

Kimberly Atkins: Welcome back to #SistersInLaw. I'm Kimberly Atkins, Boston Globe opinion columnist and recovering attorney, and the sisters and I have so much to talk about this week. With me, as usual, are...

Jill Wine-Banks: I'm Jill Wine-Banks, the former Watergate prosecutor and author of The Watergate Girl.

Barb McQuade: I'm Barb McQuade. [00:00:30] I'm a professor at the University of Michigan Law School and a former federal prosecutor.

Joyce Vance: I'm Joyce Vance, also a law professor, but at the University of Alabama Law School and the former United States attorney for the Northern District of Alabama during the Obama administration.

Kimberly Atkins: And we are #SistersInLaw. So sisters, fill us in about what you've been doing since we talked last, last week. Barb, how about you?

Barb McQuade: Well, I've been watching an awful lot of impeachment on television [00:01:00] in between teaching. I've watched as much of it as I can. One thing I find that's different from being a lawyer in the courtroom and watching trials, when you're listening to opposing counsel argue, maybe you're jotting down notes, points that you want to respond to. Instead, I've been live-tweeting. So sometimes things are ending in exclamation points because I can't yell it out at my TV, but I'm watching a lot of that, and I'm shaking my head a fair amount.

Kimberly Atkins: What about you, Joyce?

Joyce Vance: [00:01:30] So I teach a seminar in the spring on democratic institutions and as luck and good fortune would have it, on the syllabus next week is a topic that we all know a lot about right now, impeachment. So as I've been watching the trial and playing along on TV and on Twitter like Barb, I've also been doing some reading on the history, reading really great books, including one by professor Laurence Tribe at Harvard, some other more recent books that have come out [00:02:00] and just pondering whether impeachment in general is sufficient to ensure the health of the institution of the presidency. It seems like a much more live issue than it has in previous years.

Kimberly Atkins: Jill, how about you?

Jill Wine-Banks: I've been doing pretty much the same as everybody else glued to my television, watching the impeachment trial and having the benefit of a computer next to me, I get to look up whatever they say to see if it's true or false. Guess what? I found? A lot [00:02:30] of false hoods word spoken today when the defense went forward. So that's pretty much what I've been doing. But I also, like Barb and Joyce this week, I taught two classes at AU, American University. I'm a professor who has a class that includes my book as a tool. So that was fun for me.

Kimberly Atkins: And I too have been spending a lot of time focused on impeachment, watching it, writing about it in the Boston Globe, [00:03:00] talking about it on MSNBC, and now I look forward to talking about it some more with all of you. So let's get right into it. This week we'll be taking on the impeachment and its first amendment implications or lack thereof, the possible consequences for the former president and breaking down the newly opened investigation into his conduct in Georgia. After that, we'll be answering some of the questions that you have sent in for us.

So I will start us off talking [00:03:30] about the defense today. One of the issues that Donald Trump's lawyers brought up to try to defend his conduct is to say that it was protected by the first amendment. The gist of the argument was that he was engaged in a political exercise. When he gave that rally, that Stop the Steel rally on January six, said it was just like all the other rallies he's been holding for five years, and in that way he was engaged in speech that the Supreme Court [00:04:00] has found to be protected.

Now, as the lawyer in me, sort of was jumping up and down and, and screaming back at the screen, like Barb was saying, because it brought up the standard in the Supreme Court case, Brandenburg v. Ohio. I'm going to read it to you. It's a two-prong test to decide whether speech has first amendment protection. One, its speech can be prohibited if it's directed at inciting or producing imminent lawless action, and two, if it [00:04:30] is likely to incite or produce such action.

It seems to me that the impeachment attorneys did a very good job in making both of those cases. But it seemed really strange to me, and I want your take about how among the things that Trump's lawyers did today will sort of Mark the impeachment attorneys for talking about whether or not what Trump said and his conduct and his actions would [00:05:00] foreseeably cause people to go to the Capitol when that is an essential element to show that it does not enjoy that first amendment protection.

They seem to be pretending like that wasn't the standard while pointing out that it was the standard and saying that they didn't meet the standard. I was trying to follow that legal train of thought, and I got lost a couple of times. What do you guys think?

Joyce Vance: So can I just say that it was... Exactly. It was mind-numbing, and there were [00:05:30] points where I wanted to stand up and just start banging my head into the wall to make it go away. But I think our job as lawyers is to be thoughtful about this and to really work through the first amendment issue. So the first thing that we should discuss is whether we even have to consider the Brandenburg standard. We've talked about it amongst ourselves before. That's a case where a high-ranking member of [00:06:00] the Ku Klux Klan is prosecuted. He's facing criminal charges over some speech that was sort of reasonably provoked violence, except for the fact that he wasn't in front of a live crowd.

