

Jill Wine-Banks:

Welcome back to #SistersInLaw. I'm Jill Wine-Banks and this week we'll be taking a look at the role of causation in the Chauvin trial. We'll also discuss the issues surrounding the Matt Gaetz scandal and highlight the importance of diversity in recent judicial nominations. As usual, we'll be answering some of your questions at the end of the show, but before we start, let's talk about what's happening with all of you and vaccinations. I've been fully vaccinated. I've had both of mine and I'm feeling a great relief and an ability to, I don't know, see friends who have been vaccinated and hopefully someday, all of you in person, but what about you?

Kimberly Atkins:

I'm super excited that I got an appointment. There's been a lot written about the district of Columbia and the trouble that they've had with their rollout, but yesterday I got the email saying that I could sign up for my vaccine appointment and I did. I will be getting it next Thursday. I am getting the Johnson & Johnson, which I'm really excited about because I don't love needles. So I will take one over two any day. I want to get it as soon as possible reached that level of immunity, as you said, to be able to gather with my friends who have also been vaccinated and also the next day, my fiance today just made his appointment too. So it is happy vaccination news in my household. I'm super excited.

Jill Wine-Banks:

Excellent. What about you, Joyce?

Joyce Vance:

It's a little bit easier to get the vaccine in Alabama. Anyone who's over the age, I think as of today, of 16, who wants the vaccine can get vaccinated. That's not necessarily a good thing. It reflects to some extent, I think resistance against the vaccine, but in our neighborhood everybody's been going out and getting it and my husband and I are fully vaccinated. Friday night we met another couple, our closest friends. We had dinner at a restaurant that's put tables outside and they're really far apart. They're much further apart than six feet. We sat outside, had a great meal and I realized that I've lost my ability to behave properly in public. I'm going to have to remember good table manners again.

Jill Wine-Banks:

What about you, Barb? You can't wear your sweatpants to the fancy fine dining restaurant?

Joyce Vance:

Absolutely. I was like nice top and a pair of yoga pants. It's the only way I can dress anymore.

Jill Wine-Banks:

That sounds very fancy if you ask me.

Barb McQuade:

Well, I've had my first dose. I got it last week at Michigan Stadium, The Big House-

Joyce Vance:

Go Blue-

Barb McQuade:

Yeah, which was kind of a fun place to get it. I had some concerns, concerns about just, it's such a big location that it would be a big crowd in a long line and quite to the contrary it was like clockwork. I have great respect and admiration for a well-run operation and this was. I never stopped walking. I walked in, I went to station one, station two, got my shot, and for the first time in my life had a seat at the 50 yard line at Michigan State [inaudible 00:03:24] getting a shot at the time.

Barb McQuade:

It was great and I got an appointment. I got the Pfizer vaccine. I go back three weeks from then, two weeks from today to get dose number two, and then I shall be invincible.

Joyce Vance:

Here's use to the Sisters In Law all getting together in person at some point later this year.

Jill Wine-Banks:

Oh, I would love that Fabulous idea. Absolutely terrific. My husband is also vaccinated. We had Moderna and so we had to wait four weeks in between, and it was hard in Illinois. People here want the vaccine. So unlike you, Joyce, we fought for it, but let's move on. Joyce, do you want to start the conversation about the ongoing trial of Derek Chauvin and the issue of causation.

Joyce Vance:

Sure. So I suspect that we've all been watching and I mean, not just the four of us, but everyone who's listening, the trial of ex Minneapolis cop, Derek Chauvin, who's on trial for the homicide of George Floyd this week. We know you guys are probably watching and probably have a lot of questions. It's a painful trial, it's difficult, but it's also incredibly important to watch it. So we'll probably talk with you about this trial, not just while it's in progress, but down the road as we see whether the criminal case and the \$27 million settlement in the civil case are effective in driving much needed reform in policing, but today we want to take on one of the core trial issues. All crimes consist of a set of elements that the prosecution has to prove to a jury satisfaction beyond a reasonable doubt.

Joyce Vance:

When it comes to homicide, one of the key elements is causation proving that it was Chauvin who caused the death of George Floyd. That might seem really obvious to anyone who seen the video and heard the testimony, but it turns out it may not be as easy as it seems. So Barb, why don't we start right there and talk about what causation means?

Barb McQuade:

Yes. Causation is one of the things we talk about in first-year criminal law. You know this Joyce, you teach criminal law as well to law students. There are certain crimes that are criminal just by doing them and doesn't require any result as part of the elements. Driving while drunk, for example. It's a conduct crime. Just the mere fact that you're driving, even if nothing bad happens is in itself a crime.

Barb McQuade:

There are other crimes that require a bad result to constitute that offense and homicide is one of them. One of the essential elements is that there'd be a death, that somebody dies as a result and it is a

requirement to show that the person who's charged with the crime was the cause of that homicide. It's not a crime if you shoot someone who's already dead, for example. You didn't commit homicide. Maybe you're guilty of some offense, like mutilation of a corpse, but you're not guilty of homicide if the person is already dead.

Barb McQuade:

So what we're seeing in the Chauvin case, I think based on the opening statement and some of the questions we've seen defense attorney, Eric Nelson asked of some of the witnesses it seems to me that it is one of the theories of the defense, if not the theory that Derek Chauvin was not the cause of death of George Floyd. We've heard some evidence about underlying health conditions.

Barb McQuade:

We've heard about drug addictions. We've heard about the observations from the store clerk, Christopher Martin, that it appeared to him that Mr. Floyd was under the influence of some substance. So it seems perhaps that the theory of the offense will be it wasn't Derek Chauvin who caused this death. It was the underlying health conditions triggered by the drugs that Mr. Floyd had ingested that caused his death.

Barb McQuade:

One of the things that I think that he's going to run up against is this idea of substantial factor. One need not be the sole cause of death, as long as his conduct is a substantial factor in the death. So it could be that George Floyd would not have died, but for his ingestion of drugs or his underlying health conditions but as long as the jury finds that in addition to those things, Derek Chauvin was a substantial factor in his death that could be sufficient for a conviction yet

Joyce Vance:

It seems to me that if you are having a drug overdose and so you're driving to the hospital to get treatment, and it's fairly likely that that treatment will be successful, but while you're on the way, another car just T-bones you, going 120 miles an hour and kills you dead right there on the spot, that it's not the drug overdose that's the cause of your death. It's the person who hits your car. It'll be interesting to watch the defense try to make the argument, though I think you're right that that's where they're heading. We heard testimony this morning from police officers about the use of the prone position, which is how Mr. Floyd was laid out on the street and how dangerous the prone position is. Kim, what's that about and why does it matter here?

Kimberly Atkins:

So a lot of time was spent today and earlier this week on this issue about George Floyd being in the prone position, face down on the ground, and it gets to really two things. One is certainly this causation issue. It goes right to it. Whether being in that position was especially dangerous, especially for an extended period of time and led to his death and it also gets to the issue of use of force and the dangerousness that how dangerous George Floyd was perceived to have been to police officers.

