

Barb ([00:00:07](#)):

Welcome back to #SistersInLaw. I'm Barb McQuade. This week, Joyce, Kim, Jill and I will be taking a look at sexism and the obstacles facing Neera Tanden. We'll break down the tactics being used to suppress voter turnout and harm our democracy before giving you the latest developments with the new George Floyd Justice and Policing Act. As usual, we'll be answering some of your questions at the end of the show. This week, we're going to actually start with some kernels of good news. There's a lot of heavy stuff in the news. Kim, tell us something nice that has happened to you this week. Well,

Kim ([00:00:39](#)):

Well, Barb, the best news for me this week is that members of my family are starting to get doses of the vaccine, which has been so exciting. My parents both are going to get their second doses next week. Some of my siblings have gotten doses. It's just such good news to me after a year of worrying so much about this, and worrying about the vaccine and how the infrastructure was set up, and whether we'd all have access to it. Having the people that I love get vaccinated has been wonderful news for me.

What about you, Joyce?

Joyce ([00:01:14](#)):

My news is the same, Kim, not only has my husband had his first dose of the vaccine, he's a judge. In his courtroom, he actually has to see people. My mom, who's got a medical condition and is in a nursing home has now received both doses of the vaccine. We haven't been able to see her for over a year now. Her nursing home is one of the ones that shut down right away, and they've done a really great job of protecting their patients, but we are really hoping to get to see her soon.

Jill, what about you?

Jill ([00:01:49](#)):

I hate to repeat, but my good news was that I got my second dose, and I'm feeling really good that one in 10 Americans now have at least one dose, and 1.7 million people are getting vaccinated every day. Just to add something new, I want to say I love diving, so there's another bit of good news. Coral reefs are actually improving. The Gulf of Mexico's largest coral reef just got 200% bigger, so there is some good news this week. What about you, Barb?

Barb ([00:02:22](#)):

Well, I'll join the course of COVID vaccines. My mother got hers too, and I'm feeling very good about that. But aside from that, you all know that I am a big sports fan. I have been really enjoying watching my Michigan Wolverines succeed on the basketball court. They've been playing great. They had a 23-day hiatus because of COVID-19. They're back and they're playing well. I believe I control their destiny by my choice of seat as we all have these things. When I sit on my lucky couch, they're undefeated, and so it's a blessing and a curse because although I love the power of controlling their destiny, it means I have to stay in that couch all the time, and I have to be there at game time.

It's a lot of pressure on me, but I'm doing my part to help them to-

Jill ([00:03:04](#)):

Barbara, I have to say that my husband is an FSU alum. They're ranked, I think, number one in basketball, so we might have to have a side bet going here.

Barb ([00:03:14](#)):

Well, see you on the court, and let them do their talking on the courts.

Joyce ([00:03:18](#)):

Barb is nothing if not vicious about sports.

Barb ([00:03:22](#)):

Well, we'll carry on that conversation another day. Well, let's get into it. Jill, I know you wanted to talk about Neera Tanden and sexism. She, of course, is facing confirmation as director of OMB. What are your thoughts about that?

Jill ([00:03:39](#)):

I think that it's important for our audience to know that now that Congress has turned his attention to confirming the cabinet, normally, the president gets whoever he wants. The first real opposition has come to Neera Tanden, and many people are saying that it's based on sexism. It's not based on her qualifications. Everybody acknowledges that she is qualified for the job she's been nominated for, and that it's really because of what I'm going to quote, mean tweets from her. First of all, it seems to me that hypocrisy is really active here, because Republicans never said anything about all the mean tweets from Donald Trump and many of his enablers.

I think that there is hypocrisy, but I also do think the double standard comes into play here in terms of her being female. Women can say certain things, but they can't say others. It's something I learned a long time ago in trial work is you cannot be too tough or you're considered a... I guess... I don't know if I can say the word, but it begins with a B and rhymes with rich. You don't want to be viewed that way, but you don't want to be ignored, so you have to find the right way to communicate. I'm just wondering if Neera Tanden were male, that anybody would be criticizing her tweets.

What do you think?

Joyce ([00:05:20](#)):

I think we all know the answer to that, right? The answer is no, because Neera Tanden is being questioned by a group of senators, some of them have sent tweets that certainly rival hers for snarkiness. What really bothers me is it's not just Neera. There's also opposition to Deb Holland, who's immaculately qualified for interior. When we get to justice, we're already seeing an ad campaign against Vanita Gupta, who's slated to be the associate, and Kristen Clark, who's slated to be the head of the criminal division. These are four very talented women.

Ironically, something that they all have in common is that they are women of color, and I think that that plays a big role in this. Opposing one of those women might be something of personal judgment. Opposing two, three, four of them, that's a pattern, and the pattern is misogyny and racism.