The Supreme Court says, "No, this speech is not going to be speech that the government can criminalize because it's not designed to incite immediate violence." That's how we end up with this standard. The question is, [00:06:30] would that even apply at impeachment? The answer is no, not at all, because impeachment isn't just limited to criminal charges. Impeachment in yesterday, Representative Raskin was very clear about explaining, impeachment is about violating your oath of office. There's no first amendment, right, that's implicated in that situation. So we don't really even have to get to the Brandenburg argument, but we can discuss it for the sake of argument since [00:07:00] Trump's lawyers raise it.

Kimberly Atkins: I think that's a great point, and it's an important one that the first amendment is not necessarily a shield. There are things that a president can do that in other circumstances might warrant constitutional protection. But as president and when you're taking your oath, that could still be grounds for losing that job and losing the ability to continue to do that job, particularly when it puts the democracy in peril. Barb, [00:07:30] I would love your thoughts on this.

Barb McQuade: Yes. I've read some very good analogies to this, because as both of you point out, it isn't that President Trump is being criminally prosecuted or even civilly sued for things that he said. The first amendment protects us against unlawful speech. Instead, the decision is, are you worthy of the office of the president of the United States? One could imagine some of these analogies that I've read about, a president who decides, "From now on, I'm going to wear a swastika armband. [00:08:00] From now on, I'm going to burn the flag on the lawn of the White House every day." Those things are all permitted under the first amendment. But I think many of us would say, this is not a person who is fit to serve as president of the United States. So it's a very different question.

I also think that this first amendment argument is a way for Trump's lawyers to argue very narrowly the scope of his misconduct. They want to focus solely on what he said that day on January 6th and say, "Sure, this is just another fiery speech." Everybody says, fight, [00:08:30] fight, fight when they're talking to their political followers, and that's all protected by the first amendment. But what you have to look at is the entire scope of conduct that's occurred for many months, beginning in the summer, when he said, if I lose the election, it will be because the election was rigged and trying to intimidate election officials in Georgia and Michigan and elsewhere and inviting people to come to Washington as far back as December. Come January 6, we'll be wild. So I think all of that is part of the case, not just solely looking at what he said [00:09:00] on January 6th in isolation.

Kimberly Atkins: Yeah. How about you, Jill?

Jill Wine-Banks: I agree, of course, with everything that's been said. But I would divert to the actual first amendment normal understanding as applied to any citizen. I would say that even an ordinary citizen could not have given the speech in the context

that it was given, because context really matters. When the defense today used the word fight and showed video of Democrats using the [00:09:30] word fight in I think at least 200 times, none of those was a intention of causing violence. None of them was in the context that it led to violence. All of them were, I'll fight for you. I will fight for civil rights. They were legitimate uses of a non-violent fight, as opposed to how Donald Trump has encouraged violence and urged [00:10:00] fighting in a violent way and how on this occasion, when he said go to the Capitol, the only action they could take to stop the vote, which was what he told them to do was to use violence. There was no other legitimate interpretation of his words. So under even the lowest standard, the first amendment would not protect him, even if he was just an ordinary citizen.

Kimberly Atkins: That's so important, Jill, I mean, I think that's one reason I [00:10:30] was particularly gobsmacked when Trump's attorney, Bruce Castor brought up to support this first amendment argument the case Bond v. Floyd, which of course involves civil rights icon, Julian Bond. What that case is about is essentially the student non-violent ordinary coordinating committee back in the sixties came out against the Vietnam war and came out against the draft, and the Georgia State legislature [00:11:00] wanted to try to get Julian Bond from... prevent him from being seated and asked him if he would denounce that position by the organization, and he said he wouldn't.

The Supreme Court said that was protected. That was protected speech to say, "I am against the war," to say, "I am a pacifist." So the fact that Trump's attorneys were using that case of all cases to say that he had the right to incite violence just really, not [00:11:30] only was that not legally on point. It was just particularly offensive to me.

Joyce Vance: It really was. The way that they raised both the case that involved snitch and other cases that they talked about as though they said something that was exculpatory for the president, and they really weren't. The case law says political officials, elected officials have a right to engage in free speech. They can go out and speak their mind. But [00:12:00] what those cases don't do, they don't extend the first amendment any further than it would reach for an average citizen for one of us.

So to Jill's point, which I think is exactly the right one here, none of us could go out on the ellipse and direct an angry and violent mob to launch at the Capital. Trump can't do it either. The first amendment is not a safe harbor for him here.

Barb McQuade: Yeah. As some members of the Supreme Court has said, the bill of rights [00:12:30] is not a suicide pact either. These rights are not absolute. We have to temper them with some common sense. I think President Trump's lack of willingness to take responsibility for his actions is very telling. There's been no apology or remorse for the loss of life at the Capitol that day, and I think all of that is very telling. Can I just say one other pet peeve that I heard today that is not so much a legal argument, but something that I heard again and again,

referring to [00:13:00] the party as the Democrat party? Deliberately mispronouncing Kamala Harris' name, Kamala Harris.