Kimberly Atkins:

We've seen in these cases, so often it's an underpinning about police use of force. Police have the ability to use force that is commensurate to the threat that they think the person they're confronting presents

to them. So it's this idea that even in a prone position face down on the ground, there seems to be this idea particularly today, Friday's testimony that George Floyd could have still been some sort of threat to Derek Chauvin.

Kimberly Atkins:

We heard the defense attorney really drilling down on this idea about his drug use, asking questions about whether somebody who is under the influence of drugs, even if they fall unconscious, could they regain consciousness and be particularly threatening, could they regain consciousness and then suddenly get aggressive toward a police officer, et cetera, et cetera. I found that a really troubling line of questioning myself, because it is not only reinforcing for the jury this idea of dangerousness, which inherently comes with this racial component.

Kimberly Atkins:

We've seen this idea, this inherent bias that black people, particularly black men somehow are more dangerous than other people and that is used as a justification by police for excessive use of force. In this case, in trying to make this claim, essentially what defense counsel was trying to do was to put forward this idea that an unconscious man lying face down in the street could still pose enough of a danger that it required him to still be restrained in this way with a knee in his neck.

Kimberly Atkins:

I really questioned that line of questioning just in terms of the jury having to buy that and if it works, if Officer Chauvin is ultimately acquitted, I think it sets a terrible precedent about this idea that somebody, even when you're unconscious, you can still be deemed dangerous enough to be placed in that position. It also goes to, as we were talking about causation, whether it is the fact that George Floyd, on the ground, in this prone position whether his airway was cut off to the point that that was the cause of his death.

Kimberly Atkins:

We heard a lot about police training and in that sense, the testimony really showed that officers are not trained to hold people down in a prone position for nine minutes. Generally speaking, when the prone position is used, it's meant to get the person in handcuffs, to put them down to restrain them and to get handcuffs behind them, but that they shouldn't be kept in that position because it has been shown to be particularly dangerous to keep them in that position.

Kimberly Atkins:

We saw those long nine minutes, but even after George Floyd was in that position, he lost consciousness and for several minutes after that, even when the off-duty firefighter offered assistance and said she wanted to at least make sure he had a pulse, even when EMT showed up to assist George Floyd, it wasn't until the very end that Derek Chauvin released his knee from George Floyd's neck. So I think regardless of either of the two things that that was trying to show, it was particularly bad look for the defense, but I certainly worry that in the case of an acquittal, that both of those things will serve as bad precedent moving forward to just reinforce what we know to be really bad policing.

Joyce Vance:

I really agree with you about how inflammatory, that line of cross-examination was and at first I was really surprised that the prosecutor wasn't objecting because the defense lawyer is cross-examining a police expert and he's spinning all of these crazy hypotheticals. "Well, what if he slipped one hand out of the handcuff? That's happened before, hasn't it, Sergeant Zimmerman, and he hammered the police officer with the handcuff," and not to make light of that.

Joyce Vance:

That's obviously a possibility, but not when you have someone like Mr. Floyd who's out cold, like he was. So the defense lawyer keeps going with these crazy hypotheticals. The prosecutor never objects and I wonder, we can't see the jury as we're watching this trial, but I wonder if it's not because the prosecutor has taken the measure of this jury and has decided that they know what's going on here and that they're offended by it. I hope that that's the case.

Joyce Vance:

I have found so much of this to be not just painful, but really offensive. We'll find out what the jury is thinking at some point and the key evidence on causation, Jill is likely going to come from medical examiners. So what should we expect to get when we get to that point?

Jill Wine-Banks:

I think the medical testimony is going to be important, although I do agree with what you just said that it's been offensive so far, and possibly it is because the jury really is being offended and so the prosecution is not stopping it. I've been a defense lawyer as well as a prosecutor. So I'm sympathetic to both sides having a right to present, but the defense can go too far and can cause great damage to the defendant.

Jill Wine-Banks:

In terms of the medical testimony, we have to start with the medical examiner's conclusion, which will be presented about the cause of death was homicide. It wasn't natural causes, which of course, a heart attack or a drug overdose would not be homicide. It's clear from evidence, I think that asphyxia is now the theory of the prosecution. In the beginning, they were going to be eliciting a medical testimony about a heart attack, but they have switched to asphyxia, which clearly would be the result of cutting off the oxygen and blood flow by a knee on the neck.

Jill Wine-Banks:

There will be testimony from toxicologists about the levels of fentanyl and methamphetamines in George Floyd's blood, but there will also be testimony again, going back to what Barbara talked about, that even with drugs in his blood system, unless that's the sole cause of death, it can still be the knee the neck, because that is a substantial cause. So there will be some testimony and cross examination about the level.

Jill Wine-Banks:

I think there will also be testimony that George Floyd, because of his unfortunate addiction and longtime use of drugs had a higher tolerance. So even if there's testimony about the level in his blood, which might kill you or me, wouldn't kill George Floyd. There will be testimony from medical people

about his surviving a drug overdose just months before he died from this episode where he recovered from an overdose, which would again, show that it isn't medically caused by the drugs in his system.

Jill Wine-Banks:

So his tolerance will be an issue. There will certainly be questions about the knee and whether it caused him to have either a heart attack or to die from lack of oxygen. There will also be, I can't remember now if we've mentioned it before, this excited delirium syndrome argument. So there may be some medical testimony saying, "No medical experts actually recognize this as a legitimate syndrome," and besides he was not exhibiting the symptoms that might lead to someone being afraid that he would awake from his unconscious condition and have super human strength and be more aggressive and threatening than he was before he was put in a prone position, handcuffed, meaning that his chest compression and expansion was restricted, which automatically restricts the blood flow.

Jill Wine-Banks:

So I think we'll see all of those things, toxicology, evidence of asphyxia, and the level of pallor ins that he had and that the jurors also are seeing the tape and they saw what they will see as his life being ebbed away by his not being able to breathe. Oh, by the way, the excited delirium is treatable by things like water. Usually injected intravenously but if they had just given him water, as he was asking for, "Give me water," that would have helped if that was a problem, which there is no physical evidence of.

Kimberly Atkins:

Well, at least Derek Chauvin would have had to take his knee off his neck long enough for him to get some water. There's that.

Joyce Vance:

The evidence was so clear today. You don't keep someone in a prone position when they're handcuffed, which stretches their chest muscles back and makes it more difficult to breathe. Once he's down, they should have had him on his side or sitting up. I thought the prosecution did a great job today with the police testimony, but I will confess, I've tried a number of excessive force cases with pretty good evidence and we've had some cases where we've had acquittals, despite really good evidence. So what are the possible outcomes at the end of this trial? The jury deliberates one possibility is conviction. There are three charges, I suppose, that there could be conviction on some or all of them. What are the other possibilities?