Kim ([00:06:16](#)):

I think that's absolutely right, and I'm so glad that you pointed out the fact that these are women of color really facing just an amazing and seemingly unprecedented block of scrutiny based on things other than their qualifications, bordering on opposition. As a journalist for the last four years who have watched while members of Congress literally, I called it, tweet nisha, pretended to forget everything that Donald Trump tweeted in an effort not to have to respond to it to the press, not to have to answer

to it, not to have to address the way that Donald Trump weaponized his Twitter account against his political enemies, real and perceived, to suddenly now say, "Oh, well, we need decorum."

Therefore, if you've tweeted something in the past that is objectionable, that will cost you your job. As anybody who spent some time on Capitol Hill, we have heard elected members of Congress say things that are way worse than anything that Neera Tanden has ever tweeted. I mean, it is not a place for gentle, docile language up there. This idea that they have to keep that standard really is subterfuge for something that is much broader. Listen, the four of us as women in the legal profession have all faced sexism in real blatant ways. For me, I'm not sure if it was always the sexism or the racism or the misogynoir or a combination of them all, but I'm sure we all have stories about the sexism and bias that we've experienced in our jobs.

I mean, I think I've talked before about the fact that every time I went to the courthouse to argue a case, I was a civil litigator. I was usually either asked if I was represented by counsel by the court clerk, or folks tried to direct me to the criminal division because they assumed that I was a defendant. One of my favorite stories is when I was in my law office and an opposing counsel in a case showed up for a deposition, and I went to greet him at the door. He looks at me and hands me a stack of papers and said, "Can you make two copies?" He assumed, obviously, that I was a secretary. I'm sure...

I'm of the view that you shouldn't treat even the secretary that way, even if you showed up at someone else's office, but I politely handed the stack of papers to our office assistant who happened to have been white and male. Then I turned back to the attorney and extended my hand and said, "Hello, I'm Kimberly Atkins." Of course, we'd corresponded by mail and also on the phone, so all the color in his face left, and he was truly embarrassed. Hopefully, he never did that again, but this is something that exists unfortunately in the legal profession, and I experienced it all the way.

What about you guys? What have you experienced?

Barb ([00:09:31](#)):

Same here, Kim. I can think of similar experiences. I can remember a time when I was going through a trial practice training program, and someone told me that I needed to tone down my rhetoric, that I need to speak in a softer voice. I needed to smile more. I came across as the word that Jill used. As a young lawyer, I found that very unsettling, and I found it to be completely different from the feedback my male colleagues were receiving. I can't help but think that it was gender based.

One of the things that I think all of us have had to navigate, and I hear young women lawyers ask this question, "Should I live in the world as it is, or in the world as it should be?" I think all of us when those situations occur, and someone says something incredibly inappropriate, or treats us the way you just described, Kim, we have to make these very quick calculations on our feet, "Do I speak up? Do I just roll with it? Do I go with the flow? Do I... How do I do it?"

I have often found humor to be one way to disarm someone, and that can be helpful. There was a time when I was trying a case while very pregnant. I was very visibly pregnant, and it was a child pornography case. The defense attorney actually filed a motion to exclude me as trial counsel, and on the basis of prosecutorial misconduct, that it would engender undue sympathy for, I don't know, the victims, I guess, by seeing me pregnant in some way.

Joyce ([00:11:15](#)):

Oh my God.

Barb ([00:11:16](#)):

The judge called us back into chambers. I think he wasn't quite sure how to handle it, and asked the defendant to explain his position, and he did. Then he looked at me and said, "What's your position?" I said, about this defense attorney who was on the heavier side, I said, "I won't make any comments about defense counsel's weight if he doesn't make any comments about mine." and the judge-

Joyce ([00:11:40](#)):

Well done.

Barb ([00:11:40](#)):

The judge chuckled, and we moved on. It shouldn't come to that, right? I also don't want to body shame anybody, so I'm not proud of that, really, in retrospect, but you shouldn't be put in those situations, but we are, and we do. In the same way we talk about people for crisis management planning, if you have to make the decision and figure out the solution on the spot, you're probably not going to come up with a good solution in the same way that we teach our kids to role play about when they're offered drugs, or at least this is the way my children roll their eyes at me. You need to think in advance, "How am I going to handle that situation when it occurs?"

You can't game out every situation, but thinking of ways to deal with it, "Am I going to call them out, or am I going to go along with it?" I think what I would tell my younger self is I'd be a little braver and just say that's just not appropriate. That's not appropriate way for us to be talking about this. I'm a professional. Treat me like one., and let's move on."