I know they know better. You hear this frequently from some Republicans in the House, not so much in the Senate. I find it to be very disrespectful and unprofessional, and it immediately labels somebody as part of a team. I am on team Republican, I'm opposed [00:13:30] to team Democrat. I find that so unhelpful and unhealthy in a democracy. When I hear that, and obviously, I'm not the target audience, and maybe there are some who find that attractive in some sort of way, but it immediately undermines the speaker's credibility. I mean, can anyone explain to me what that is all about?

Joyce Vance: I think it's the same as the people who use dog whistles, right? It's exactly what you're saying, Barb. It's identifying [00:14:00] yourself as part of a tribe where that second-grade playground conduct is acceptable, and it's offensive to us. But I think what it's important as the country moves forward for us to wrap our minds around is that there are people out there who welcome that sort of signaling who count themselves among groups that think that that's clever conduct. If we're really going to have a conversation in this country about how we get back together again, we're going to have to learn to understand [00:14:30] folks who are in that camp. Right now, understanding really eludes me.

Jill Wine-Banks: I agree with you, Barbara. I think it is definitely intended as a call-out to Trump's supporters. It's a silent whistle to them, and it is offensive. In order for us to have the dialogue that we need to heal, we have to respect each other. I always called Donald Trump, President Trump. Not everyone did, because they didn't [00:15:00] want to show him that respect. But I think whoever holds that office has that title. I think that we have to use the right name for our current vice president. We have to avoid that kind of demeaning behavior.

Barb McQuade: Yes, I agree with Jill. I think by modeling respectful behavior, perhaps we'll see more of it. So we'll take a pledge to do that. Why don't we move on now to thinking beyond this trial and thinking about long term, [00:15:30] what might be the consequences for President Trump as a result? I mean, if he is convicted, does that mean the end of his political career? Does that simply make him a martyr in the eyes of some who follow him?

If he is acquitted, as appears to be likely, in terms of vote counting, what does that do to his political future? Does that simply embolden him and his followers that he is untouchable. Kim, what do you think about that?

Kimberly Atkins: I think probably the most [00:16:00] consequential result of this trial would be if there is a conviction and the Senate subsequently makes him ineligible to run for office again. That's the one way to protect democracy in terms of making sure that he doesn't engage in these very same actions, right? Again, tomorrow, if he's acquitted, he could the next day declare he's running for president in

2024, set up a campaign finance account and be able to fundraise and hold more rallies and do exactly [00:16:30] what he did. That's the biggest danger here. So I think that is the most consequential thing. If he's acquitted, there's absolutely nothing that will stop him from doing that, and that's what's at stake here.

I think, look. He has succeeded in using division as a political tool for so long, both to denigrate people who he sees as political enemies and also galvanized his own supporters [00:17:00] in a way that's just... It's beyond fanatic that I think he'll absolutely be seen as a martyr by some folks, no matter what happens. But I think if he loses his political power, if he's unable to run for office again, if you look at frankly autocratic governments, a lot of times when those folks lose power, the people who were very, very, just demonstrating nothing but fealty to them quickly stop, because there's no reason to. Of course, I'll have some supporters. [00:17:30] I think his support will begin to diminish greatly if he can't run for office again. So I think that's the biggest thing that's at stake here.

Joyce Vance: But something that's really concerning is that just like Trump could not issue pardons for crimes that were charged in the state system, the Senate can't exclude him from running for statewide office. So we could, for instance, see him announce his candidacy to be governor of Florida. [00:18:00] Barb, I see the look on your face right now and [crosstalk 00:18:03]-

Barb McQuade: God, no.

Joyce Vance: ... with all of the same problems, right? It's exactly what Congressman Lieu announced yesterday as a potential problem. He runs, he loses, he puts the country through this again. That is a real problem that it's not just up to Democrats to confront. This is up to Americans to confront.

Jill Wine-Banks: It is. But I have been hearing some commentary that gives me some hope that Republicans feel that even if he is acquitted, [00:18:30] the House managers put on such a compelling case that his political future is over, that even without being convicted, he will never be elected again. But I would suspect that his movement isn't going to die so fast and that his supporters are going to transfer their loyalty to Holly, Cruz, hard to say exactly who, Lindsey Graham.

But I also haven't quite given [00:19:00] up all hope of getting 17 senators because the questions that need to be answered, even the question that Senator Cassidy said he needed answered before he could say how he would vote on the merits, which was why did Donald Trump do nothing when he knew that the vice-president was in danger, that the Capitol had been invaded. That question was not addressed by the defense, at least as of now. I assume it'll be a [00:19:30] question there'll be asked during the question period, but we're recording during that. So we don't know what they're saying.

As of now, that's an open question, and all of House manager Raskin's questions have not been answered. So there are some real questions that could... I cried twice listening to the evidence, and I was very deeply moved. I think there may be some Republicans beyond the six that we have counted [00:20:00] and that maybe he will be barred from office.