Jill Wine-Banks:

Obviously, acquittal on some or all, or a hung jury on some or all. I think that the-

Joyce Vance:

Well, Jill, start by talking about what the difference is, because I think it's not always clear to people that there's a difference between a hung jury and an outright acquittal.

Jill Wine-Banks:

Okay. So that goes back to the basic standard of proof and the burden. The prosecution has to prove beyond a reasonable doubt, all of the elements of a crime and convince all 12 jurors. There are currently

more than 12 because you have alternates, but as soon as it goes to the jury and they go into the jury room, those alternates will be excused, and there will be 12 jurors deliberating.

Jill Wine-Banks:

All 12 have to agree on either conviction or acquittal. It takes a full vote. Only one has to say, "I don't know. I have some doubt and I can't vote for conviction." 11 people can vote. It doesn't matter. The one results in a hung jury. That means that the defendant could be retried because it was a hung jury. It didn't go to a full verdict and that's allowed, but before it goes to a retrial, a prosecutor would look at well, was it one juror who had doubt or was it six jurors? Before they would decide to retry, they would be evaluating, what is the likelihood that a different jury would reach a full decision one way or the other?

Joyce Vance:

The evidence has come in, I think very likely. The evidence has come in very likely, even better than prosecutors had hoped for in this case. It really has looked surprisingly good so far, but even if there is a conviction, there will be an appeal afterwards, right Barb? How would that process work?

Barb McQuade:

Yeah, and it's interesting you use the phrase, the evidence has come in well. That is such a prosecutor's way of looking at a case, right? I think about, in my former office, if either I were trying the case or one of my colleagues, and you'd say, "How's the trial going?" They would always say either the evidence is coming in really well or it's not. I think that's such an important thing. I think that when you're watching the trial, you might expect the lawyers to be incredibly eloquent or asking all kinds of tricky twist questions and that's not really how it works in real life. It is really the job of the prosecutor to get out of the way of the evidence and let the witnesses shine and let the evidence speak for itself, because that is what the jury is going to look like.

Barb McQuade:

In fact, the judge will instruct the jury that what the lawyers say is not evidence. So you want all the important words to come out of the mouths of the witnesses and not out of the mouth of the lawyers, but as you say, Joyce, there will very likely be an appeal if Derek Chauvin is convicted. That is a very common step. I mean, why not?

Barb McQuade:

If I were convicted of a crime, I would most certainly pursue all avenues of appeal and you can appeal for things like mistakes in evidentiary rulings. The judge is there to decide issues of law. Sometimes the jury instructions are wrong and there can be a mistake there. Those are kinds of things, but there's also one that is typically filed in almost every case and that's called sufficiency of the evidence and that is, even though this jury may have found the defendant guilty, there was so little evidence on one particular element that no reasonable jury could or should have found that way.

Barb McQuade:

So for instance, if there's one element that never got addressed by the proofs during the trial, that might be a basis for sufficiency of the evidence. So I suspect that there will be an appeal one way or another. A good defense appellate lawyer will review the record. Will find things like objections that should have

been made or evidentiary rulings that perhaps were arguably wrong or jury instructions that were wrong and sufficiency of the evidence.

Barb McQuade:

I think one of the things that the jurors have the luxury of here, because of the way the case is charged, is some choices between second degree murder, third degree murder, and second degree manslaughter. So depending on how they feel about the facts, there are sort of lesser degrees of culpability here, depending on what the facts they ultimately find. I think in that way, the prosecutors were strategic in making sure that even if the jury is not quite so inclined to find certain levels of culpability or that there was an underlying assault, there's still some basis for finding at least manslaughter, if not murder.

Kimberly Atkins:

On that issue, looking at this, I think probably the most likely areas of appeal would be, especially with that second degree charge, which is a felony murder charge, you have to have a finding that there was an assault. I think a lot of this when you get to training and what, was reasonable and what the amount of force that was being used.

Kimberly Atkins:

I think that's getting to that element that an assault took place that would be required to find that second degree murder charge. Then with the third degree, it would be the acting in a way that showed reckless disregard for George Floyd's life. I think that's probably going to be an area that we're seeing a lot of focus on and that could be the subject of appeal, but I want to ask this because I'm not a criminal lawyer.

Kimberly Atkins:

I did civil appellate work, but it seems to me watching that a lot of times when you see successful appeals in criminal cases, usually involves procedural things like a jury member not being forthcoming about what they knew about the trial, about what their biases were. So is that a possibility more likely? I'm thinking about for example the appeal in the Boston marathon bombing case of Tsarnaev that's going to the Supreme Court. That's based on what the jurors knew about the case. Is it going to be something procedural like that, that doesn't necessarily get to the elements of the crime?

Joyce Vance:

There are all kinds of procedural issues that can come into play along with substantive ones in an appeal. So something really important that you do in a case like this, and I suspect that Keith Ellison, the Minnesota Attorney General, who's a very fine lawyer, has someone on their extended team who's doing this every day. Watching the issues that come up during the day and even if it's something that appears as innocuous as a juror and a prosecutor coming into contact in a bathroom or something like that, they're immediately going on the record with the judge and cleaning that up and making sure that there's nothing that they haven't fully documented that clarifies these sorts of procedural problems.

Joyce Vance:

There can be things that come up that you're just not prepared for. For instance, issues like something that goes on in the jury room that prosecutors don't know about at the time, but by and large, the

reason you want an appellate lawyer on your team during the trial is to make sure that there's nothing coming up that you're not prepared for and making sure that you fix it at trial, which is the right time to clarify both these procedural and substantive problems.

Jill Wine-Banks:

So can I add something from two different perspectives? One is I've also been a defense lawyer. So let me just point out that the defense really only has to poke holes in the case. They don't have a burden of proof. They just have to, in legal terms, create reasonable doubt, what people would say poke holes in the case. That is something that we have to keep in mind in terms of what could happen, but Joyce, your point about having an appellate lawyer watching this.

Jill Wine-Banks:

When I started as a prosecutor, the first assignment that all the lawyers in the organized crime section had was to handle appeals. and the idea was so that you would become very aware of the mistakes that can be made in trying a case so that you, when you start trying cases, don't make those. Then there are issues, I think Kim, you were referring to this, the merger question when you're talking about the assault being the basis for the homicide for the murder charge.

Jill Wine-Banks:

That is something that could be grounds for an appeal based on law, not based on how the evidence went in, which I would agree has, as Barb said, it went in really well. The sympathy factor, the humanizing of the victim, who he was and seeing the videos of him lively, active, dancing, cheerful, doing side lunges just before life was snuffed away from him. So I just wanted to make the point about from the defense and from the appellate point of view.

Joyce Vance:

We want to tell you about Magic Spoon cereal. It's the best when you want great flavor and great taste, but still want to be healthy.

