precedent or rather they couldn't extend the doctrine of retroactivity unless a decision was considered watershed.

Now he was citing precedent that had never been followed. This is a rule that really didn't exist. He sort of pulled it out of the sky to say, "Well this isn't watershed because I say so." And so therefore it is not retroactive. In a dissent Justice Elena Kagan really excoriated that move, saying that that decision

had been called everything from vital to essential to end dispensable, but somehow because of the word watershed wasn't in there it doesn't apply to all of these criminal defendants whose convictions will stand in the face of this. So Kavanaugh tried to clap back and basically criticized Kagan because she voted in the dissent in the Ramos decision, basically saying well, what he was doing, the result that his decision ended up with was overall better for defendants than what would have happened if the court had ruled the way that Kagan decided in dissent, to which justice Elena Kagan responded, essentially, "Don't come from me unless I send for you."

She said, "By the way, the reason that I ruled in dissent the last time is based on this little doctrine called stare decisis, following past precedent. Now with the Ramos decision, that is now the law of the land, which I think we should be following, and you are not." So yes, you are seeing both in the words from Justice Sotomayor and Justice Kagan that they are seeing essentially, and these are my words, not theirs, some of the other justices playing games with the doctrine of stare decisis ahead of some of these big cases that we are going to be seeing. I say look out for that when we're looking at things like the Obamacare decision that's about to come down, certainly the abortion cases that are coming up, affirmative action, which the court has allowed to be whittled away, but at least held that in some circumstances a race could be considered in admissions. We may see that go away. I think you're really going to need to keep an eye on this.

Joyce Vance:

That seems to be exactly the context, right? I think we've set the table for everyone to understand the court's decision to hear Dobbs, and the case is Dobbs versus Jackson, women's health and abortion case, and the Supreme Court will consider that next term. It's about whether a ban on abortion after 15 weeks is constitutional. It's the first abortion case since Amy Coney Barrett replaced RBG, and at the time of his confirmation Justice Kavanaugh was viewed as the possible swing vote to reverse Roe. Now we've got Kavanaugh and Barrett and we've got a court that's increasingly willing to disrespect stare decisis. So just how worried do y'all think we should be about what might happen in Dobbs?

Kim Atkins:

I'm worried.

Jill Wine-Banks:

Me too.

Barb McQuade:

I'm worried as well. Justice Thomas is another one who has said that he thinks that rather than those principles about stare decisis, like reliance and development of the law and other things, are not important, that simply we should look to decide whether decisions were erroneously decided is the only basis for deciding whether to overrule a case. And that really can mean that if you have a new set of justices who simply disagree with a particular case, that alone is enough to justify changing precedent. And I think that's really alarming when you consider the current makeup of the court.

Joyce Vance:

It's a frightening environment. I think Roe is certainly, if any case is a bedrock principle, the notion that the decision women make about pregnancy should be between them and their doctor, their families, their spiritual counselors, but should not include the state, at least not before the fetus is viable. That

seems to have become so entrenched, almost an assumption of women as they come of age. This really threatens that decision. And it seems to me that the implementation of reversing Roe might be one that would set the integrity of the court really into question.

We all know that it was in large measure the courts and the independence of the judiciary that carried us through the Trump era. This sort of a reversal of precedent could really do a lot of damage beyond the specific topics where the court might choose not to follow prior precedent.

Jill Wine-Banks:

It could, and if I could add one other concern I have, which is that I have been fighting this issue for longer than the people who should be concerned have been alive. And I think that it's time for a younger generation to realize on this particular issue what is at stake and to start being active advocates of their own rights. So I'm talking to you, young women. If you're a teenager even, you should be concerned. And certainly if you're in your twenties or thirties, start paying attention to this issue and being active in it.

Joyce Vance:

Well, last question for y'all. To add to this controversy, President Biden has created a Supreme Court commission and their job is to study the issue to consider so-called court reform, which really means whether or not there should be an increase to number of Supreme Court justices, largely reflective, I think, in the distaste people have for the way that Trump put two of his Supreme Court justices on the bench.

One you'll recall was the long term holdout where Mitch McConnell refused to give now attorney general Merrick Garland a hearing for almost a year, holding that position open for Justice Gorsuch to take the bench. And then quite the opposite end of the spectrum, the rush rush confirmation of Amy Coney Barrett after people had already started voting in 2020. So there is, in some parts of the country, the notion that Democrats should in essence pack the court. Biden has created a commission, which includes, Barb, one of your colleagues at the university of Michigan and my colleague, Tara Lee Grove. They had their first meeting this week. How might that commission impact what's going on on the court? I'll start with you, Barb.

Barb McQuade:

Yeah. Kate Andreas from the University of Michigan Law School is one of them who's terrific and brilliant, and it's a really great all-star panel of people to look at things. I think one of the things they're going to look at certainly is expanding the court and whether there ought to be more than nine justices on it, or term limits, things that will take some of the politics out of the decision-making because I think one of the things that is so important is not only that we have good people making decisions on the court, but there's the perception that they're making decisions based on justice and the law and that they're being influenced by improper partisan concerns.

And so I think if you can limit their terms or add to the number, or think about some different kinds of ways that you could staff the Supreme Court, it complies with the constitution. I think all of those things are worth exploring and those are some of the things that they'll be looking at.

Joyce Vance:

Kim, I don't know if you've been using Hydrant for extra hydration, but I got some and I actually got to use one, it was great. And I haven't gotten to use anything else because my 18 year old promptly stole it

all from me. He plays soccer with his friends in the afternoons now that they can get out together again and he absolutely loves it. He's been carrying around a big water bottle, he fills it up with Hydrant and he is constantly raving about it.