Kimberly Atkins: One thing that came to mind when I was listening and watching that case to, Jill, is seeing that video of Officer Eugene Goodman stopping Mitt Romney and telling him to turn around and go back because the insurrectionists were coming. How do you, if you are a member of that body that votes not to convict [00:20:30] Donald Trump, how do you face Mitt Romney in that chamber? How do you think about his family and how close he came? How do you face Chuck Schumer, who too had to run on that video to get away from the mob that was coming that would have certainly recognized either one of them and who knows what would have happened? They have to work with these folks, and that's the part that really strikes me.

Jill Wine-Banks: They have to look at themselves in the mirror in the morning. [00:21:00] How do they look at themselves? They heard the evidence we heard. They heard the defense that we heard, and it doesn't answer the evidence that we saw. It just doesn't. So to me, it's a very compelling case with no defense.

Joyce Vance: It's an interesting question of the emotional impact versus the legal arguments that are being made. I had a moment when I was watching the videos that really hit close to home. [00:21:30] We were watching Speaker Pelosi's staff run into the inner office where they barricaded the door. Then we saw the mob banging on the door. So my daughter worked on The Hill two summers ago, and I had this momentary flash of my 20-year-old in that situation, having to figure out what to do to protect her life. It was painful, even at that great remove, and you wonder about all of the people who have loved ones in the Capitol, not just the members [00:22:00] and their staff, but the janitors, the cafeteria workers, the engineers, right?

You have to take a moment and wonder, how did these senators look any American in the eye after that? Then you think about the Capitol police officers who take an oath to, and they stood out on the front steps. They retreated into the building. They upheld their oath that day. How did these Republican senators do any less and retain credibility? [00:22:30] I just can't get past that.

Barb McQuade: I know that they wanted to move the trial along fairly quickly because the Democrats have President Biden's agenda of COVID relief and confirming nominees and some other things. But I thought they really missed an opportunity to call some live witnesses to really bring home the real harm that did occur. I think that people feel like, "Well, we really dodged one." Mike Pence is okay. Thank goodness all these members of Congress are okay. But lives were lost that day. Two more police officers committed suicide, [00:23:00] and seeing that body cam footage, you can understand the trauma that they went through

and the idea of returning to the job. I'm sure it was incredibly traumatic, but I would love to have heard from some of those people, Joyce, that you mentioned, the Nancy Pelosi staff who cowered under a table as protestors pounded on doors for hours.

Also, you know who I feel I'd love to have heard from? Some of the janitors who faced the mob. They were in the building. So their lives were in danger, and then after it was all over, they had to clean up the mess. They had to wipe feces [00:23:30] off of walls. They had to sweep up broken glass. I'd like to hear from some of those people about what they experienced that day. I think that it could have been a very powerful moment to help us really understand the harm that was done here.

Joyce Vance: I agree with you. I also would have liked to have heard Officer Hodges, who was the officer who was squeezed in the door, was bleeding from his mouth. You could see it. They kept on. [00:24:00] It was so horrible, and the silent security camera taping was really dramatic. So that would have been good. I would have liked to have heard Vice President Pence.

Kimberly Atkins: Same.

Joyce Vance: How did he feel knowing that he was attacked by the president after the president knew that his life was in danger and that he had been whisked away. I don't want to use the word for Nancy Pelosi staff as cowering. They were taking cover from a [00:24:30] violent mob. [crosstalk 00:24:32]-

Jill Wine-Banks: [crosstalk 00:24:32] and cower sounds like coward. So let's not use that word. It just troubles me.

Joyce Vance: Yeah, sure. Yeah.

Kimberly Atkins: I think the point about Mike Pence is so important though. I mean, I would have, if I were in permanent manager, tried to make the case to at least invite him in to talk about that. Because that gets to a crux of the impeachment case itself. Well, [00:25:00] some of the other things we're talking about just talks about the enormity of it, the immense... just how dangerous it was. The fact that Mike Pence was in there and Donald Trump was still tweeting knowing from both the Secret Service, who would have notified the White House if Mike Pence was in trouble, and also the fact that he's the president, he has intelligence of what was happening inside. Also, the reporting which was substantiated by Senator Tuberville this week, that the [00:25:30] president called him and was able to get through to him, and he told the president, Mike Pence was just evacuated, and he still tweeted after that, and he still didn't call the people off.

The fact that Republicans themselves were urging the president to call them off is evidence to me that he's the one who sent them there. So to hear Mike Pence say what he thought when those moments were transpiring, what he was going

through, [00:26:00] the fact that he didn't talk to the president and didn't talk to the president for days afterwards, I think that would have been really compelling evidence that I think was missing here.