Kimberly Atkins:

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Kimberly Atkins:

I usually go for high protein snacks and in this case, magic spoon is perfect, and an extra tip is putting it over yogurt instead of just eating it with milk. That makes it even more high protein and it's really delicious.

Joyce Vance:

It sounds great, and if you're like our house, Kim, our eating habits have dropped off a little bit during the pandemic. So having something like this that we can use to make sure we're eating in a more

healthy fashion is really great. Go to [magicspoon.com/sister](https://magicspoon.com/sister), to grab a variety pack and try it today. Be sure to use our promo code, sister, at checkout to save \$5 off your order. Magic Spoon is so confident in their product, it's backed with 100% happiness guarantee. So if you don't like it for any reason, they'll refund your money, no questions asked.

Kimberly Atkins:

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Joyce Vance:

Well, should we move on now and talk about GaetzGate, Kim?

Kimberly Atkins:

I think so. So according to the New York times, the Department of Justice is investigating whether Congressman Matt Gaetz of Florida was involved with the recruitment of multiple women online for sex who received cash payments. The Times is also reporting that there's an investigation over whether Gaetz had sex with a 17 year old girl, and whether she received anything of material value and whether that took place across state lines.

Kimberly Atkins:

The Daily Beast today also published some text messages that they report are part of this probe. Gaetz has denied all of these allegations and he's also denied a report from CNN that he showed pictures of naked women to his colleagues on Capitol Hill, sometimes even on the House floor. He also alleged in a television interview that the allegations are part of an extortion scheme against him.

Kimberly Atkins:

So I want to break down the law of this and I want to turn to Barb first to walk us through what the law involved is here. It looks like these allegations could involve everything from sex trafficking to identity theft. How do we break down what the potential liability that Congressman Gaetz could be facing here, and what about this extortion claim that he says is a part of this?

Barb McQuade:

I'm glad to talk about the law because the facts in this case are crazy. I imagine we will learn more in the coming days and weeks, but it sounds like there are a few possibilities of what's at issue here. There is a crime of sex trafficking and that makes it a crime to recruit people, to transport people, to solicit people for commercial sex acts and if you use force or threats or violence, it can be a crime, no matter the age of the victim.

Barb McQuade:

If the person is under 18, you don't even need force or threats or coercion. It is per se, a crime and those penalties can be very serious. There's a mandatory minimum sentence, if the person is under 18 of 10 years and a mandatory minimum of 15 years if the person is under 14. So in this instance, if we have someone alleged to be 17 years old, it could be a crime of trafficking if there is any of these verbs

enticing recruiting for a commercial sex act and the commercial sex that can either be in exchange for money or anything of value.

Barb McQuade:

So things like plane tickets and hotel rooms, and those kinds of things that Matt Gaetz has admitted to, can count as constituting a commercial sex act. Then there's another crime for enticing someone to travel in interstate commerce for the purpose of engaging in a commercial sex act, which is a crime of up to 20 years that doesn't require them to be under age. Again, if the person is under 18, it brings with it mandatory minimum sentence of 10 years.

Barb McQuade:

Kim, you mentioned the text messages and why those can be so important is not only can they prove evidence of intent, evidence of knowledge of someone's age, but they can also provide the jurisdictional hook that's necessary to make it a federal case. You have to show that it affected interstate commerce in some way and the use of wires for text messaging is sufficient to do that. You also mentioned identity theft, perhaps. There are some allegations about taking identities of real people and using them to manufacturer identity documents. That is also a federal crime up to 15 years.

Barb McQuade:

So that could be a potential count if that's occurring here. Then you mentioned extortion. So Matt Gaetz, perhaps taking a page out of the Donald Trump playbook, has kind of gone on the offensive. The best defense is a good offense. So he's not the perpetrator here. He is the victim and someone is trying to extort him and threatening to disclose this investigation against him unless he pays them off.

Barb McQuade:

So if that were to be true, there is a crime of extortion and it's a federal offense to threaten to harm someone either physically or to harm their reputation by disclosing unflattering facts about them and demanding a thing of value in exchange for your silence. So one of the most famous cases of extortion along these lines came with the basketball coach, Rick Pitino, when he was at Louisville.

Barb McQuade:

In that instance, a woman had accused him of rape and demanded money or else she would disclose his conduct publicly. He paid her, I think, \$3,000, but over six years she demanded up to \$10 million. So he went to the FBI and she was ultimately prosecuted for extortion and convicted. So those are some of the possible crimes out there, but I think we need to just know more about the facts before we can see what might fit this conduct, if any.

Kimberly Atkins:

I think you're right. I feel like there is a lot more factually about this case that we still don't know yet and will come out in the days and weeks ahead, but Joyce, this investigation also involves someone named Joel Greenberg, and he's a former tax collector in Seminole County, Florida who was indicted more than a year ago on federal sex trafficking charges and other crimes and he's a close ally of Congressman Gaetz.

Kimberly Atkins:

The first thing I wondered when I heard about this is, is this a potential case where investigators are looking perhaps to Gaetz or other people to help shore up their case against Greenberg or maybe getting Gaetz to flip on him in order to move their case? You prosecuted sex trafficking cases. Tell us what your take is on this.

Joyce Vance:

So, like Barb said, it's a lot easier to talk about the law in this case than it is about the facts, because number one, the facts are insane and number two, we seem to be getting new leaks on the facts every couple of hours. Part of that is because this case is apparently a DOJ investigation. So DOJ, agents are armed with guns, badges, and subpoenas. They can get a lot of information that we're not privy to when we're reading press stories.

Joyce Vance:

There may be a lot more evidence in the federal investigation, or this may be all that there is. We don't really know the answer to that yet and we don't really know what the relationship is between the prosecution of Greenberg and the prosecution of Gaetz. It is entirely possible Greenberg, the case has just been superseded.

Joyce Vance:

It's getting ready to go to trial. It's possible that prosecutors have decided that they need Gaetz's testimony on one or more pieces of that case, but I think that that's unlikely because of how far along the Greenberg prosecution is. I think it's much more likely that they bumped into Matt Gaetz and mention of him while they were investigating Greenberg. Either they found texts, or maybe some of these photos we've read about.

Joyce Vance:

Perhaps a witness mentioned this. There is at least a common thread in the news reports that we've read so far, which is that the 17 year old girl that Greenberg has allegedly trafficked is also someone with whom Gaetz had sex, and there's also allegedly another Florida state elected official who had sex with the same woman. So here's the difficulty in assessing whether there's a cooperation potential here.

Joyce Vance:

There's a spectrum of charge, as Barb does a great job of covering most of the federal ones. It's also possible that there could be state charges here, and often in my office when we handled these cases, we worked in a task force situation with state and local prosecutors and agents. We developed the facts without making a predetermination about whether we had a federal or a state case on our hands, and once we knew what the facts were, we decided how those cases would be handled.

