

Jill Wine-Banks ([00:11](#)):

Welcome back for the second weekly episode of our brand new podcast, #SistersInLaw. I'm Jill Wine-Banks.

Barb McQuade ([00:21](#)):

I'm Barbara McQuade.

Joyce Vance ([00:22](#)):

I'm Joyce Vance.

Kimberly Atkins ([00:24](#)):

I'm Kimberly Atkins.

Jill Wine-Banks ([00:25](#)):

And before we get started, let's talk about what we've been doing this week. I loved our conversation last week and missed all of you during the intervening time. Why don't you go ahead and tell us what you were up to, Barb?

Barb McQuade ([00:39](#)):

Well, this week, mostly I spent a lot of time explaining to my children who are teenagers and in their early 20s, that it really is called #SistersInLaw. They keep trying to tell me, "Do you know, you don't pronounce the hashtag." When you're the parent of children who are in their teens and early 20s you have to put up with a lot of eye-rolling and heavy sighs.

Barb McQuade ([01:02](#)):

You are immediately uncool and don't get it, how the internet works, but I persuaded them it is #SistersInLaw. And in fact, because it's called #SistersInLaw it shows up at the top of your feed among your podcasts. So I spent a lot of the week explaining that, Jill.

Jill Wine-Banks ([01:20](#)):

Excellent. And what about you, Joyce?

Joyce Vance ([01:22](#)):

Let's see, I went on a short trip to the Bahamas and we went out to eat dinner at restaurants every night and saw a couple of Broadway shows. Of course, we did none of those things because we're still in the teeth of the pandemic as President Biden said today. Alabama has been slow to roll out vaccines. So I'm at home with my husband and three of my four children.

Joyce Vance ([01:48](#)):

It's feeling smaller by the day here, but I have to say I feel in some ways guilty compared to what I know other people are going through because we're warm despite the cold weather, we have plenty, some might say too much to eat and at least we're with family. So that I think for me has made it a good week.

Jill Wine-Banks ([02:11](#)):

And Kim, what about you?

Kimberly Atkins ([02:13](#)):

Well, in addition to following what was still a pretty busy Newsweek, I also moved house. I moved in with my fiance and his family, [Buggy 00:02:24] and I, and my dog. I've been doing a lot of unpacking, quickly setting up my Skype TV space and my radio podcast space. So it's been a big adjustment, both physically, a lot of work and also a big milestone in my life.

Jill Wine-Banks ([02:45](#)):

And we have all sent our love and warm wishes on both your move and your engagement. So congratulations to you.

Kimberly Atkins ([02:53](#)):

Thank you.

Joyce Vance ([02:53](#)):

It's so exciting, Kim.

Kimberly Atkins ([02:55](#)):

Thank you so much.

Joyce Vance ([02:57](#)):

How About you, Jill? What have you been doing this week?

Jill Wine-Banks ([02:59](#)):

I had To deal with a huge snow fall and I actually had someone shovel the walks, but I decided that I would save my trees that were bending down to the ground, completely touching because of the heavy weight of the snow and took a broom to hit it off and slid down my back stairs and just laid there for a while saying, "Are all my parts intact?"

Joyce Vance ([03:26](#)):

No.

Jill Wine-Banks ([03:27](#)):

Yeah. Luckily I was okay. I think my big puffy coat protected me and I'm fine, but I'm going to be a little more careful. I am very accident-prone for those of you who don't know me well. I promise you I am accident-prone. But now we're waiting for the coldest weekend of the year. It's going to be zero degrees, so that's not going to be so much fun, but-

Barb McQuade ([03:53](#)):

It's always cold for Super Bowl weekend.

Jill Wine-Banks ([03:55](#)):

Exactly. So I'm glad to catch up with all of you. And as everybody knows, and as Barbara just made very clear, we are together #SistersInLaw. And this week we have a lot to talk about. We're going to be taking on the second impeachment of the former president, talking about Merrick Garland and his upcoming confirmation, as well as any other pending confirmations and the Smartmatic defamation case.

Jill Wine-Banks ([04:26](#)):

And then we're going to answer some of your questions and I'm really looking forward to that part because we like knowing what you're thinking and what's bothering you. But first let's talk about the impeachment, round two. Donald Trump of course, is the first President to ever be impeached twice and to have done the second crime in plain view of every member of Congress, in fact of every constituent of those members of Congress, because it was so public and so frightening.

Jill Wine-Banks ([05:01](#)):

I worry a little that the fright factor is fading and that the words that followed the actual insurrection and reaching of the Capitol building are fading. Are any of you feeling that way?

Joyce Vance ([05:17](#)):

I do have that same fear. Jill, the images were so powerful when we were all watching it happen. It seemed like an overwhelming moment, but time creates a certain amount of distance. I hope that when the House managers put on this trial, that we'll not just hear them argue the case, but that we'll see the case again and relive those moments.

Joyce Vance ([05:44](#)):

I think one of the risks that we have at this moment that we have to fight against is that natural tendency to minimize something the further you get away from it. It's sort of a survival mechanism in some ways to avoid re-confronting the horror every day of the attack on the Capitol. We need to see those images. They need to be fresh from this moment, frankly, not just through impeachment, but through the next couple of times that we, as voters go to the ballot box.

Jill Wine-Banks ([06:16](#)):

I agree completely. And that raises a good question I'd love to talk about, and that is what evidence is going to be presented next week. How are there going to be the video shown? Will there be live witnesses? Who do we think are essential? And maybe the first question is of course there was talk about the President testifying and he has turned down the offer. Anybody think he should be subpoenaed?