Jill ([00:12:37](#)):

I just wanted to follow up on some of the things that Barb said. First of all, when she talks about it being different than how a male would have been commented on, I can give you one really blatant example. When I first joined Jenner & Block as a partner, there was an associate evaluation right after I had joined when I didn't know any of the associates, but the other female partner asked me to come to the meeting and to particularly watch out for how male and female associates were being evaluated. Sure enough, the men were aggressive. The women were that same B word rhyming with rich for the same behavior.

There was no question that things that were lauded in the male associates were viewed as negatives in the female. I can remember once calling my best friend from Russia, where I was working on a deal, and my translator told me that the other side thought I was mean, and that really hurt my feelings. It made me feel horrible. I called her almost crying, saying, "What should I do?" She said, "Are you kidding me? You're negotiating. You want them to think you're mean? What else would you want?"

She was right. I mean, it was true. But in my stories, because I am clearly the oldest here, I go back to an era when, of course, every time I walk into a court, the clerk would say, "Whose secretary are you?" I would be asked to get coffee at any meeting where people didn't know that I was the lawyer. I was told when I got to law school that I was taking the place of a man who would die in Vietnam, and I've never practiced law anyway, and I shouldn't be there. When I went for job interviews, I was asked what kind of birth control I use, how many children I plan to have.

I'm not kidding. I can see your reaction, guys. It's true. Going to your question, Barbara, of how do you respond to that? You have to think really fast. Back then, I had no female colleagues that I could brainstorm this with. Eventually, I did start thinking about in advance, but mostly, it just depends on the situation. One of the things that I found like you, humor helps, and then sometimes you have to say, "Look, my goal is to win whatever it is," either the lawsuit or to get a policy passed when I was general

counsel other the army. You take an approach that leads you to getting done what you want to get done, even if it means sucking in some really horrible, insulting sexist comments.

When Judge Sirica said while I was cross examining one of the defendants, "Now, Mr. Mardian, don't you know you can never win an argument with a lady?" That was when I was really doing a great job of cross examining and getting him to be mad at me so that the jury would see how mean and evil he was. I didn't say anything because you can't. When a judge stood when I came into chambers, I didn't criticize him. I smiled and walked in. I think you just have to take a different approach each and every time that happens. Unfortunately, it is still happening.

There is some good news on this front, though. The military, the Pentagon just announced new rules for female soldiers. They can now have ponytails. They can wear a light lipstick and neutral nail polish, and stud earrings. We can all laugh about it, but truly, they used to have a tight bun. That got in the way of wearing a helmet, and so it oftentimes interfered with their vision. This is something I know from when I said to the army, "You need to have female designed equipment," because I did a parachute jump as a test of how women were doing and training, and the helmet fell off, because it was too big.

They don't make or they didn't then make them small enough for women.

Barb ([00:16:47](#)):

Wait, hold on. Before we go any further, and I want to hear what Joyce has to say. I just have to stop to say, Jill, you've jumped out of an airplane in a parachute?

Jill ([00:16:57](#)):

I went up with a jump team, and watch them doing a tandem jump, which was so amazing, and I saw someone get caught, and the jump master cut the cord so that he could fall instead of being tangled. After that, I said, "I want to see what it's like," and so I did a few hours of parachute training, and I jumped from a 30-foot tower. The first time, the helmet literally fell off, and so I violated the rule of jumping, which is I watched it fall to the ground. The first thing you learn in training is never look at the ground because you will stiffen up as you land.

You cannot look. You have to just wait till you feel it, and then collapse into it. I, of course, got hurt, but I said, "I'm fine. I want to do it again." The worst thing for me was you have to yell your name and rank from the tower and be heard on the ground before they'll release you to jump. I thought it was unladylike to yell loud, and so I wasn't heard for a while. That was one of those things you have to get over that ladylike has different definitions in the military.

Barb ([00:18:10](#)):

Wow.

Joyce ([00:18:12](#)):

I've actually got an air story. It's not as good as Jill's, but as a young prosecutor, I was working with some agents on actually a pretty interesting drug kingpin case, a Dixie mafia case, and they hadn't worked with a woman prosecutor before. There was a pretty big team of prosecutors. It was all guys. I was brand new, and I also had the albatross around my neck of being a judge's kid. My father-in-law was a judge. Everyone assumed that that was why I had gotten the job, so they were trying to figure out if I could do anything.

This was when customs used to be an agency. Two customs agents took me up in a Vietnam era helicopter to fly over an area where we were looking at some pretty involved drug trafficking that was going on. I mean, this was a helicopter with no doors, and they just stuck you in there with a helmet on, and that was how you did calm. We got up. We flew over. They kept saying things to see who I was. One of the things that they said was, "The last time we did this, they shot at us. But don't worry, we're pretty high up. We're probably okay," and so you figure out what they're doing to you.