Joyce Vance:

I don't think it's clear for one thing, whether or not Congressman Gaetz gets charged at all, and if he does, we don't know yet if it's federal or state. It's possible though, that Greenberg could have information about Gaetz and he might decide to cooperate against the Congressman in an effort to save his own soul. Lots of ifs in this case. It's going to be an interesting, if a sad one to follow.

Kimberly Atkins:

Yeah, there are a lot of ifs in this and Jill, one thing that also struck me is that all of these allegations, including this allegation of him, this report of him showing these inappropriate pictures of women to his colleagues, they all speak to the way Congresswoman Gaetz allegedly treats women.

Kimberly Atkins:

So what are the legal and political implications of that? I think just a few short years ago, something not even remotely, this potentially scandalous would have caused a member of Congress to have already resigned, but he is denying it, standing firm and setting up interviews on conservative news. So, what do you see as the legal and political implications of this with regards to his treatment of women?

Jill Wine-Banks:

So that's a great question, but before I answer it, I just want to do an extension on something Barb said and something Joyce said. One is yes, he is alleging, he Gaetz is alleging that he was extorted, but I want to point out that even if he was, that's a completely separate and unrelated case. It would not eliminate his liability for sex trafficking or for the state crime of statutory rape.

Jill Wine-Banks:

If he had sex with a 17 year old, anywhere in this country, it is a violation of the state law, wherever it happened. So being extorted doesn't eliminate his criminal conduct. The other thing is talking about Greenberg and whether he'll flip on Gaetz or Gaetz will flip on him. They are on video together doing what seems to be making false ID cards, and that in itself is a crime, but it shows how in investigating Greenberg, the authorities were able to come to Gaetz and then there were these text messages.

Jill Wine-Banks:

So I just wanted to add that, but you're right, that in any other environment, no one would survive these kinds of allegations and they would certainly be taken off committees. They would probably have to resign. We don't have to look very far back and if he were a Democrat, he probably would have been forced out because let's look at the history of Democrats being forced out because of even milder ... I mean, Al Franken's allegations are much less horrible than this.

Jill Wine-Banks:

They weren't allegations of sexual conduct. The crimes that are at risk here are both state and federal and also child porn. If he did show naked women, that's one thing. If he showed naked minors, that is a crime in and of itself. If he did it on the floor of the House or to any of his colleagues, it would behoove them to come forward right now, and they probably should have come forward and reported a crime because they are, in my opinion, law enforcement officials in that sense and have an obligation to not just ignore when a crime is committed, they should have come forward.

Jill Wine-Banks:

It is astounding to me, and I think it should be to every single person listening to this podcast to think about the fact that no one on the Republican side, well, maybe two people have said bad things about Gaetz, but most have remained completely silent. Yes, we don't know all the facts yet, but what would it take for someone to come forward and say, "Well, we don't know all the facts yet, but if these allegations are true, it is a despicable act and immediate action must be taken."

Jill Wine-Banks:

That's something that would cost no one anything to say, and it should be said, and we should hold members of Congress accountable for not responding. It's hard to believe that we're in an era where Donald Trump has created the environment that it's okay to just lie and deflect and say it's someone else's fault. That's not how we deal with these things. So it is this newly created era of denial and deflection, and that's what's happening now.

Barb McQuade:

I agree with you, Jill and as you say possession of child pornography, if the girls are under 18 is itself a crime. Manufacturing child pornography is punishable by a 15 year mandatory minimum, but even aside from all of the crimes that are occurring here and whatever you want to say about the morality, just how about the misogyny and I really think that we need to hold our leaders more accountable for the way they objectify women.

Barb McQuade:

The idea of bragging to fellow members of Congress about your sexual conquests, I think brings a level of, dare I say, toxic masculinity to the floor of Congress and it's inappropriate. It is what causes sexism in our laws and in our culture. In Michigan, in the last week, we've been dealing with an issue where the head of the Republican party in Michigan referred to our Michigan Governor, Attorney General and Secretary of State as the three witches who should be burned at the stake.

Barb McQuade:

This is not criticism of them for their policies. Certainly, there is reasonable grounds to disagree with people about policy choices all the time in politics, but to single out their gender and focus on them and demonize them for their gender, I think is so damaging to women. In the same way, I think that the way Matt Gaetz is bragging about his sexual conquests and showing pictures of naked women on the floor of Congress is itself a way of demeaning women that is unacceptable by members of Congress.

Jill Wine-Banks:

It reminds me of Ruth Bader Ginsburg saying, "When there are nine, there will be enough women on the Supreme Court. Maybe when there are a hundred female senators, there will be enough," because you're right. This does reflect the people who are making our laws are acting this way and demeaning women and not protecting women. We've already had conversations on this podcast about hate crimes, which include gender based and whether the shooting in Georgia was based on gender or based on race, ethnicity. We need to take action. We as voters can and should.

Barb McQuade:

All right, well, why don't we turn to the final topic that we talked about, which is judicial nominations. We have seen president Joe Biden make his first judicial nominations and with the first 11, he made an announcement. During president Trump's presidency, he filled 220 judicial vacancies. He had ... This is really, I think, considered one of the real successes of his presidency.

Barb McQuade:

He relied heavily on the Federalist Society, the conservative legal association to recommend names for him. Mitch McConnell in the Senate, worked very hard to push his nominees through confirmation and

he filled 220 of those judicial vacancies. There are 68 slots open now and another 26 scheduled to become vacant later this year, and Joe Biden has filled the first 11.

Barb McQuade:

What is notable about his nominees is the great diversity of them. Three African-American women for appellate courts, a candidate who will become the first federal district judge who is Muslim, the first Asian American woman who would serve on the district court in DC, first woman of color to serve as a federal judge in Maryland. One is a public defender. So a lot of potential diversity. Let me start with you, Kim. What does it say about our judiciary when we have diversity on the bench, not only diversity of demographics, but also diversity in background and experience?

Kimberly Atkins:

Yeah, it's hugely important. It's hugely important for any branch of government to have people in that branch who represent America, who are reflective of the diversity, as you said, not just racially, but in terms of background, in terms of geography, in terms of experiences and after a consistent period of time and particularly the last administration, the one term of Donald Trump for a lot of reasons, because of just vacancies that came up in an actuarial way, as well as the obstruction of president Obama's judicial appointees, Donald Trump was able to nominate more members to the federal judiciary in one term than anyone else in modern history.

Kimberly Atkins:

Those nominees tended to be predominantly white and male. So we have, aside from the whole issue of the ideological bent of the federal judiciary, which is another subject, just in terms of diversity, it was just very little. So there's a lot of catching up to do and it seems that Joe Biden is intent on doing that. I personally, I think that it is great, but also really sad that in 2021, we are getting so many firsts. The first-

Barb McQuade:

I know what you mean. Like, the first African American this or Asian American. Really? Still?

Kimberly Atkins:

I mean, it's just really frustrating.

Joyce Vance:

The first Muslim judge. That's the one that really gets to me.