Joyce Vance: So I'll play devil's advocate for a minute and say that I was taught as a young prosecutor to never ask a question if I didn't know what the answer was going to be. One really has to wonder what Mike Pence would say as a witness, whether or not he might exculpate the president. You don't have any real ability [00:26:30] to truth-test his responses beforehand. Then there's a second problem lurking here, and I'll just raise it theoretically, because there's no way of knowing who it might apply to. But I bet, like all of you, I would like to hear from some of these folks who were around Trump as this was all happening. We've got this report from Ben Sasse that Trump was delighted by how events unfolded. So it seems normal to want to hear from people around [00:27:00] him.

But I recall the testimony on the Hill of Ollie North during the Iran Contra affair, and he was given partial immunity in the course of testifying, and ultimately, that ended his criminal prosecution down the road. So who knows this is just rank speculation. But perhaps, there are concerns beyond the immediate trial that are at work here.

Jill Wine-Banks: So Joyce, I'd like to answer a couple of things you said, one about violating the rule that is the basic [00:27:30] rule. Sometimes you have to violate it. I know I did during the Watergate tapes hearing when I was presented with a witness that the White House said was the only one who could explain an 18-and-a-half-minute gap and that there was no innocent explanation. I wasn't allowed to interview her before she was in public on the stand. But all I could do was say, "What did you do?" And I had to wait for her answer and then cross-examine her.

In this case, [00:28:00] I am assuming that when Kim said that, she was assuming that the House managers would have spoken to him before and would have actually known, because in that case, I think I wouldn't take the risk, unless I knew what he was going to say. So I don't think it would have been a big risk and would have been very interesting. But I will also add that I felt strongly before the trial started the live witnesses should be called with all the risks that that implies.

[00:28:30] But after I saw the emotion that was able to be created through the videos and through the testimony really of House managers who explained some of what they went through, I didn't feel we needed that. I felt the emotion was communicated and the danger was very real so that they accomplished through video and their own presentation what live witnesses I would have thought were necessary for.

Barb McQuade: Let me just interject one thing [00:29:00] about what Jill just said. If you haven't read her book, the Watergate Girl, incredible exchange when cross-examined Rosemary Woods, Richard Nixon's secretary during Watergate and exposed the 18-minute gap. Really terrific book, Jill, not only about Watergate, but about the incredible sexism that you faced in those days. It's a great read.

Jill Wine-Banks: Thank you.

Joyce Vance: We really need to spend a whole show talking about Jill's book one day. There's just so much buried inside of it. [00:29:30] But I will ask y'all, yesterday morning, the four of us talked about the announcement by the Fulton County, that's Atlanta, Georgia district attorney, Fani Willis, that she was looking into that now infamous phone call, the taped audio that we've all heard of President Trump alternately cajoling and threatening Georgia's secretary of state, Raffensperger to find him just the number of votes he needed to win the election, right? Find me 17,000 [00:30:00] or 11,780 votes.

We had talked about that investigation. It's certainly very interesting. It could be a criminal investigation involving a former president of the United States. Fortunately, for us, Rachel Maddow got that district attorney, Fani Willis, her interview last night. So Willis is an experienced prosecutor. She was incredibly impressive in the interview, and she said she intends to conduct a grand jury investigation [00:30:30] into that matter, into the former president. It could possibly expand beyond Trump's call with Raffensperger. So let me ask y'all, do you think that this is an unimportant matter? Is this significant, and is Trump really at risk here?

Jill Wine-Banks: I would say he is. There's a number of crimes that she listed in her letter to Governor Kemp saying, "Keep all documents." Someday we ought to have a [00:31:00] conversation about transparency in government and retention of documents. But there's a good chance that he may not be convicted of a felony in that case, but it's one of the many legal challenges before him. Donald Trump is going to be very busy defending himself from criminal accusations, from civil accusations, from defamation lawsuits, from tax violations, [00:31:30] and the fact that this call is recorded, we have it, and it may lead to, as she indicated, there may be more than this one phone call that violates a solicitation of election fraud, false statements. He certainly made false statements to the election officials, conspiracy racketeering. Some of those sound pretty terrible. So I think it's an important, and she seems very [00:32:00] on top of this.

Barb McQuade: Well, I would say that, yes, I agree with, Jill that this certainly ought to be of some concern to President Trump, but facts matter, of course. So the facts will determine whether there is a crime that occurred here, this idea of soliciting election fraud. Imagine the worst case scenario, and that is, in that call, President Trump was asking the secretary of state of Georgia to lie about the election results and say that Trump earned 11,000-plus more votes than he actually did. [00:32:30] That would be a very serious crime.

It could be, on the other hand, that President Trump truly believed that fraud had been committed in the vote count and that he believed that if the proper count were done, that there would be 11,000 additional votes for him. So the context is going to matter here. So that's why an investigation is important. What other communications have occurred before and after that communication between President Trump and the secretary of state and with President Trump's own staff. [00:33:00] So I think that that investigation will matter, but no doubt there is certainly at least a sufficient suspicion to merit an investigation.