On the way home, they said, "Do you want to fly?" I didn't want to fly. I was terrified of being in a helicopter. I don't like flying anyhow, but of course I said, "Sure, I do." I did it for a little while until one of the guys very gently into my ear said, "Joyce, you need to ease up on the stick at your right arm. You're actually taking us down." I was so tense that in addition to doing what I was doing, my elbow was on some sort of a lever that came out with... that was the lever you press to go down, but the great thing about it... I will say, and I will give them huge credit, they all became really good friends.

I know that they had to have their moment with me, but because I had the support of the guys on my team of the older, more experienced prosecutors, the agents gave me that same level of legitimacy, and so something here that gives me a moment of hope is there are enough women like us who've been around for a long time, not just in the legal field, but in other professions. I think we have to be really intentional and really deliberate about finding ways that we can support younger women, and make sure that they don't have to deal with any of this nonsense.

Barb, that goes back to your point, right? Do you live in the world that is or in the world that you want to be? I think it's up to us to make it be the world we want it to be? This is the time to do it. Women have put up with this stuff for way too long.

Barb ([00:20:55](#)):

I know I feel an obligation, I'm sure you do as well, to help the next generation because I now feel much bolder than I did when I was young and uncertain of my place in it. I feel this obligation to help women. I also want to acknowledge as you just did, Joyce, the allies I had in women who are my peers and older and also men. There were many men who were great allies, who did speak up when something was inappropriate. I had many men in law enforcement, who were incredibly professional and collegial along the way.

I don't want to suggest that everyone out there is a raging sexist, but there should be zero tolerance for sexism, and so until we get to that point, I plan to speak out against it.

Joyce ([00:21:41](#)):

Should we move on and talk about voting rights and voter suppression? There's obviously no need to tell this group how important the right to vote is. I think our listeners all understand that too, but what's going on in state legislatures right now, especially states with Republican majorities and super majorities, is really pretty disturbing. According to the Brennan Center, which tracks these things, 33 states are considering new laws that would restrict the ability to vote more than it's already restricted.

Kim, why don't you talk with us a little bit about what's going on? Why are all of these legislators taking a step back?

Kim ([00:22:23](#)):

Yes, so we are seeing a lot of proposals for new restrictive voting laws, and they're coming at a time... As you pointed out, they are coming fast and furiously. Basically, the argument, the laws take different forms, and there are different arguments. But right now, they're mostly largely coalescing in a similar

way, which is to say after all of the disinformation and the big lie, frankly, that was pushed by Donald Trump and those who supported him, there is a lot of confusion and distrust in our election systems, and so in order to allay the fears of voters, we need to show them that voting is secure.

Therefore, we need to implement these restrictive voting measures. They include voting ID requirements, requiring photo IDs, which has been shown to target poor people, people of color for whom it may be difficult to obtain a voter ID. I mean, picture IDs or licenses, they also cost money. It can also be seen, essentially, as a poll tax. In terms of restricting early voting, of course, we saw early voting and mail in voting as well. We saw those playing a crucial role during the pandemic to expand voting to make it more available to people and allow them to vote more easily during a pandemic, and it was found to be largely fraud free.

There's absolutely no evidence from the 2020 election of widespread voter fraud at all. The idea that we need more security or to make it more difficult just doesn't make a lot of sense. The political reality is Republicans largely lost a lot of elections in 2020. The more people that vote, the more people who are likely to vote democratic come out, and they are able to cast their ballots, so we're seeing a political effort on the part of Republicans in states where they still control the legislature to try to roll that back and make it harder. But one thing I'm really concerned about is on Tuesday, the US Supreme Court is going to be taking up a voting rights case out of Arizona.

We know that in 2013, the U.S. Supreme Court gutted a key protection for voting rights when they threw out the preclearance formula in section five of the Voting Rights Act. What that meant was a lot of districts that had a history of voter suppression, whenever they change their voting laws, had to submit those plans to the Department of Justice ahead of time to be pre cleared before they can implement them so that the Justice Department can make sure that there was no shenanigans there. The formula to trigger that was thrown out, so that hasn't been used since 2013. Since then, there have been a plethora of new laws put into place in these very districts to try to restrict voting.

Some of them have been thrown out, but some of them have remained in place. Now, there is a new challenge to Arizona's law, which, in a sense, led to made it easier for election officials to throw out provisional ballots that were coming from precincts outside of their own precincts rather than holding them and counting them later. The Democratic National Committee brought suit basically saying, "Look, throwing out those provisional votes are really having an impact mostly on black and brown voters." They claim that it's violating section two of the Voting Rights Act, which prohibits racial discrimination, essentially, in voting.

This is a harder case to make, because this puts the burden on the plaintiffs, on people who are complaining about this, as opposed to putting the burden on the state who have this history of voter suppression to show that that's not what they're doing. I'm worried that before the Supreme Court, which has already gutted the key part of the Voting Rights Act, that this case will allow many more restrictive voting laws to be put in place, and really get the okay from the highest court in the land. I'd like to hear what my sisters have to say about this.