Barb McQuade ([06:48](#)):

Well, I'll talk a little bit about what the trial might hold next week. And of course I can't shake my DOJ regulations and media policy. At this moment, it is an alleged crime, Jill alleged high crime and misdemeanor. I don't think we want to convict Donald Trump until the Senate has a chance to see the case. It reminds me of [crosstalk 00:07:11]

Jill Wine-Banks ([07:10](#)):

Those old DOJ habits die hard, don't they Barb?

Barb McQuade ([07:14](#)):

They do. It reminds me of a cartoon in New Yorker once that I saw where there is a lawyer representing a client in front of a judge, and you hear the lawyer says, "Objection, your honor, alleged killer whale." [crosstalk 00:07:35] and the drawing of the client as a whale. I'm not surprised that Donald Trump is not testifying.

Barb McQuade ([07:41](#)):

I mean, number one, I think there's a long tradition in this country of invoking the Fifth Amendment and while have a right not to incriminate ourselves, we have a system that is one based on interrogation and not one based on... It is an adversarial system, not one where you have to confess your own sins. And also president Trump, as we have seen, is incapable of telling a consistent story.

Barb McQuade ([08:06](#)):

He, I'm sure would have a hard time despite coaching by his lawyers keeping his story straight. So, that part doesn't surprise me. I think we are likely to see a lot of video of what happened during the insurrection and I think that's valuable. And I'll tell you strategically, I think one thing, if I were advising the House managers about what to do is not to spend too much time.

Barb McQuade ([08:29](#)):

You lose the jury, in this instance, it is the Senate and the American people who are the jury. If you play these videos too many times over and over again, it sort of loses its horror after a while. That was a strategy in the first Rodney King trial with the beatings. They showed the jury these videos over and over again, until at some point it became clinical where they're breaking down frame by frame and it lost that shock value.

Barb McQuade ([08:53](#)):

And so I think seeing somebody walking the Capitol with the Confederate flag and spreading feces on statues and paintings and walls, walking around with flex cuffs in the house chamber, sitting in the chair, putting their feet on Nancy Pelosi's desk. That's all horrific and I think you show it once and let people remember what that felt like.

Barb McQuade ([09:13](#)):

And also going back, Joyce to your point about, has the fear, the outrage worn off? I'm not sure it's worn out for those senators who were actually there that day. They'll live through that. They're going to have to relive it next week and I think it's going to remind them of the palpable fear that they felt that day. So I think that there is a lot of strategy to be thought about how not to overplay one's hand, but there's a lot of good evidence here that can be used persuasively.

Kimberly Atkins ([09:38](#)):

And Barb to that point, I mean the impeachment managers themselves were there. They're themselves in a way witnesses to what happened and I think just even hearing so many of them tell their stories, whether it's on the House floor, whether it's in interviews have been really so compelling to remind Americans to paint a picture of exactly what really happened.

Kimberly Atkins ([10:04](#)):

Because even though, as we said, this event on January 6th played out in real time in front of the American people. The coverage was from outside. The impeachment managers can really bring to life what was happening inside.

Kimberly Atkins ([10:20](#)):

And I think that coupled with the video, particularly the video of what Donald Trump actually said and the reaction of the people in that crowd, to what he said as a march to the Capitol. I think all of those things will be the most critical evidence that the impeachment managers can present.

Joyce Vance ([10:41](#)):

What would your strategy be, Barb? Last night, we saw 199 members of the House vote in favor of letting the Georgia Congress woman who believes that some of her fellow colleagues should be executed, letting her retain her committee seatings.

Joyce Vance ([10:59](#)):

In the Senate there's been a similar lack of willingness to hold people in the Republican party accountable for insurrection. You got to get to 67 to convict the President on impeachment. What do you think the best strategy looks like?

Barb McQuade ([11:16](#)):

Well, I think you [crosstalk 00:11:17]

Joyce Vance ([11:18](#)):

Or are we really just talking to the American people as the jury, not the Senate?

Barb McQuade ([11:22](#)):

I think so, but the Senate is there as their proxies, right? They represent constituents in those States. And if you can persuade the American people that this was horrific, this goes beyond politics. This isn't about Republican and Democrat. This is about overthrowing our government, stopping the certification of an election.

Barb McQuade ([11:40](#)):

And I would hope that senators are there to represent the people of their districts. And if you can persuade the American people, which I can't even believe is a difficult case. But persuade the American people that this is horrific behavior. We need to send a strong message that it will never be tolerated again. It can't happen in America. Then I think maybe the senators go along with that.

Barb McQuade ([12:05](#)):

And I think having been there themselves and feeling that fear that they must have felt when they were there is important. I also think one really interesting dynamic that might make this different from last year's impeachment, you have to clarify when you're talking about Donald Trump which impeachment it was, because there are so many to choose from.

Barb McQuade ([12:23](#)):

But last year the stakes were high because it meant he would be removed from office. He's out of office and I wonder if now that the stakes are a little bit less high, perhaps some senators might be more willing to come along. I don't know. What do you think, Jill?

Jill Wine-Banks ([12:35](#)):

I think that the stakes are very high for the Republican party. And so that prohibiting him from running ever again is a very good goal. I think there are a number of reasons for this trial. One is just for the historic record to lay out a very clear case. The second is to convince constituents of Republican senators that they need to lobby those senators.

Jill Wine-Banks ([13:01](#)):

I know during Watergate that public pressure made a big difference in the outcome. And I think that this is a case where people were really upset at what they saw, but I think it's also to remind the senators of how they felt in that moment, how frightened they were. And I think the videos, I agree with you, you can overdo it. Once and done would be good.