Kimberly Atkins: I mean, one fact that I'll be looking at in this investigation, and I agree with everything that Barb just said, but I recall when that tape was released, that hour-plus long tape was released, and I listened to the whole thing. The most shocking part to me is aside from the just barrage [00:33:30] of election fraud conspiracy theories that were just patently false, even if he believed them, the part where he was pressing Raffensperger and was essentially saying, "If you don't find these 11,000-plus votes, that's criminal. That's criminal activity there."

It felt like a threat. It felt like he was going to threaten some criminal consequence [00:34:00] if Raffensperger did not get on this part of the scheme. That's what it clearly felt like to me, and I think that is one area where I think this investigation can really bear fruit, particularly if there's other evidence of it.

Jill Wine-Banks: I think what happened today in the trial, in the defense presentation of the Georgia case, the word find, which was repeated, I don't know how many times they use that word is going to be the equivalent of the Clinton impeachment. [00:34:30] It depends on what the meaning of the word is. We're going to keep that too. Depends on what the meaning of the word find is. I agree with you, Kim. There sounded like a threat. If you don't do this, it's going to be bad for you. It's going to be criminal for you. That's a threat. So that's why I take this as a serious investigation.

Joyce Vance: It's all context, right? When I hear the word find and this statute in the deep South, it makes me [00:35:00] think of these old-timey cases, the reasons many of these statutes were put in place. What we used to call it in Alabama was dead people voting. I mean, there would supposedly be stories that you would hear about dead people voting in elections. So the Republicans had to pass these restrictive laws to keep that from happening. So much of that context, I hear, when Trump is saying, "Find me ballots."

But Barb, you raised something interesting. You asked about what other calls took [00:35:30] place between Trump or his staff and folks in Georgia. We do know that there was at least one other call because it's so hard. I think now we all live pre and post-coup, right? But pre-coup and pre-Trump's call with Raffensperger. There actually was a call between Lindsay Graham acting on behalf of the president and the secretary of state. He was the first one to float

this notion of votes, and a letter was written to the secretary of state asking for an investigation [00:36:00] and somehow or another, that developed into news stories. So does that make us think that there might be more to this than just that one call from the president?

Barb McQuade: Yeah. Of course, all of this evidence will matter in terms of determining President Trump's intent. You may remember when Michael Cohen testified before Congress, he described the way President Trump talks. He talks like a mobster. He doesn't say, "I want you to do X." He'll say, "Nice public office you have here, Mr. [00:36:30] Secretary of State. It'd be a shame if something should happen to it." Right? He doesn't directly and overtly threaten it, but he suggests that something could happen to his political career if he doesn't play ball.

So we need to determine what was meant by that. So all of that context choice that you mentioned, that conversation with Lindsay Graham and others is going to matter in terms of assessing his intent.

Joyce Vance: So interesting question. Is this investigation influenced by whether [00:37:00] Trump is convicted in the impeachment trial. Let's play what District Attorney Fani Willis had to say, and then we can discuss it?

Rachel Maddow: Did the impeachment and that process have any bearing at all on your decision to open this investigation or how you look at your responsibilities here?

Fani Willis: Zero. None whatsoever.

Rachel Maddow: Just a completely independent process. Okay. We have-

Fani Willis: Yeah. I mean, if we watch... So I would just want to be clear. If [00:37:30] we watch that trial and witnesses come forward that are relevant to my investigation, certainly we will do our due diligence and interview them. But whether there was an impeachment or not an impeachment would not change the fact that something occurred here within my jurisdiction that may be criminal, and if that is the case, it needed to be investigated.

Jill Wine-Banks: Yeah. I think that she's exactly right. These are different forms of legal redress, different [00:38:00] forms of constitutional redress that are aimed at different things. The impeachment power is aimed at, in part, as we discussed, protecting democracy, holding the chief executive responsible for his actions in violation of his oath. Criminalized meant to do something else. It's meant to prosecute when the law is broken.

One does not preclude another. That's why I got so ticked by Senator Marco Rubio's tweet. The other day I wrote a whole column about it in [00:38:30] the Boston Globe, you can read it, suggesting that what happened at the Capitol

was terrible. There's a criminal justice system to deal with it. No, Senator Rubio your job is also to deal with it. So the two are completely separate.

Barb McQuade: People should understand that the impeachment clause itself says that the penalties for being guilty of an impeachable offense of a high crime and misdemeanor are removal and borrowing from future office. It [00:39:00] specifically says, you can go ahead and be charged with crimes for the same things. So there's no double jeopardy. It is completely possible to have a federal offense, a state offense, and an impeachment.

Joyce Vance: Do you think President Trump could actually go to prison in Georgia?

Barb McQuade: He could, but he probably won't.

Joyce Vance: One step at a time. I mean, how do you put a former president-

Barb McQuade: Imagine the secret service having to be with him.