Joyce (00:26:52):

Before y'all say anything, can I just say guilty as charged, Shelby County, the case that gutted the Voting Rights Act came out of my district, and something that's always stuck with me is that in the dissent, Ruth Bader Ginsburg said, "Why would you want to throw out the Voting Rights Act saying that it's worked, so we don't need it any longer? That's like tossing out your umbrella in the middle of a rainstorm, because you're still dry." Kim, everything that you said drives that home. Jill, Barb, what do y'all think?

Jill ([00:27:25](#)):

Obviously, the preclearance might not have worked so well in the last four years anyway, because I wouldn't have trusted that justice department to say that a proposed change was unconstitutional, because they didn't have the same view of voting rights. I think some of the laws, and Kim, you mentioned, Arizona, their proposed change in voting rights would basically say, "It doesn't matter what the people say, if the secretary of state wants to have a different winner, that's who the winner will be." We cannot allow these to happen. Mark Elias and the democracy forum are on top of all this, and will be bringing, I'm sure, lots and lots of lawsuits.

That's what we will need. There is a new day coming because we now have a new department of justice that will protect these rights, and that won't agree to the changes. But ultimately, you've hit on a real problem, which is it's going to end up being up to the Supreme Court. The current configuration of the Supreme Court does not make me feel cheered about the likely outcome. I think we're going to have to, in every state, watch this, and then also look at what can the federal government do to pass voting rights and to get us into a place that John Lewis Voting Rights Act needs to be passed?

I think there's a lot more that the federal government is going to have to take on to stop what are... Unfortunately, this shouldn't be a partisan issue, but if you look at the states that are trying to change their laws to eliminate early voting, to eliminate mail voting, to take away ballot boxes that are distributed across a county, they tend to be states that have Republican governors and Republican legislators, and so the Democrats are going to have to do something to protect voting rights, which will include starting to pay more attention to the election of democratic governors and Democrats in the state houses, in state legislatures.

That's the only thing, I think, that's going to work right now.

Barb ([00:29:50](#)):

Well, Jill, as you said, I don't know that I agree with that. I do agree that voting access should not be a partisan issue. I would hope that whoever is in a governor's office understands that access to voting is instrumental to democracy. Here in Michigan, in the last few years, there was a ballot initiative, voter-led effort to make voting by mail, absentee voting at no excuse space, and it was wildly popular. It passed by an overwhelming margin. As a result, during the COVID pandemic, we had a record turnout in the polls, because so many people were allowed to vote in advance and submit their ballot either by mail or in a drop box.

What I think we're seeing happen is we talked about the big lie as President Trump won the election because of election fraud. The foundation for that big lie is the even bigger lie, which is that there is fraud in elections, and that is a lie that President Trump began even before he was elected in 2016. You remember he had that... He put together some commission on election integrity, and they ended up disbanding within a very short period of time because they couldn't find any election fraud. It's because there isn't any.

I mean, there may be onesies and twosies here and there. But in terms of widespread election fraud, it isn't an issue. What is more common... I have worked in the past on Election Day on voter protection initiatives, and just helping people make sure they're in the right place to vote. What happens a lot is people will only vote every four years in a presidential election, for example. Show up to the wrong place on election day. This initiative in Arizona that says, "We're going to throw out the whole ballot if they voted in the wrong place," their vote for president and U.S. senator and all these other things should stand, right?

If they're in the wrong place, and so they voted in the wrong election for city council rep, that vote doesn't count, but everything else on the ballot should count, right? All of these laws about eliminating the ability to vote in advance and showing a photo ID, it's all designed for one thing. It is to suppress the vote. You mentioned Mark Elias. I exchanged some emails with him in preparation for this conversation, and one of the things that he has said publicly is the only reason we're seeing all of these ballot proposals, legislative proposals and bills in Georgia is because it's being advocated by people who don't like the outcome.

They had two senators who were democrats get elected, and what's their response? Not, "Let's energize our party and our ideas," but, "Let's make it harder for people who won't vote for us to cast their ballot in the first place." That is antithetical to democracy in America. We should be working to make it easier to vote, not harder to vote. All of these things that put up these obstacles are designed for one thing, and that is to advantage the Republican Party over the Democratic Party.

Joyce ([00:32:53](#)):

I think it's really interesting that the two states that we've mentioned, Georgia and Arizona, are both states that are in the middle of a rapid demographic shift. In fact, by 2026, they'll be majority minority states. That's not lost on Republicans, most of whom don't say it out loud, but former President Trump actually did say it out loud during the campaign when he was talking about the COVID provisions that made it easier for people to vote. He said, "This is crazy. If too many people can vote, Republicans will never win another race." That's really what's at stake here. This is about politics.