Jill Wine-Banks ([13:27](#)):

But I think there are a lot of live witnesses that can be called, who will give... For example, listening to AOC talk about how terrified she was and that she just hoped that she would live to be a mother one day. That moved me and I think it will move other members of Congress. And I think maybe they've learned a lesson. It took the Democrats to vote to remove committee assignments from Congressman Greene, but the Republicans didn't do it.

Jill Wine-Banks ([14:02](#)):

And then she went right back out and is repeating the same trash that she repeated before. And maybe they've learned that ignoring it doesn't make it go away, doesn't make it better, that they're still stuck with her as a member of their party speaking to the public. So I'm hoping that some members of the Senate will come to their senses and go, "I saw this happen."

Jill Wine-Banks ([14:31](#)):

If this isn't impeachable, there's no point in having impeachment in the constitution. And I think that it can happen. I think probably there's so much more to talk about this and we'll answer questions that you send to us on our Twitter feeds, but let's move on to [crosstalk 00:14:54]

Joyce Vance ([14:54](#)):

Y'all, can I just cut in one last comment on that.

Jill Wine-Banks ([14:56](#)):

Mm-hmm (affirmative).

Joyce Vance ([14:57](#)):

One of the most important pieces of evidence that we'll likely see in the impeachment trial involves Trump's reaction to the insurrection. He wasn't surprised. In fact, there's a report from Senator Sasse that he was delighted. So it would be interesting to see whether or not Senator Sasse will testify about how he obtained that knowledge.

Joyce Vance ([15:18](#)):

But certainly if Trump did not intend to incite insurrection, which is the charge against him, he would have reacted more forcefully than reassuring the rioters when he was finally forced by his staffers to make a public statement that he loved them. This evidence just if you were playing it out to a jury in a court of law would be overwhelming because impeachment is a political trial, in essence, we may see a different outcome.

Jill Wine-Banks ([15:46](#)):

Okay. So now I have to add just one last thing, which is-

Joyce Vance ([15:49](#)):

Sorry. My bad.

Jill Wine-Banks ([15:52](#)):

... I think that his conduct after the insurrection started when he was getting calls for aid and was still prohibiting assistance being rendered to his own Vice-President who was in danger tells us a lot about what his intent was. The testimony of staff who were with him and said he was actually enjoying watching the television.

Jill Wine-Banks ([16:15](#)):

These are things that are very important pieces of evidence and could sway people to say, "He is a danger to our country, to our Congress, to me as a member of Congress," and very important to present that host evidence.

Kimberly Atkins ([16:34](#)):

I agree with that. I agree with that completely. But I think we should move on to our next topic which is Merrick Garland. Merrick Garland is someplace that is very familiar to him right now, which is in limbo, waiting for a confirmation hearing. A place that he's been before, obviously when he was nominated by Barack Obama back in 2016 to take the seat of the late Supreme court justice Antonin Scalia on the US Supreme Court.

Kimberly Atkins ([17:08](#)):

Now, he is waiting for a confirmation hearing as Attorney General, a pretty big and important job as Joe Biden seeks to put his cabinet together. And while Republicans delayed in coming to an agreement with Democrats in the Senate over how they would share control, of course, Democrats have control technically because of the tie-breaking vote of Vice President, Kamala Harris.

Kimberly Atkins ([17:33](#)):

The Republicans dragged their feet a little bit and coming to an agreement and that gave them enough time with Lindsey Graham holding the gavel as Chairman of the Senate judiciary Committee to put off the beginning of the confirmation hearing for Merrick Garland until after impeachment, and also after the budget reconciliation process over this COVID Relief Bill.

Kimberly Atkins ([17:55](#)):

So that means that it will probably be weeks before we have a Senate-confirmed Attorney General at the top of the Justice Department at a time, of course, that a lot needs to be done at the Justice Department. After we have seen, as I wrote in a column today in the Boston Globe, many years of attorneys general under President Trump really rolling back A lot of the policies that Joe Biden believes in.

Kimberly Atkins ([18:25](#)):

There was a denial, frankly of the importance of right wing's extremism and the threat that it posed despite DOJ's own data that shows that posed the greatest threat to Americans and the lack of will, really, to address that. We saw the Black Lives Matter movement throughout all of last year demanding criminal justice reform. That needs to be done.

Kimberly Atkins ([18:54](#)):

And, oh yeah, we have alleged insurrectionist, Barb, who need to be prosecuted and investigated. And yet we have no permanent person at the top of the Justice Department. To me that move felt like the same kind of obstructionism that we saw from Mitch McConnell during the Obama Administration when he vowed to make Obama a one-term president.

Kimberly Atkins ([19:23](#)):

But it's also important to me because I think one of the most important things that needs to be done at the Department of Justice is to de-politicize it. De-politicize the department, de-politicized US Attorney's offices. And so I wanted to throw it to y'all, I'll start with Joyce. As a former US Attorney, talk a little bit about why the politics need to be taken out of the DOJ in the way that they do their work.

Joyce Vance ([19:55](#)):

If you ask any career prosecutor in one of the 94 US Attorney's offices across the country... Here's a little piece of DOJ trivia. 94 offices, only 93, US Attorneys because Guam and the Mariana islands share a US Attorney. So if that ever comes up on Jeopardy, now you're prepared to answer the question.

Joyce Vance ([20:16](#)):

But I promise you that every single one of those prosecutors would tell you that their job has nothing to do with politics. It's about the law and it's about justice. And the reality of being DOJ or of being a US Attorney's Office is that you can only be effective, you can only do your job when the community trusts you and has faith in you, because ultimately you have the ability to put people in prison, to take them away from their families and to put them behind bars.