Joyce Vance: ... in prison, yeah, with his secret service [00:39:30] agents. I mean, it's a first offense. I mean, I'll make the Trump case. It's a first offense. It's a non-violent crime. Maybe he would get probation. But would that still be a significant sanction for a former president of the United States?

Kimberly Atkins: I think it would be a sanction for him, even if he just gets house arrest and he's not able to go golfing.

Barb McQuade: Well, I think criminal prosecution isn't only about punishment. It's also about deterrence, and it's about saying what society is [00:40:00] willing to tolerate. So I think if the evidence is there to prove his guilt, even if he doesn't serve any prison time, there's still some accountability that can do some good.

Joyce Vance: Yes. I think that's the key. This is a president who never faced accountability for any of his misconduct. So baby steps. But it's good to see serious investigations by people who know how to do that without pre-judging the outcome, because no one, Trump or anyone else should be prejudged until a full investigation [00:40:30] has been conducted and the evidence is in. It can be very tempting, right, to call [inaudible 00:40:35]. But we've had a little bit too much of that in this country, and we need to restore a thoughtful constitutional criminal process.

Jill Wine-Banks: I think that's a great ending to this conversation, and maybe it's time for us to turn to listener questions now. Each week we answer questions that listeners send to us at sistersinlaw@politicon.com or via a tweet [00:41:00] using #SistersInLaw. If we don't get to answer your questions during the show, we will try and answer as many as we can on our Twitter feeds throughout the week. So let's go to questions.

One of our first questions is from Catherine in Sacramento, California. She writes, "I have a question about judicial appointments, particularly the ones rushed through by the Trump regime. Is there any way for the Biden administration to review some of the more [00:41:30] religious appointments and possibly reverse them?" I assume she's referring to some of those that have been rated as totally unqualified by legitimate higher associations. Anybody want to take an answer to that?

Barb McQuade: I don't think that there is a way to look at those in hindsight, unless those judges were to commit impeachable offenses. They have life tenure. They are on the bench. If anything, this is a lesson for the Biden administration to get going [00:42:00] with highly qualified, diverse, and maybe even young appointees for the seats that are open.

Kimberly Atkins: Yeah. I think it's also a political lesson for Democrats again who have not... They just haven't in recent years prioritized the importance of the judiciary in that appointment power when they campaigned in the way that Republicans have. That was Mitch McConnell's number one job was to turn the judiciary very, very conservative with the help of conservative organizations, like the heritage [00:42:30] foundation and the Federalist Society, and he's done a great job of that. The Democrats have not done that in the same way, and that's why you see this imbalance that is likely going to be in place for some years to come.

Barb McQuade: Elections have consequences, and this is one of them.

Jill Wine-Banks: So I agree with that. So let's move to the next question, which comes from @MyresearchM. In order to pass the John Lewis voting rights act, would you support ending the filibuster?

Joyce Vance: [00:43:00] Boy, that's a real trade-off, isn't it?

Kimberly Atkins: Is it really though, Joyce? I mean, the filibuster, look, there is an argument that could be made that it was designed to sort of build consensus and lawmaking and in confirming cabinet members and other appointees. But what it's actually been used as in history, and in fact is as a tool often by senators from the South in order [00:43:30] to block civil rights legislation in a way that protects them, even when they are in the minority. It has been a disaster for civil rights, in my opinion, in my opinion.

I would not be sad to see it go. I think it's rarely been used for the higher goals that people often cite when they want to protect it.

Joyce Vance: In addition to that, you're absolutely right about all of that. In reality, if we were to go a step further and the Democrats [00:44:00] were to try to honor it out of principle, there's no guarantee that the Republicans wouldn't do away with it when it became convenient for them. So I tend to agree with you.

Barb McQuade: Yeah, it's not in the constitution. It is a tradition that has developed over time, and it is a tool of inaction. It's an opportunity to obstruct and delay. So I think that anybody who cares about advancing progressive causes or just progress in this country, the filibuster is something that stands in the [00:44:30] way. Now, on the other hand, it can be a check on behavior that is too aggressive or too radical, I suppose. But to pass the John Lewis voting rights act, I don't know, I might go for it.

Kimberly Atkins: It's perfect. That's not to be-

Joyce Vance: Is it naive to think? Is it naive to think? It used to be that the voting rights act was often re-upped under Republican administrations that the votes were bipartisan. Is it too much to think that the country could get back to that point where we could see a [00:45:00] bi-partisan confirmation of the John Lewis voting rights act?

Kimberly Atkins: I would say yes, especially now that it seems that for Republicans from Congress to state houses that keeping people from voting, implementing restrictive voting rights laws, laws that make it harder, voter ID, limiting registration is the way to go. They try to win elections. They're basically trying to stop people who won't vote for them from voting. So I think [00:45:30] the days of unanimous and lopsided support for the voting rights act are gone. I just don't see the sort of issue that would lead to a Mr. Smith goes to Washington moment where the filibuster is used for good and not used for something to ferry us.