Who you choose on your ballot, sure, that's a political decision, but whether or not you can vote, that's quintessentially American. Without a right to vote, we would not be the country that our forefathers aspired to build. Hasn't that always been the story of America making it possible for more people to vote women protests in the Civil Rights movement that expanded voting rights for black people now movements to let immigrants and other people vote more easily? I mean, that's something that we should all be fighting for, no matter what party we belong to.

Kim ([00:34:09](#)):

It is absolutely such a crucial civil rights issue. I have to say, I too, am a Michigan native like Barb, and one of the lasting images of the last election that really broke my heart was seeing the vote being counted in Detroit, my hometown, and seeing the crowd that was almost entirely white standing outside saying, "Stop the count." Detroit is the blackest major city in the United States by population, and that fact just tells you everything you needed to know about that moment. But I want to move on to another big civil rights issue, which is policing reform.

Next week, the house is set to vote again on the George Floyd Justice in Policing Act. I just want to highlight a few things that this law does. It will prohibit federal, state and local law enforcement from racial, religious and discriminatory profiling. It will also require law enforcement to collect data on investigatory activities. That's so important, because when we talk about policing and racial profiling, there is no national clearinghouse for data, so we really don't even know the extent to which it happens because police departments aren't required to say.

It'll ban chokeholds. It'll ban no knock warrants, both for federal law enforcement, and also incentivize state and local law enforcement agencies to ban those practices too. It won't cover them directly, but it'll incentivize through funding those state and local authorities to stop those things. One thing that is really crucial is that it'll make it easier to prosecute offending officers by amending the

federal criminal statute that prosecutes criminal misconduct. It'll change the requirement in Section 242 to be amended from willfulness to recklessness.

I want to throw to Barb on this as a former federal prosecutor to talk about why that police misconduct willfulness standard being changed is so important.

Barb ([00:36:24](#)):

I think that is one of the critical provisions in this bill. Currently, it requires willfully, and that comes from a 1945 case called Screws versus the United States. It's a predecessor statute, but 242 is the statute that federal prosecutors use to prosecute police officers who deprive citizens, residents, of their constitutional rights such as through excessive force under what is known as color of law, their badge, their authority as a police officer. It requires that it be done willfully, and willfully has been interpreted to mean an act that it was done with the specific intent to do something that the law forbids.

It is such a high standard that it becomes virtually impossible for federal prosecutors to charge and convict a police officer because the case law says things like bad judgment, inherent bias, mistakes, poor training. None of those things are irrelevant, unless you can prove that the person had the specific goal of depriving the person of their constitutional rights. I just don't think that it's realistic to think that that's actually what happens on the ground, that a police officer is thinking, "How shall I deprive this person of their constitutional rights," unless it's a deliberate assassination, nor can a prosecutor prove that.

Now, on the other hand, I don't think you want to completely eliminate any mens rea [inaudible 00:37:51] or put you under the law. You have to show that the person did something that was unlawful and intentionally so, but by changing it to knowingly or with reckless disregard, I think you will capture some of that wrongful behavior, but also giving police officers the leeway that they need when they make honest mistakes. I mean, we don't want to have police officers so afraid to do their jobs, that they won't use appropriate force when it's necessary to protect their lives or the lives of others, or sign up to be a police officer in the first place.

It's a very modest change, but I think it reflects the reality, and it will enable prosecutors to convict people whose conduct is wrongful without requiring that standard that is proved unworkable in practice.

Joyce ([00:38:37](#)):

I think Barb makes a really good point here. Not to dig too deep into the details, but in the Screws case, part of the conduct involved is the law enforcement officer whose charged is dragging this guy through the police station bouncing his head on a concrete floor. The court decides that that's not an intentional deprivation of constitutional rights. The standard is so high in these cases, and we prosecuted a lot of these cases during my tenure as U.S. attorney, not involving deaths but involving the use of excessive force. The debate every time we went to indictment review wasn't, "Did this police officer do something wrong, and did he know it was wrong at the time?"

It was always, "Can we prove that he intended to deprive constitutional rights?" The last case that we tried involved a grandfather who had come from India to help his son with a new child, and the grandfather weighed about 100 pounds soaking wet. He was walking through the neighborhood one morning. It is apparently customary in India to look into Windows, and he was looking into a garage. Somebody in the neighborhood called it in. Police officers showed up, and they approached him and said, "Show us your green card." His response was, "I don't speak English." The police officer in this case weighs about 250 pounds.

He ultimately body sweeps the grandfather, a prohibited practice, partially paralyzes him. We tried the case. The jury hangs not once, but twice. That means we can't get a unanimous verdict, and the judge won't let us try it a third time. Look, there's just no question on these facts that that was an excessive use of force by this police officer. It is important that we protect the ability of police officers who make split second decisions in dangerous situations, dangerous to them personally and to the people around them that we preserve their ability to act, but this was not a good faith law enforcement effort by this officer.