Joyce Vance ([20:50](#)):

And if communities don't believe that you're exercising that power wisely and in a way that serves the interests of the community, then you begin to lose your ability to be effective. So President Trump, in order to serve his own purposes, in order to protect himself from prosecutions, went on the attack against DOJ.

Joyce Vance ([21:13](#)):



He named prosecutors, which was particularly heinous. He attacked the FBI, he attacked the Intelligence Community, and there is some data available that shows that public trust in law enforcement and the Justice Department has flagged as a result of that.

Joyce Vance ([21:30](#)):

So it's critical that we get Judge Garland confirmed as Attorney General so that he can begin to assemble his team and help to restore confidence in DOJ. Prosecutors are not used to going out to the public and selling themselves, but I think unfortunately we're at a point in time where everyone from the top leadership in the Department, to US Attorneys will have to show an unusual willingness to engage with their communities.

Joyce Vance ([21:57](#)):

You can't talk about ongoing investigations, but we can talk about process. I shouldn't say we anymore. They can talk about process, how they do things, what the standards and the rules are. People are very curious, DOJ will need to sort of pull back the layers of the onion and let the public in a little bit, and re-establish its credibility so it can perform its important mission, which is keeping all of us safe.

Kimberly Atkins ([22:24](#)):

Yeah. And to that point, I mean, I want to point out one of the things that Attorney General Barr did, which was lift this bar against starting investigations very close to an election that involve elections. That was an important rule that was put in place because the DOJ doesn't want to make it seem as if it will try to influence the way that people might vote, but that was rolled back.

Kimberly Atkins ([22:49](#)):

It does not seem that any of the US Attorneys actually took that invitation to actually open up any public investigation into alleged election fraud. But Barb, talk a little bit about those rules that are in place and what Merrick Garland might be seeking to do.

Barb McQuade ([23:12](#)):

Yeah. I mean, my guess is that when he comes into office there will be a number of policies that he will look at to consider changing. And for every day that goes by that he's not in office, he loses the opportunity to do that. When I was in the Justice Department, one of the people we had a chance to work with was Tom Perez, who was at that time the Assistant Attorney General for the Civil Rights Division.

Barb McQuade ([23:34](#)):

And he had been in the Clinton Administration. I remember him telling us repeatedly, "You got to think of it as the sand is going through the hourglass. You have a finite number of minutes to do this job. It's four years and then the sand runs out and your opportunity to do good, to make positive change, to change policies, to improve the quality of the Criminal Justice system, whatever it is you want to do, the sand runs out.

Barb McQuade ([23:58](#)):

And if you're starting late, then you're missing out on some of those opportunities to do some of those things." So I think every day that goes by is a missed opportunity. Now, I think we're in good hands in

the interim. The acting Attorney General is someone named Monty Wilkinson. He's someone Joyce, and I know pretty well. And he is a career professional. He's been there a long time. He came from the Justice Management Division. He's a solid career professional person, but he's a caretaker.

Barb McQuade ([24:26](#)):

He is not going to shake anything up, I don't think. That's typically not his mission. He's made a few policy changes. One I know that he has issued already was to rescind the Zero-tolerance Policy that Jeff Sessions had put in place to prosecute all persons who have entered the country illegally, felonies or misdemeanors, every one of those had to be prosecuted.

Barb McQuade ([24:51](#)):

And as most of us can appreciate, when you use your prosecutorial resources in one case, that means you're not using them in another case. So when you take a zero-tolerance position on misdemeanor illegal entry cases, that means you don't have those resources to work on something that might be more important that day.

Barb McQuade ([25:08](#)):

So he's doing some things like that, making sure that the trains are running on time and some modest policy changes are made, but I think we likely won't see any of those major policies until we have a new attorney general. And I don't know that we're going to see any of those other positions filled, those important positions, that assistant attorney general like some of these other divisions and some of the US Attorney positions. So precious sands are falling through the hourglass every minute that goes by.

Jill Wine-Banks ([25:37](#)):

Yeah, I think the delay is obviously a problem, but I want to talk about a possible solution to that. And that is for Merrick Garland to be named the acting Attorney General in the full knowledge that he will eventually be confirmed. There's no way that he won't be confirmed because, one, the chairman of the judiciary is now my Senator and will proceed to the confirmation and it only takes a majority.

Jill Wine-Banks ([26:08](#)):

That means that the Democrats will confirm him and he can start on his job right now. I just don't see why we don't do that or why the president doesn't do that so that we can have him. And I want to point out how important he is, particularly after Watergate, the attorney general replacement was also from Chicago.

Jill Wine-Banks ([26:34](#)):

Merrick Garland actually is from my hometown of Skokie and went to Nilas High School, which is where I also went, so yay for Chicago. I think that what is needed is something like what happened after Watergate. It was Edward Levi from the University of Chicago who was really not a political person. He was really someone who restored integrity to the Department of Justice.

Jill Wine-Banks ([27:01](#)):

I started my career at DOJ. I love DOJ. And I'll repeat what Joyce said, which is the first thing we learn is that we do justice and that we have to do what the public is willing to accept. That's something that has been totally lost in the pantheon of attorneys general under Donald Trump.

Jill Wine-Banks ([27:23](#)):

So I want to see him appointed today and I don't want to wait until after the impeachment and the trials next week and then the Senate goes on recess. That's another two weeks. Why should we wait? Isn't there a possibility that... I know it's not ideal to be the acting, but if you're the acting who is under nomination to be the permanent, why not?