Barb McQuade: Come on. You don't want to hear Ted Cruz read green eggs and ham.

Kimberly Atkins: [crosstalk 00:45:51]-

Jill Wine-Banks: [crosstalk 00:45:51] that we can do that and no one else has to be in the chamber so that it really loses its impact. [00:46:00] I think if we look at filibuster as a protection for minority, so that they can be heard. You can accomplish that by allowing people when they actually want to talk about the substance and address an issue, that they can have the floor for as long as they want to talk, but that you don't need a two-thirds vote to stop it. You only need a majority and that you have a normal vote. That would allow people to talk as long as they want and to make their points [00:46:30] and to try to convince people but wouldn't be the gridlock that we get from filibuster now. I'm getting to the point where I'm used to be a big supporter of filibuster, and now think that it is really an impediment to accomplishing anything.

Kimberly Atkins: Hey, Jill, I have a question. Can I ask a question?

Jill Wine-Banks: Yes.

Kimberly Atkins: This is Kim from Washington, long-time listener, first-time questioner. So this week the news came out [00:47:00] that the president Biden's justice

department is asking for the resignation of Trump era US attorneys. But he wants the US attorney overseeing the federal tax probe into his son Hunter to remain in place. So in the past, we've heard a lot about purging at the DOJ and politicizing the DOJ. Since y'all are former federal prosecutors, I would love to hear you [00:47:30] explain the difference between what is happening here and that kind of politicized purging.

Jill Wine-Banks: Barb or Joyce, why don't you take a shot at answering first?

Barb McQuade: Sure. So when President Trump came into office, you may recall I was one of the 46 lawyers who was still remaining as an Obama appointee, and we were asked to resign on March 10th and leave on March 10th. I found that to be disruptive to myself personally, but more importantly to my office, because we didn't have adequate time to transition. We had been told [00:48:00] that there would be sufficient time for orderly transition and that didn't happen. What I see happening this time is giving lawyers about three weeks, US attorneys three weeks, notice that you're going to be asked to resign in about three weeks. That allows them to transition you know, items on their computers, cases projects, speeches, and other things to other members in their office and to finish up some of their commitments and responsibilities. So I think that's worthwhile.

As to keeping a few people on, there is some tradition to doing [00:48:30] that. For example, during the Clinton administration, right at the very end of his administration, he granted a pardon to Marc Rich who'd been a donor to his campaign, and US attorney in the Southern District of New York, Mary Jo White was permitted to stay on to continue that investigation. Now, certainly there are assistants who are actually really doing the real work. Joyce and I took a lot of credit for the work of our assistants, and those assistants will continue to do that work. But in terms of approvals and some of the big [00:49:00] strategic decisions, those are typically approved by the US attorney, him or herself.

So if there were to be a change in leadership, it would require at least I would think 30 days or so for a new US attorney to get up to speed to make those decisions. So I think both to protect the integrity of the case itself and the appearance of justice in a case like that it is common and wise to keep people on board. I think the acting US attorney in Washington DC, who's acting, [00:49:30] not a Trump appointee is sticking around as well as he is investigating these Capitol Hill rioter cases.

Jill Wine-Banks: Right.

Joyce Vance: I think that last point you made Barb about the appearance of the investigation being supported when you don't replace a U S attorney with someone from the new administration right when they're in the middle of what might be a difficult or high public value, public corruption case really matters because DOJ can only [00:50:00] complete its mission successfully if it retains the trust of the communities that it's serving. So when it tastes like that, preserving the

appearance of neutrality and propriety can really matter as much as actually being objective, like we all know that the officers are when they conduct these cases.

So this is a good thing to see happening. We all know that DOJ's reputation suffered under the Trump administration, and I think it's positive step [00:50:30] to see Biden being sensitive to this and taking an early step to begin to restore communities trust in the justice department and the US attorney's offices.

Jill Wine-Banks: If I could just maybe phrase what you said, both Barbara and Joyce a little differently, which is it's not the appearance of impropriety that the case might fall between the cracks in the transfer. It's that the decision on something that affects the new president [00:51:00] is being made by the person who started it and who he didn't point and so that it's probably a wise move to leave, in that case, the US attorney in place who started the investigation of Hunter Biden in the hopes that he is a man of integrity who will make a fair assessment of the evidence and act on that.

Kimberly Atkins: All right. Well, thanks for answering my question. That brings us to the end of our show. Thank you for [00:51:30] listening to #SistersInLaw with Joyce Vance, Jill Wine-Banks, Barb McQuade, and me, Kimberly Atkins. Don't forget to send in your questions by email to sistersinlaw@politicon.com or tweet them for next week's show using #SistersInLaw. You will find the links in the show notes. To keep up with us every week subscribe to #SistersInLaw on Apple Podcasts, Spotify, or wherever you listen, and please give us a five-star review. We love [00:52:00] to hear what you think. See you next week for another episode, #SistersInLaw.