This change in the law would have made it possible to convict in that case, so I think this is a great development.

Jill ([00:40:58](#)):

These are all great points, but I'd like to maybe focus on two other parts of this law that I think are really interesting. One is that it will allow easier lawsuits by people injured and families of people injured, because it will take away the qualified immunity that police officers now have. But the other is really a part of what I think is really important in government, which is transparency, and this will create a national registry called the National Police Misconduct Registry, to compile data on complaints and records. You cannot establish a pattern and practice lawsuit against a police force unless you have this data.

I can speak from experience in Chicago, where the police union contract said that after five years, any misconduct reported had to be erased. Well, it's very hard to establish a long-term pattern or practice if someone does something and you're one, and you're three, and maybe you're four, and then it's wiped out. The decision in Illinois was to abolish that and to require that they be kept permanently. I think that that's an important part of this law that may not be as sexy as some of these other parts, but it is important to protecting the rights of citizens, and at the same time, protecting police officers.

I think Barb and Joyce have both made the very compelling point that police have to make split second decisions, sort of like what we were talking about with women having to make split second decisions on how you respond to a horrible sexist comment, and they need to be protected in that. But when you have a case of a 200-pound police officer slamming 100-pound person who says, "I don't speak English," you need to be able to prosecute that, and you need to have that record so that if he does it again, you know that he's done it a second time.

Kim ([00:43:05](#)):

I think those are really great points. I also think about the point with this legislation, that if it passes, it will help bring a sense that justice can be done in these cases. As not just a recovering attorney, but also a person of color, I can speak from personal experience to say that every time we see another one of these awful stories of someone being killed at the hands of police in this really awful way, we almost expect the police officer not to be held accountable in any way. But when that actually happens, that compounds the trauma. This past week was particularly traumatic for a lot of reasons.

There was hope because we saw the DOJ ramp up its investigation in the George Floyd case against Derek Chauvin, the former Minneapolis police officer whose the video of his knee on the back of the neck of George Floyd really changed the entire conversation about policing reform. But it was sad because it was the one-year anniversary of the murder, I call it a lynching because it was the closest thing to that that I've seen, of Ahmaud Arbery, the jogger in Georgia, who was hunted down on a suburban street in Georgia in the middle of the day, and shot dead.

We also got news out of New York that the police officers who were involved in the death of Daniel Prude, the man who was suffering from a psychological emergency, and was grabbed by police, had a mesh bag put over his head, and held down on the street until he was unconscious and he passed away some days later that there would be no charges brought in that case. Every time that happens, it breaks down the trust in communities of color in the police. That too puts police more in danger. I remember being a journalism student in New York, and doing a ride along with police at that time.

This was not long after the Amadou Diallo case. They said that the lack of trust from members of the community made it so much harder for them. They used to know from being able to talk to people in the neighborhood who the people they were, who they saw on the street where they knew, "Okay, well, that's a good kid. He has a brother who is in some bad stuff, but the mother is really worried about this young kid, really wants him to go to college. We want to make sure that he's okay," but if the community stops talking to cops, that kind of community policing can't take place, and they approach everyone like a suspect.

It puts everyone in danger, and it's really hard. What do you think, Barb?

Barb ([00:46:00](#)):

I also want to speak about the dishonesty that goes on with some of the rhetoric, this us versus them, that is police versus community. When we see politicians who want to run on a law and order platform, and attack others who want to improve policing as somehow being anti police, there's nothing anti police about wanting to improve constitutional policing for the reasons you just said, Kim, that police officers know they need the trust of the communities they serve if they're going to be effective. If they're going to get tips from the community, they need to be trusted. If they're going to be safe when they're out in the streets, they need to be trusted.

I'm part of a foundation of a board member that has put out some grant proposals to police departments to work on some of these issues. The response by police departments in Metro Detroit has been overwhelming, because police departments want to get better. They want to have the trust of the communities they serve, so they want things like training on excessive use of force and community reconciliation, citizen oversight. In Detroit, we had a pattern and practice consent decree with the Detroit police department. The police chief, James Craig, will tell you that that department is better today than it was before then, because it has better practices, better policies, better training, and the result is a better community trust.

Joyce ([00:47:29](#)):

Can I just echo what Barb is saying about how much law enforcement wants this? Birmingham was one of six pilot cities in a program called the National Initiative for Building Community Trust. It was a program with three pillars. It involves training police on procedural justice, on implicit bias and then working on community reconciliation to rebuild broken communities. After Birmingham had gotten about two thirds of the way through the program, the police chief A.C. Roper and I did a presentation statewide for law enforcement agencies, for police and for sheriffs.