Barb McQuade ([27:50](#)):

I think there might be some technical rules, Jill, that he'd have to come in and serve in a high level official capacity for 90 days or something like that before he can be acting. So I don't know that there's time.

Barb McQuade ([28:01](#)):

Matt Whitaker came in and served in Jeff Sessions' staff for a little while before he became... So I think anyone who's already Senate-confirmed or a senior official who's been working in the administration for 90 days is confirmed through [crosstalk 00:28:14]

Jill Wine-Banks ([28:14](#)):

Well, but he is senate-confirmed. He's senate-confirmed as a judge.

Joyce Vance ([28:18](#)):

That's a good point. That's a good point.

Jill Wine-Banks ([28:19](#)):

I just had a conversation with Adam Jentleson who was the Deputy Chief of Staff to Harry Reid when he was the leader and he confirmed that he thought it was a possibility. So I think the Vacancies Act would allow it. And we know that in the Trump Administration, people confirmed in one agency were transferred to another agency. And so if it worked for them, it could work for us. I don't think the Democrats frequently take all the power that they have and use it in the same way that the Republicans have.

Joyce Vance ([28:58](#)):

Wow.

Jill Wine-Banks ([28:59](#)):

[crosstalk 00:28:59] to think about it.

Joyce Vance ([29:01](#)):

Here's one implication of not confirming the Attorney General, to make concrete, Jill what you're saying and what Barb's saying about the need to get on with it whether it can be done as you suggest or not. We'll see early this spring the George Floyd case, or at least parts of it will go to trial.

Joyce Vance ([29:22](#)):

We will see similar cases related to excessive force by police go to trial in criminal settings, and I'm sure we'll talk about this in coming weeks, those cases can be very difficult for prosecutors to get convictions

in, in large part because of the state of mind you have to prove for police officers involved in shooting, but also because of a defense called qualified immunity that gives them more latitude to act than it does to general citizens.

Joyce Vance ([29:53](#)):

This came up in the Ferguson situation, which happened near the end of the Obama Administration, where it wasn't possible to prosecute criminally. But what DOJ was able to do was to use something called the Consent Decree process to force those departments to reform their practices. Where they had had systemic problems to force them to redo their training and their standards and to come under DOJ scrutiny so that these horrible incidents would not continue to happen.

Joyce Vance ([30:26](#)):

Jeff Sessions as Attorney General discontinued the use of Consent Decrees. So one of the most important things we need is to see Judge Garland confirmed, to see Kristen Clark confirmed as the Assistant Attorney General for the Civil Rights Division, so that if we're not able to obtain prosecution or convictions in those cases then the departments can be forced and DOJ has the tools to fix that problem. Barb, it looked like you had something to say.

Barb McQuade ([30:53](#)):

I just wanted to say a quick word about Consent Decrees. We had one with the Detroit Police Department during the time I was US Attorney. And I think sometimes people see this as an us-versus-them, that you have to be for the police or against the police. And that Jeff Sessions was the champion of police departments by removing this tool from prosecutors.

Barb McQuade ([31:11](#)):

But the Chief of Police in Detroit will tell you that this was a gift. This was a great thing. It caused the Police Department to become a constitutional Police Department. It is now a model of best practices around the country, and it brought in the resources that he couldn't do on his own to transform the Police Department.

Barb McQuade ([31:26](#)):

So I think everybody wants a police department that works equitably for everybody in a community, that has the trust of the community it serves and that the Justice Department can come in and bring resources and the expertise frankly that it takes to transform departments, then everybody should welcome it.

Kimberly Atkins ([31:45](#)):

I agree with that wholeheartedly, especially since so little of police reform can be done at a federal level. This is really a state and local issue. And this is one of those few tools that can be used to bring to bear the resources of the Federal Government in on this as well.

Jill Wine-Banks ([32:03](#)):

Related to this is another reason why we need Merrick Garland and leadership at the top is the misunderstanding that people now have about DOJ having dropped the lawsuit against Yale. People

think that that was against civil rights, but actually the lawsuit was against affirmative action. And I don't think people even have a public spokesman who's made that clear.

Jill Wine-Banks ([32:31](#)):

I get a lot of questions on Twitter about why would the Biden Administration go against affirmative action? And it's not. It's the lawsuit that the Trump Administration filed against Yale was to stop affirmative action.

Kimberly Atkins ([32:44](#)):

And they filled it that way on purpose to make it look as if it was some sort of civil rights claim when it was actually essentially in a way that I find really repugnant using Asian American students as pawns in order to stop affirmative action programs that are aimed to increase the minority population of the student body in schools like Yale and Harvard.

Kimberly Atkins ([33:07](#)):

Okay, I'm going to throw it to Joyce. We can talk about this all day, but I'm going to throw it to Joyce to talk about another really interesting case involving civil law and defamation.

Joyce Vance ([33:18](#)):

The Smartmatic case is the case that you're talking about, Kim, and this is a fascinating one. This week, a company called Smartmatic sued Fox News. It sued three of its hosts, Lou Dobbs, Maria Bartiromo and Jeanine Pirro. And it also sued Trump lawyers, Sidney Powell, and Rudy Giuliani. The lawsuit alleges defamation. It's a group of claims, but they all come down to defamation.

Joyce Vance ([33:44](#)):

Smartmatic is a company that makes voting machines. The lawsuit gets filed, as Kim says, it's a civil case in State Court in New York. This might be one of my favorite pleadings of all time. And for those of you out in Podcast Land, who haven't had a chance to take a look at this complaint yet, I'm just going to read you a little snippet from the introduction.