Kim Atkins:

It's popular in my household too before I even tried it. My fiance who goes on a run most mornings always has some in his water right after when he comes back. He's a big fan of it. I've started doing it too. The weather's getting really warm here in Washington, DC so after a hike or I go out to walk my dog, I try some too. And I really, I normally don't like sports water, the taste of it, but Hydrant is really light. I really like the blood orange flavor most and it gives you what you need to keep hydrated and to get on with your day. And we all know that we should drink more water, right? But when you feel thirsty, you're already dehydrated and tired.

Joyce Vance:

Hydrant makes it so easy to do. You just pour it in, shake it up and you're ready to drink water. It makes something that we should all be doing and that we know we should be doing a lot easier to do. And that's a great convenience right now.

Kim Atkins:

So we all know that we should drink more water, right? But when you feel thirsty, you're already dehydrated and tired.

Joyce Vance:

That's where Hydrant comes in. It's a refreshing drink mix powder made with four key electrolytes, sodium, potassium, magnesium and zinc using real fruit juice powder and nothing artificial.

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Joyce Vance:

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Kim Atkins:

And we've got a special deal for our listeners to save 20% off your first order, or subscribe and save 30% off your first subscription order. Go to drinkhydrant.com/sisters and enter our promo code sisters at checkout.

Joyce Vance:

So hopefully my kid is listening because I know he's just about out. That's D-R-I-N-K-H-Y-D-R-A-N-T.com/sisters and enter promo code sisters for 20% off your first order. drinkhydrant.com/sisters and enter promo code sisters to save 20%. And our thanks to Hydrant for sponsoring this podcast.

Kim Atkins:

Hydrant, where water meets wellness.

Barb McQuade:

As always, we've received some great listener questions this week. If you have a question for us, please email us at sistersinlawatpoliticon.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 where we can answer as many of your questions as we can. The first question comes from Mark in Jerusalem. What happens if Trump refuses to return to New York to face trial? Kim, your thoughts on that one?

Kim Atkins:

Yeah. I've gotten this question a lot. I think people confuse international extradition, we think about cases like Roman Polanski, where he can't be prosecuted unless he sets foot back on US soil. I will say in any of the 50 states of the United States, if another state is seeking to charge you with a crime, the long arm of the law will reach you. The constitution and federal statutes make very clear that officials in those states may bring you back to the state where you are being charged to face charges. So there is no way, despite what Governor DeSantis in Florida might be saying about the ability not to produce Donald Trump to New York City, Tish James will get Donald Trump back to New York city.

Barb McQuade:

All right. Very good. From Marie in Albuquerque, New Mexico, she asks can Amy Coney Barrett be forced to recuse herself from any abortion case since she has publicly contributed to and supported extreme anti-abortion positions? Jill, any thoughts on that one?

Jill Wine-Banks:

Yes. Unfortunately the answer is no, it's up to the judge to recuse themselves. It is one of those things where it is not up to the chief judge of the Supreme Court, it's up to the judge, the justice to decide that. So she cannot be forced to recuse. Neither can Thomas, because his wife has been involved in a lot of political activities. Same issue. It's up to Justice Thomas to decide that.

Barb McQuade:

All right. And finally we have a question from [inaudible 01:08:51]. She wrote [inaudible 01:08:55], why would attorney general Merrick Garland ask for another week to decide on the judge's ruling to release the bar memo, that's the one regarding the Mueller report, if he could just release it? Joyce, you have thoughts on that?

Joyce Vance:

So this is a good question. We don't know the answer for certain, but the way things often work inside of DOJ is not that something nefarious is going on, simply that there are differing views and the attorney general has decided to solicit all of those views and give people representing different equities the opportunity to share their views before he makes the decision.

It might seem obvious to those of us who are just frankly dying to get our hands on this, that the new justice department would automatically release this, but there are a lot of equities surrounding the assertion of executive privilege. There may come a time down the road where the Biden administration might want to use it to protect itself. There may be concerns about the institution of the presidency and

the executive branch at play here. So I don't really take anything bad about this delay. I think this is a smart, new attorney general making sure he listens to everyone before he makes a decision.

Barb McQuade:

Thank you for listening to #sistersinlaw with me, Barb McQuade, Joyce Vance, Jill Wine-Banks, and for the last time, I'll be saying Kimberly Atkins. Next week we'll have a special guest in for Kim while she's off getting married. Don't forget to send in your questions by email to sistersinlaw@politicon.com or tweet them for next week's show using #sistersinlaw. And please support this week's sponsors, Jenni Kayne, Audible, and Hydrant. 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.

All right. And then before we start our third topic, I did just want to take a moment to note we record this using an app sort of like Zoom where we can all see each other, and I appear as Barb and Joyce appears as Joyce with her name there. And Kim appears as Kim, but I noticed that Jill always appears as Jill Wine-Banks, and I think it's fitting because I think Jill Wine-Banks is one of those people that you always say the whole name. You don't just say Joyce or Kim, you say Jill Wine-Banks. It's sort of like Charlie Brown. You ever notice how the characters never referred to him as just Charlie? He's always Charlie Brown. And I think in the same way, Jill Wine-Banks, it all just sort of flows off the tongue. So I'm glad to see you.

Jill Wine-Banks:

I'm going to fix it. I'm going to fix it, I promise.

Barb McQuade:

No, I love it. I love it the way it is.

Kim Atkins:

I like it.

Barb McQuade:

I just took a photo of it and tweeted it so everybody can see it is Barb, Joyce, Kim and Jill Wine-Banks.