Barb McQuade:

Yeah, first.

Kimberly Atkins:

It's disheartening in a way, and I don't want to take away the momentousness of this occasion, but that's where we are now. So this is a game of catch-up. I think we're going to hear a lot, particularly as opposition begins to be mounted against some of these nominees this idea that they are just token nominations or that they're not fully qualified because of this. Don't be fooled by this. We are playing catch-up, that there have always been qualified people of various backgrounds who can fill these roles and should have been filling these roles for decades.

Kimberly Atkins:

So it's a matter of playing catch-up, but one thing that I think is important, Barb, that you bring up is that it's not just about racial or ethnic or religious diversity, it's diversity of experience. We think about the first woman who was appointed to the US Supreme Court, Sandra Day O'Connor. She was a former lawmaker in Arizona.

Kimberly Atkins:

So I think that it is great to have had somebody on the Supreme Court who understands the process of passing a law, who understands the give and take, the negotiation. We talk about things like legislative intent when you're interpreting a statute, this was somebody who understood how legislation passed because she passed legislation. I think that's important, and we reached a point where all we had on the Supreme Court were people who went to elite law schools, were appointed to the federal judiciary and just work their way up to the Supreme Court.

Kimberly Atkins:

It was a really homogenous kind of half to that court, and yet they're ruling on things that involve farmers, that affect farmers, that affect people in urban areas, that affect people who didn't just come from ... We also had a very coastal court. People who were just from the East or West coast when they're ruling on cases that involve the middle of America. So I think the more diverse the federal judiciary is, the better and that that should be front of mind to Joe Biden and the people who are advising him, that the people who are nominated to these seats really reflect America so that they can rule in a way and have in mind how these rulings are going to affect all kinds of different people in America.

Barb McQuade:

I think it's so important to remember, as you say, we're still catching up ... Where we are now and where we've been, and the hazards of having a court that is homogeneous. Jill, when you began practicing, and you write about this in your book, *The Watergate Girl* you found yourself in courtrooms, in front of male judges who were accustomed to only male lawyers appearing before them. How did that affect your experience as a litigator?

Jill Wine-Banks:

Yeah, it's was true. I was almost always the only woman in the courtroom, except for the stenographer who recorded it. The question I would be asked when I'd first walk in is, "Who's secretary are you?" There was never an expectation that I was representing the United States of America. The behaviors that I encountered were maybe humorous in retrospect, but I would walk into chambers and the judge would stand.

Jill Wine-Banks:

As you all know, they don't stand for litigants, but because in that era, proper gentlemanly behavior was to open doors for women and stand when they came into the room, judges would do that. I also encountered a lot of sexist trial tactics where a lawyer would sniff at my neck, if you can believe this, and say, "Oh, nice perfume." Just loud enough for the jury to hear as a device to demean me and to-

Barb McQuade:

Are you serious?

Jill Wine-Banks:

I am. I almost said a bad word. Yes, I am serious.

Barb McQuade:

Oh my goodness.

Jill Wine-Banks:

Yes, absolutely.

Barb McQuade:

Oh my goodness.

Jill Wine-Banks:

Then you have the decision of how do you respond to that, because if you speak too aggressively, you are viewed as a bitch. If you don't respond, you're ignored and you're demeaned and the jury may lose faith in you and one thing we all know is the jury has to trust you, if they're going to believe the witnesses you put forward and the arguments that you espouse. So you have to learn to deal with that. It is ... One of my proudest things is that if I am in a job and they hire other women, it means that I didn't screw up and that people think that women can do the job. But yes, it definitely changed how I behaved in a courtroom and the things that I had to do to make sure that I was trusted by the jury.

Jill Wine-Banks:

It was even things like the title Miss, became something that was a possibility to use while I was early in my career. I opted not to adopt that, although it would have been my preference because I worried that the jury would think I was an uppity feminist and would lose trust in me. So I used the title Mrs., which was appropriate. I was married, but I never thought of myself as a chattel who belonged to a man. So I would have used Ms as my own identity or even miss would have been fine.

Barb McQuade:

Jill, how has that changed since we've seen more women come on the bench and more women judges? Have you seen a change in the way judges treat women litigants?

Jill Wine-Banks:

Yes. I think nowadays not only are the judges likely to be women or there a good number of women who are judges, your opponent may also be a woman. It's possible to have two parties and the judge all be women in the courtroom and FBI agents who testify or IRS agents can be women. It does make a difference, but also just the fact that judges now have wives and daughters who are either lawyers or in other professions, means they are more aware of discriminatory behavior and are more likely to behave and treat you as an equal. I think that's an important thing that we all need to look at is we don't want special treatment. We want to be treated as a trial lawyer. I don't allow myself to be called a woman lawyer. I am a trial lawyer. I'm a litigator, I'm a defense lawyer.

Barb McQuade:

There's a great quote. Ruth Bader Ginsburg repeated it. It was said by another woman litigant. It was something like, "I ask no special favor for my gender. Just that you take your boot off my neck," or something along those lines.

Jill Wine-Banks:

Sort of appropriate to our first conversation, too.

Barb McQuade:

Right.

Kimberly Atkins:

I was just going to say, I think that it is really interesting, Jill, when you were speaking about the fact that you are representing others. I don't always think about it that way, but that certainly was in my mind when I practiced law in Boston as a litigator. Usually when I was waiting in the hall, when I went to argue a motion or something, there was a hallway where the lawyers would all hang out and I would look down the hall and I would just see this sea of white men and me.

Kimberly Atkins:

It was in my mind, that perhaps this judge, I would probably be the only black woman attorney that they would see that day or that week or something else and that I was going in there and representing not just myself, but that all the women that would come before me, or when I was sworn into the Federal Bar to argue at the district court in Massachusetts and the judge who did the swearing in, was a woman and there were several women being sworn in that day and she remarked about how unusual that was.

Kimberly Atkins:

There were these reminders that we did represent something bigger, and again, that's another thing that gives me a mixed feeling because on the one hand, I'm glad to have been able to do that, but on the other hand that shouldn't be unusual. We shouldn't have to represent anybody because there should be, we're half the population. There should be enough of us that the few of us who reach those echelons of judicial practice should not have to be carrying that burden.

Jill Wine-Banks:

I'm reminded of the day that Attorney General Loretta Lynch was sworn in and just by happenstance, a large number of the US attorneys happened to be in Washington, DC that day. Barb, I can't remember, were you there or not? We all went out in the courtyard at DOJ and we took a picture with Loretta and there's a picture of her surrounded by US attorneys and there must be 15 or 20 women in the group, and it's very diverse. Black women, Asian women, white women, Hispanic women.

Jill Wine-Banks:

I remember that picture, and then looking at the pictures of how male and how white DOJ transitioned to become during the Trump white house and I think about all the experience that's lost and the decision making that isn't as well-rounded and well-informed as it could be, because everyone is coming from such a similar background when you go ahead and just really desecrate that diversity that's taken so long to build up.