Joyce Vance ([34:06](#)):

Here's how it starts. The earth is round. Two plus two equals four. Joe Biden and Kamala Harris won the 2020 election for President and Vice President of the United States. The election was not stolen, rigged or fixed. These are facts. They are demonstrable and irrefutable. What a great start to a lawsuit? I've never heard anything quite like that. Barb, talk with us a little bit about what the lawsuit is about. What are the claims that Smartmatic is making?

Barb McQuade ([34:41](#)):

Yeah. There's 16 different claims, all claiming defamation that Fox News and various of its hosts and guests made false that the Smartmatic voting machines and they make software and hardware for voting, that they were somehow involved in fixing and rigging the election in favor of Joe Biden. It's completely false and it has harmed their business.

Barb McQuade ([35:11](#)):

They sell their software and hardware to communities. The only one they worked in the 2020 election was in Los Angeles County. Nonetheless, that fact has not gotten in the way of spreading falsehoods that they were involved in election irregularities in many other States. There are allegations like they were owned by the same company that owned another voting election software and hardware company that was launched by Hugo Chavez, the leader of Venezuela who is now dead. All kinds of crazy allegations.

Barb McQuade ([35:47](#)):

But it's very interesting, they are seeking \$2.7 billion in damages because they say this will harm the reputation of our business. There will be some communities who will say, "I heard Rudy Giuliani say on national television that this company produced goods that rigged an election. We want to have fair elections in our community."

Barb McQuade ([36:08](#)):

And so I think they've alleged very strong claims. They specify all 16 of these claims that they're seeking. It includes, as you mentioned, Rudy Giuliani and Sidney Powell, lawyers for President Trump, as well as some of the Fox News hosts. So it'll be an interesting case going forward, but looks to be one that's very strong.

Joyce Vance ([36:28](#)):

It's utterly fascinating, right? It's not just one instance of defamation and they say in the complaint that this happened over and over, night after night on Fox, where it reached millions of viewers. It really sets it apart from any other defamation or libel case that I've ever seen. Jill, you had something to say.

Jill Wine-Banks ([36:47](#)):

I just wanted to add, although they were only involved in the 2020 election in Los Angeles County, they are a very large international operation. They do machines in many, many foreign countries. And so at first when I read it, I thought, "Oh, whoever heard of them and how could they be hurt to the point of \$2.7 billion?" And then I looked at the rest of it and you can see how they could lose dramatic business.

Jill Wine-Banks ([37:19](#)):

Now, of course, in proving the case, if Smartmatic doesn't get a settlement offer, which they might. But if they don't and have to go to trial, they're going to have to prove their actual damages and show what business they actually lost. Not just that they hypothetically are losing business because of the defamation. And they also are going to have to show they aren't a public figure so that the standard of proof doesn't get raised.

Jill Wine-Banks ([37:50](#)):

In defamation cases, if you're just an ordinary citizen, then you can just prove that it was false. If you're a public figure, you might have to also prove that it was malicious, that the speaker knew it was false. Although I think that would probably be pretty easy to prove in this case, that anybody saying that knew that it was false. But it's going to be a very interesting case.

Jill Wine-Banks ([38:12](#)):

And it's very interesting that it might be a civil defamation case that takes down Rudy Giuliani, Sidney Powell, Fox News, and its hosts. And they were very careful to Sue the news hosts, not the opinion hosts because opinion is opinion, but news is supposed to be true. It's supposed to actually be based on facts.

Jill Wine-Banks ([38:35](#)):

So I think this is going to be very interesting and it also shows the defamation cases against Trump may be powerful in controlling Trump, some reserve hosts and E.J. Carroll have lawsuits pending for defamation. And false hoods can get people in trouble. When we turned over the briefcase full of evidence and a roadmap to impeachment at the end of when we indicted the defendants in Watergate, we gave it to the house.

Jill Wine-Banks ([39:10](#)):

And one of the areas that we provided evidence, that we felt was impeachable was for all the lies. We had a list of, the president said X, here's the facts. And I think that this could be very interesting against the president as well as Fox News.

Joyce Vance ([39:32](#)):

It's interesting usually we talked about criminal cases, but this is a civil case. What's different about a civil case. What kind of outcome could we ultimately expect here?

Kimberly Atkins ([39:43](#)):

Well, I think one of the biggest potential outcomes of this is beyond the money, right? I mean, one of the things that these plaintiffs are going to be looking for is for the news organizations that spread this false disinformation to go on air and with the same vigor correct the record.

Kimberly Atkins ([40:05](#)):

I mean, they're seeking the best fact-check that you could possibly get. I mean, the people who watch Fox News and these other organizations that are being sued, they don't read PolitiFact, right? They don't care about the Washington Post and their Pinocchios, but if they are sitting and watching this and they see the same hosts and anchors say, "There is no evidence that these organizations, that the manufacturers of these voting machines committed fraud. That the things that were said and don't have to go through."

Kimberly Atkins ([40:38](#)):

We've already seen it happen a little bit with the Dominion suits on Newsmax and other organizations, have to give these corrections and so that is going to be an important thing. And think about it, in so many ways we've been talking about how to hold folks accountable for the big lie. This falsehood that there was election fraud that was perpetuated by the president and all these other people.

Kimberly Atkins ([41:08](#)):

And we're saying we don't know if there will be a conviction in the impeachment trial, so we don't know if there might be accountability there for the alleged incitement of insurrection.

Kimberly Atkins ([41:20](#)):

We know that the people who participated in those events on January six are being prosecuted, but that's not going to reverse the disinformation that caused them to engage in this really horrific act. But if you can get at the dis-information itself, that's really important. And it's these civil suits that might be the best way to do that. What do you think, Barb?