Barb McQuade:

I don't want to express any hostility against white men. There's certainly a place for them at the table as well, but in what universe do you ignore half the population, half the talent or other percentages of the talent just right off the top and say, "I'm only going to recruit from this very narrow talent pool." It's really a foolish way to staff your needs. Joyce, I want to turn to a different angle on this. President Trump, we've said was very successful by some measures in filling judicial vacancies. He was able to get a lot of judges on the bench, and it seems that Republicans have figured out the importance of the courts in American life.

Barb McQuade:

Democrats perhaps have been a little slower historically to fill some of these vacancies up, but if our judiciary is, as we say independent, then what's the value of filling these vacancies from the perspective of the Biden administration?

Joyce Vance:

It's a really good question, and I think your observation is correct that Republicans have always done a much better job of prioritizing judicial nominations as an issue that drives elections. You may not love your party's presidential nominee, but if you want a conservative Supreme Court, then you have to vote for that nominee. There was a lot of that, that I think perhaps drove support for Donald Trump at various points in his career. Then as you say, Barb, if we believe that there's an independent judiciary that magically transcends the political party of the president who appoints it after judges ascended the bench, maybe it shouldn't matter at all, but it does and here's why Joe Biden needs to focus on it.

Joyce Vance:

So much of what happens in our system of government, so many of our institutions depend on people having faith in them for them to work and there's nowhere that that's more important than with the judiciary. There's no military might, no guns and men's in body armor going out to enforce decisions that are made by federal judges and state court judges.

Joyce Vance:

Decisions that are made by our judiciary are enforced, because as a country, we continue to believe in the rule of law. We continue to have faith and confidence that the judiciary is independent enough, that when they resolve our most contentious issues, we should abide by their rules. So it's critical that that faith in the judiciary continue. Biden, I think, has made a tremendous start here. The diversity in his early appointments is very good.

Joyce Vance:

11 nominees. His aides have said that he intends to have a follow-on group pretty quickly, because as you all know, there's a pipeline. It takes a while for these folks to get confirmed. They have to fill out extensive questionnaires. They have to have Senate hearings. Many senators will file questions afterwards, there will be staged votes. So it's not a fast process, and they're competing for space on the Senate judiciary committee's calendar with all of the nominees who have to be confirmed at DOJ.

Joyce Vance:

It's really a miracle anybody ever gets confirmed unless it's Mitch McConnell trying to confirm a Supreme Court justice in under 10 days. Then that's when I guess the magic happens, but let me say one last thing about Joe Biden's nominees and why they are so critical to the independence of the judiciary. Donald Trump's nominees, by last summer, only three of his nominees to the federal bench had had expertise as public defenders.

Joyce Vance:

Nominees came mostly from prosecution and from private practice, from law firms, Donald Trump was not unique in that regard. You could say that the numbers weren't quite as pronounced, but in most other administrations, there's really a heavy skew towards former prosecutors. So Biden, four of the folks that he's nominated in this first batch of 11, have serious experience as public defenders. There are people who have done some other form of public service sort of work.

Joyce Vance:

It is so important that we have a federal bench that's populated by people with diverse professional experience. We need more civil rights lawyers. We need more lawyers who come from the defense bar because decision-making will be better, judges who are surrounded by other colleagues who have diverse backgrounds are likely to learn more about their perspective and their background, and ultimately it will fuel public confidence in the judiciary so we won't have to worry about whether our judges are Democrats or Republicans. They'll just be independent federal judges.

Jill Wine-Banks:

That does seem like a perfect ending to this discussion, and maybe it's time to move on to our questions and answers. If you have a question for us, please email us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tweet using #SistersInLaw. If we don't get to your question during the show, keep an eye on our Twitter feeds throughout the week as we will answer as many as we can there. Let's go to our first question and that's from Tom.

Jill Wine-Banks:

Michael Sherwin gave an interview on 60 Minutes regarding the riots and January 6th, without approval from the Justice Department. Will he face any punishment for violating 1-7.400 part A? Pretty technical question, but I think there's an answer to that. Barb, do you want to answer that one or is that Joyce?

Joyce Vance:

I'll go ahead and take that one, Jill. Tom asks a really interesting technical question about how DOJ disciplines its own prosecutors when they violate the regulations. In this case, the section that he's referring to is a section that very narrowly limits, how prosecutors are supposed to talk about existing investigations inside of DOJ. With very limited exceptions involving civil rights cases, the policy is not to confirm or deny the existence of an investigation, but simply to reference the process, that cases are referred to investigative agencies and that they're handled in a consistent fashion with the principles of federal prosecution.

Joyce Vance:

Obviously Mr. Sherwin, who was at one point, the acting US attorney in the district of Columbia under the prior administration, went and gave an interview on 60 Minutes and he did that without approval from DOJ. He talked about the investigations and prosecutions related to the insurrection in detail.

Joyce Vance:

He made some statements that could ultimately be damaging, and Tom's question is what happens to him as a result of that? I think the answer is this, that situation will be referred to something called the OPR, the office of professional responsibility and they'll make a decision about whether Mr. Sherwin violated those regs. It sure looks like he did, and whether he should be disciplined.

Joyce Vance:

Unfortunately though, I don't think he'll face consequences. It looks like he's on the way out of the Justice Department. That interview that he gave to 60 Minutes looked a little bit like an audition for his next job and typically once you leave DOJ, these sorts of disciplinary proceedings terminate, because you're no longer employed by DOJ. There are cases where they can continue, but often they don't. So I think it's likely that Mr. Sherwin will escape responsibility, except we all know what he did.

Jill Wine-Banks:

Thank you, Joyce, and here's one Barb that mentions you specifically from, @StRose. Listening to the latest pod, @BarbMcQuade, talking about Title IX and NCAA women's basketball and men's basketball tournament facility disparities, which we all saw, of course. In reporting this week, I read that NCAA isn't subject to Title IX. Can you please clarify?

Barb McQuade:

So Title IX is a part of the education amendments act of 1972. So if you are a girl who played sports after 1972, you had the benefit of this law that required higher education and educational organizations to provide equal opportunities based on sex. So as a girl born in 1960, I had full advantage of this law, which was wonderful. I was able to play high school sports and other things, but as @StRose points out, the law does not apply to the NCAA, the National Collegiate Athletic Association, which is an organization outside of higher education, but it's maybe a distinction without a difference because its member organizations are governed by this law that says that benefits and opportunities must be equal and there cannot be discrimination between the sexes on that basis.

Barb McQuade:

So you couldn't file a lawsuit against the NCAA, for example, for a violation of Title IX but you could Sue the college that you attend if you believe that they were providing a disparate treatment between men and women.