Barb McQuade ([41:45](#)):

Yeah. It's very interesting you mentioned disinformation and that is the way this lawsuit is framed. They talk about it as this is a part of a disinformation campaign. And so it seems like that may be the come up in state matters most rather than criminal prosecution, but all these defamation suits, as Jill mentioned, the women who are suing Donald Trump and this one.

Barb McQuade ([42:05](#)):

And the other thing that we saw that was a little bit unusual was the filing in Michigan of a motion for sanctions against Sidney Powell for the filing of a frivolous lawsuit. There's a rule in civil procedure that says, "If you file a lawsuit that's not well-grounded in fact in law, the lawyer and the party could be liable for monetary sanctions, a financial penalty, but judges are [crosstalk 00:42:30]."

Joyce Vance ([42:30](#)):

Rule 11.

Barb McQuade ([42:30](#)):

Yeah, there you go. Rule 11 for 200. Judges are very reluctant though to award those. It's very, very rare. But if ever there was a case where they should be awarded, I think you might be able to argue that the lawsuit that Sidney Powell filed in Michigan, like many others that were filed around the country was not well-grounded in fact.

Barb McQuade ([42:52](#)):

It was a frivolous allegation that there was fraud in the election. It was filed before a Federal District Judge in Detroit who summarily dismissed it and said there's absolutely no basis for this lawsuit and dismissed it. And so now there's a motion pending for sanctions.

Barb McQuade ([43:08](#)):

I think the granting of sanctions in a case like that could have a very powerful deterrent effect on some of these frivolous lawsuits going forward. And just like this lawsuit, if Smartmatic is able to get \$2.7 billion or something close to it and a retraction from Fox News that could go a long way towards stopping disinformation in a way that perhaps criminal prosecution can...

Jill Wine-Banks ([43:29](#)):

That's a great point.

Joyce Vance ([43:30](#)):

The disinformation point is a great one because before you can file a defamation lawsuit, you actually have to reach out to people before you sue them, put them on notice that you're planning on filing a suit and give them a set amount of time in which to retract the false statement, and so that's what happened here.



Joyce Vance ([43:50](#)):

They actually reached out to Fox and said, "If you don't retract your statements within a certain number of days, we'll sue you." Fox and the other defendants chose not to retract. Obviously they thought that that would be problematic for them for whatever reason. So to see them potentially being forced to do that in the context of this lawsuit, I think that that underlines how important the comments that y'all are making, and it's not just for this suit. It could be for the next lawsuit.

Joyce Vance ([44:18](#)):

For instance, the Lincoln Project has a situation where they have actually put someone on notice and demanded a retraction. Future defendants might be a little bit quicker to retract and perhaps what we are seeing here is the real way to hold Trump and other people who spread disinformation accountable. So, who would have ever questioned it would come through a civil case.

Jill Wine-Banks ([44:41](#)):

I have a question about what I think is a really excellent pleading, very compelling, very well done, but I just wonder if anybody feels that possibly they went a little too far in saying that this is what caused the insurrection and whether that has any relevance to damages to Smartmatic.

Joyce Vance ([45:06](#)):

Well, I think they have to prove that, right? I mean, all they have to prove is that there was false statements made about their reputation that will cause harm. So I agree. It's probably a little bit sensational and it's a little bit superfluous because if they have to set out to prove that they've made their job a lot harder, I don't think they do. But I suppose if you are a defendant, you might ask to strike that as superfluous.

Joyce Vance ([45:35](#)):

But this is a civil case, not a criminal case, so the burden of proof is lower for the allegations that they make. I think it was perhaps put in there deliberately for that reason. It might be a savvy move, or as Barb says, a judge might go ahead and strike it as scandalous and superfluous.

Jill Wine-Banks ([45:55](#)):

You say superfluous better than I do, Joyce. Well done.

Joyce Vance ([45:58](#)):

Superfluous. It's my Southern accent.

Jill Wine-Banks ([46:01](#)):

[crosstalk 00:46:01]

Joyce Vance ([46:01](#)):

Barb, we have questions from our listeners. Should we go ahead and move on to those questions?

Barb McQuade ([46:06](#)):

All right, let's do it. Each week we will be taking your questions. You can write us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or you can send us a tweet using #SistersInLaw. If we don't get to your question in the show, we will try to answer as many of them as we can on our Twitter feeds throughout the week.

Barb McQuade ([46:23](#)):

Let's take a couple of them. We've got one from Diane in Monrovia, California who's at D Logan 34. Diane says, "It seems in general people are shrugging their shoulders as if there are no laws to charge the insurrectionists other than trespassing and assault. Can you talk more about potential charges?"

Joyce Vance ([46:44](#)):

Well, let me answer Diane, since she's from really close to my neck of the woods. I grew up in the Pasadena area, which is just next door to Monrovia. So hi, Diane. The answer, I think in part at least is this, what we're seeing prosecutors do right now is bring easy charges, accessible charges so that they can make arrests, in some cases take people who pose an ongoing risk and incapacitate those folks so that they can't do any more harm.

Joyce Vance ([47:14](#)):

What we'll see is DOJ continues its investigative work will be superseding indictments. That means that they'll amp up some of these more basic charges with more serious charges where they're available. So people who were originally charged with the federal equivalent of trespassing might ultimately face charges for assault or any other crimes that they were involved in.

Joyce Vance ([47:39](#)):

The last thing that I would say is some people have suggested that it's a problem that we don't have a domestic terrorism statute and having done a lot of domestic terrorism work, I'm not too worried about that.