Jill Wine-Banks:

Great answer. Thank you, Barb. We have time for one more question. This one comes from Mary in San Francisco. Mark Elias, and his group are seeking to file lawsuits to overturn the anti-democratic voter suppression laws recently enacted in Georgia. If these lawsuits are unsuccessful, you think congressional Democrats and especially President Biden will finally see the necessity in expansion of the courts at all federal levels, including the Supreme Court?

Kimberly Atkins:

So I will talk a bit about that. I think as it is now, aside from these lawsuits, it should be for the reasons we already discussed about. Diversity, that it's important to install people in the federal judiciary who reflect America. I don't know what Mary means by expansion, by putting more ... Perhaps that means putting more people on the court, including the SCOTUS. I think particularly with the SCOTUS, that's a bit of a fraught idea, but what I think is really the issue here is a case that is currently pending at the US Supreme Court, which involves a challenge to voting laws in Arizona and that's going to loom large over any of these lawsuits that are filed over these restrictive voting laws in Georgia and other states.

Kimberly Atkins:

So what essentially happened is in 2013, the US Supreme Court struck down a key provision in the Voting Rights Act. It was section five, which allowed the Department of Justice to, for certain districts that had a history of voter suppression, it allowed the DOJ to require them to submit any changes in voting laws for pre-approval before they could be implemented. The Supreme Court threw that case out saying that the formula that was used to decide this was too old and did not reflect whether or not racism still existed.

Kimberly Atkins:

This is a Supreme Court including the chief justice, who has said things like the key way to rid the world of race discrimination is to just simply stop discriminating on race. He seems to really not have an understanding about the way that racial discrimination continues and is perpetuated in society, but that's my personal opinion and I'll put that aside. So the only thing that is left is for people to bring lawsuits, like the ones Mark Elias and his group are bringing under section two of the Voting Rights Act, which is still in place, which prohibits discrimination in voting laws on the basis of race.

Kimberly Atkins:

Now, we have seen laws even after that Supreme Court case in Shelby County that struck down voting restrictive laws on the basis of race in places like North Carolina in a federal court decision that said that voter ID laws were enacted in North Carolina with, "surgical precision," directed at black voters to make it harder for black voters to vote. So it is not impossible to win these kinds of cases, but if the Supreme Court in the case that is pending right now sets a new standard, sets a new test in order to win these cases that is really onerous and makes it much harder than it takes away yet another vehicle under the Voting Rights Act to really go after these cases.

Kimberly Atkins:

If that takes place depending on when these lawsuits are resolved, it can make it a lot harder, A, for Marc Elias to win these suits or B, for those cases to be upheld on appeal when they are appealed. So this really is in the hands of the US Supreme Court right now. It underscores the importance of these courts, but of course, of course, Congress can act immediately to A, restore the part of the Voting Rights Act that was struck down by the US Supreme Court, and also pass pending laws that betrust voting rights that are pending, that have already been passed in the house.

Kimberly Atkins:

It would require the elimination of the filibuster, which we've talked a little bit about before, but I personally think that there is no other reason that is more important to eliminate the filibuster, which

has been used repeatedly to stymie civil rights legislation than to pass civil rights legislation that protects the right to vote. So I think he is A, in the Supreme Court's hands and also in the ability of Congress to pass laws that protect voting rights. That's where you'll see it, not necessarily in the expansion of courts.

Barb McQuade:

Representative Clyburn from South Carolina had a great tweet this morning. He said, "Nobody should be able to filibuster away my civil rights," and that's really what this comes down to. Even now, section two cases under the Voting Rights Act are very difficult to prevail in. The Supreme Court will likely make it more difficult. The only real answer is to pass the legislation in Congress, both the We The People Act and the John Lewis restoration of the Voting Rights Act. As Kim says, that is the only path forward for dealing with these voter restrictive laws that are cropping up in Republican-controlled legislature is all across the country.

Kimberly Atkins:

Just one last coda on that. States can also play a role here and I will give applause to Governor Northam in Virginia, who I've been very critical of in the past, in passing essentially a state law that does what I'm asking Congress to do, which is create this pre-clearance system for implementing voting laws. In Virginia, they have to be approved by the Virginia Attorney General's office before they're implemented and also really expanding access to voting laws.

Kimberly Atkins:

I lived in Virginia, I don't anymore. I lived in Virginia for 13 years and the first time I voted in the 2008 election, I waited in line to vote for three hours because I lived in a largely Democratic district in Northern Virginia and it was a Republican legislature that made it more difficult to have enough voting booths in each precinct in the Democratic districts to vote.

Kimberly Atkins:

Then in the pandemic last year, right before I moved away, it took 10 seconds. I put a ballot in a drop box because voting was expanded and that's the sort of thing that is being codified in Virginia. So governors, even in states in the former Confederacy can betrust those laws.

Barb McQuade:

Kim, when you mentioned about what Chief Justice Roberts said in the Shelby County case, I feel like justice Ruth Bader Ginsburg is now speaking to us from the grave. She wrote a dissenting opinion in that case about why it was necessary to continue with these pre-clearance rules, because she was very concerned about what would happen without them and the words in her dissenting opinion were, "You don't throw away your umbrella in a rainstorm just because you're not getting wet."

Kimberly Atkins:

That's right.

Joyce Vance:

I feel so guilty. The Shelby County case came out of my state, the district where I was the US attorney. Shelby County is just South of Jefferson County where I live. So I'd like to think that maybe we'll get the first case in Alabama under the new restoration of the Voting Rights Act and start turning the country a

different direction. It seems to me that no matter what your political party is, you should want to support everyone's right to vote. You never know when you're going to be in the minority. Demographics are shifting in this country. We want everyone who's eligible to be able to vote. It's just that simple.

Jill Wine-Banks:

I'm totally with Kim on the fact that we need to look at the filibuster, whether it's eliminating it or amending it. One of the neatest ideas I've heard was to make a vote of the senators who represent 60% of the American population be enough to end debate. So that would mean it wouldn't take 50 even. If you had California, New York, Illinois in favor, and several other states, you would represent right now-

Barb McQuade:

Spoken like someone from a populous state.

Jill Wine-Banks:

Well, it is, yes, but Michigan would be in there too. Let's be honest, right now, 50 senators represent 70% of the American population and 50 represent 30%. That 50 can stop passage of civil rights legislation of voting rights and that's wrong. So we need to look at that.

Joyce Vance:

Jill, we need you to run for the Senate. I think Jill should run for the Senate. I'd like to watch her make Mitch McConnell's head explode.

Jill Wine-Banks:

Okay. I'm ready. Maybe I'll run for alderman in Evanston instead. Anyway, I think it may be time to call this to a conclusion. So let's say thank you to all of you for listening to #SistersInLaw with Barb McQuade, Joyce Vance, Kimberly Atkins, and me, Jill Wine-Banks. Don't forget to send in your questions by email to [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com), or tweet them for next week's show using #SistersInLaw.

Jill Wine-Banks:

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Barb McQuade:

I always feel the need to do jazz here after this.