Joyce Vance ([47:52](#)):

The fact that there's no specific statute means that every statute on the books is a domestic terrorism statute, and I have charged everything from tax code violations to fake ID violations in an effort to bring domestic terrorists to justice. There is a lot of statutory room out there for prosecutors to hold these folks accountable.

Jill Wine-Banks ([48:13](#)):

I would say that conspiracy is one of the big ones that people are not talking enough about and even felony murder, because when they undertook to reach the Capitol, to break in, to break the glass, to push aside barriers and police officers, some of them came armed and they did serious injury to many of the Capitol police.

Jill Wine-Banks ([48:43](#)):

That makes them all responsible in the same way that the getaway driver who's waiting outside the bank doesn't pull the gun that kills the guard. He or she is also responsible for the murder of the guard because they were part of the conspiracy to rob the bank. And here they're all part of the conspiracy to

violate the sanctity of our government and to breach the Capitol. So I think there are some very serious crimes that could be charged.

Barb McQuade ([49:12](#)):

All right, let Me move on to another question. We've got this one from Carol in Salt Lake City, Utah. She says, "I am dismayed hearing about so many serious threats made to politicians. Can't the individuals who make these threats be prosecuted?"

Joyce Vance ([49:28](#)):

So the answer is yes, they can be in some cases where the threats are indicative of a desire to do violence. We all have first amendment rights, but there's a point in time where that line can be crossed. And if you do make an actual threat to do harm to someone, there are specific statutes involving threats against members of Congress.

Joyce Vance ([49:51](#)):

We've seen that invoked in a case involving Nancy Pelosi and other ways to bring folks to justice and accountability. These cases can be tough to investigate because they sometimes turn on the state of mind of the person who made the threat. And it's really tough to get inside of someone's head and figure out what their intent was.

Joyce Vance ([50:12](#)):

That means prosecutors and investigators have to look for context. What conversations were these folks having with people around them? Did they actually go out and buy a gun if they said they were going to shoot someone? So, don't mistake a failure to be quick and speedy about bringing prosecutions over events like this.

Joyce Vance ([50:31](#)):

As we saw in Michigan over the summer, and maybe that's something that Barb can speak to, but we did have threats against the governor and others in Michigan and they were responded to with indictments by law enforcement.

Barb McQuade ([50:44](#)):

Yeah. I'll just say briefly, one of the phenomenon that we have seen here in Michigan that is very disturbing is protestors going to the homes of elected officials and protesting at their homes with weapons. If they're in a public space on a sidewalk or on a street, there is no crime for them to gather and assemble and protest that way, but it can be very intimidating.

Barb McQuade ([51:06](#)):

I know Secretary of State Jocelyn Benson tweeted about how she was inside her house watching How the Grinch Stole Christmas with her young son while there were armed protestors outside her home. It's not illegal. They have the right to do that, but it strikes me as crossing a line that makes it dangerous to hold public office in a way that I think is unhealthy for a democracy.

Barb McQuade ([51:31](#)):

We want to encourage people to run for public office. And if you know that your family's safety might be put at risk, I think there's worry about that. A lot of it comes online. And as Joyce said, the question is whether it is someone speaking their mind about displeasure with an elected official's conduct and decisions, or what is known as a true threat and that is a specific threat to injure or kill a particular person, which is prosecutable.

Kimberly Atkins ([51:57](#)):

And I think in this case, Barb, because it is so difficult is as you and Joyce correctly point out to bring criminal charges and to use the criminal system as the cure for this, that it needs to be a political solution. I think it needs to be bi-partisan condemnation across the board from office holders to say that this is unacceptable.

Kimberly Atkins ([52:23](#)):

This type of threat, this type of violence against people who have been elected to do the business of the American people, even if you disagree with their views, that this type of threat is not acceptable. And I think if we saw more of that perhaps that would help also to tamp down that level of anger and vitriol that is thrown, not just at elected officials.

Kimberly Atkins ([52:48](#)):

I'm sure the four of us have our share of things in our inboxes that we get. And it's just such a polarized and vitriolic time that it is a really big problem. And if we had our leaders stepping up and condemning it, perhaps that would go at least a little bit of the way to stopping it.

Barb McQuade ([53:07](#)):

Yeah. I agree with you. I think there has to be some public condemnation to it so it's not normalized. Let me read one last question, Jill maybe we can ask you to chime in on this. Sarah in Orlando has asked, "What do you mean by senior status with respect to judges? If a judge has senior status, can the president replace him?"

Jill Wine-Banks ([53:26](#)):

Senior status is a voluntary act by a judge who reaches a certain age. And my friends who are judges are of that certain age, and some of them have taken senior status. And it simply means that they don't have a full caseload, but they maintain their office, they do hear cases, they do do trials, but it's just not a full load.

Jill Wine-Banks ([53:55](#)):

And no, they can be replaced as the judge that they were. They stay senior and for as long as they want to stay senior status. But yes, that means that all of the judges who were waiting and announced on inauguration day that they were going to senior status meant that there were vacancies that President Biden can now name people to. And because we only need 51 votes to confirm those judges, the process should move forward quickly and I hope that it will.

Joyce Vance ([54:35](#)):

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That brings us to the end of the show. Thank you for listening to #SistersInLaw. As Barb pointed out, hashtag is part of our name. #SistersInLaw with Kim Atkins, Barb McQuade, Jill Wine-Banks, and me, Joyce Vance.

Joyce Vance ([54:51](#)):

Don't forget to send us your questions so we can answer them next Friday and every Friday. Our email address is [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com). You can also tweet your questions to us using #SistersInLaw. We would love it if you would listen to us every week.

Joyce Vance ([55:10](#)):

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