We went into it thinking, "This is not going to be well received by some of our small agencies in more rural parts of the state, but we're going to do it anyhow. We're going to expose people to it." Chief Roper is an amazing guy. At the end of the presentation, he asked for questions, and a whole bunch of people shot their hands up all at once and immediately, and the questions were all the same, "How can we get the pilot program in our jurisdiction?" They all wanted it because they knew it would make their department stronger.

They could serve their communities better. I think you're dead on the money. This is something that police are hungry for. I hope that the Biden Justice Department will advance programs like this, and rebuild those relationships of trust that have been shattered.

Barb ([00:48:50](#)):

Let's turn now to questions. You can send your questions to sistersinlaw@politicon.com, or tweet at us using #sistersinlaw, and we'll try to answer them during the show. If we don't get to your question during the show, we will try to answer as many as we can on our Twitter feeds during the week. Let's start with this one. It comes from Robert in New Orleans, Louisiana. He says, "I have only a layman's understanding of RICO charges and prosecution strategies, but could former President Donald J. Trump be charged and convicted under RICO?" Joyce, Jill, what do you think?

Jill ([00:49:27](#)):

Anything is possible. I'd like both you and Joyce to talk about the current policies of DOJ. The advantage of RICO is the damages are quadrupled, and you get a much better outcome. All it requires is that there be a conspiracy with some actual overt acts in support of that. It is definitely possible because I can think of a lot of crimes that were committed as part of a conspiracy, so I think so, but I think there are some hurdles in terms of whether the DOJ would approve bringing such a prosecution.

Barb ([00:50:05](#)):

There are some additional elements. Of course, RICO was passed in an effort to attack organized crime, and so it requires an enterprise, which it can be an individual or a group or an association, so you could charge Donald Trump or others that he was working with. You have to show that there's a pattern of racketeering activity. A pattern just means two or more different crimes. Racketeering activity is defined in the statute to include a number of different crimes, but many of them include things like bribery, fraud, extortion. If the facts fit, I think there's a potential for a charge there.

But as you just said, Jill, just because you can charge under the RICO statute doesn't mean that you should, and DOJ has some policies that restricts when it can be used.

Joyce ([00:50:52](#)):

I think that's right. Let me just put a pin right now in the fact that one of the predicate offenses for RICO charge is money laundering, which may or may not have taken place here, and that a corporation can be a RICO enterprise, not just an individual or a loose confederation of people. But if there's corporate wrongdoing with more than two predicate apps in the space of 10 years, then that could sustain charges. But like everyone has said, the real drag on seeing RICO used here is this deference at DOJ that says it's a restraint, that says, "RICO should only be used in cases where the underlying crimes prosecutions for the underlying whether it's bribery, or kidnapping, or whatever it is, wouldn't serve the interests of justice sufficiently to see justice done."

A U.S. attorney can't just bring RICO charges on their own. They actually have to go to the Criminal Division in Washington and get approval. It is a complicated process. As Jill said, possible, but I wouldn't bank on it just yet.

Barb ([00:51:58](#)):

All right, let's move on. We've got another question from Karen. I might direct this one at Kimberly. Can you explain the history of the filibuster, the ways it has been used and abused and the pros and cons of potentially abolishing it?

Kim ([00:52:13](#)):

Yes. That's, of course, a very ripe issue right now in the Senate. They are considering whether or not to abolish the filibuster Democrats. Some democrats are really pushing for that. Republicans, including Mitch McConnell, are saying that they don't want it. This question is interesting, because for so long, I thought about the filibuster as a good rule, as something that would by requiring 60 senators to agree to move on to move legislation forward, that it's a way to push for more consensus, more bipartisanship, particularly with things like confirming judges so that we wouldn't have such partisanship in the judiciary.

But when I went back and looked at some of the history, it became really clear that the filibuster was not really used very much throughout history, until it came time for civil rights legislation. In that point, Southern members of the Senate would use it to try to block civil rights legislation from passing, and they were largely successful at doing that. It required the supermajority to move to something called cloture, which is essentially ending debate on a bill so that they could vote on it. It would never reach that point, because Southern lawmakers, even when they were in the minority, would use that power to block it.

In fact, a filibuster was attempted on the Civil Rights Act in 1964 of the major Civil Rights Act that forms the basis of so many of the civil rights laws, the civil rights protections that we enjoy today. It was really enlightening. It really was never used as a tool of reconciliation, as a tool for bipartisanship. It's been used as a tool for obstruction. That, me personally, changed my view on it, and I think that it probably needs to go. What do you think, Joyce?

Joyce ([00:54:15](#)):

In fact, the longest filibuster ever in the Senate was 24 hours and 18 minutes conducted by South Carolina, Strom Thurmond, in an effort to block the Civil Rights Act of 1957 and Eisenhower piece of legislation that preceded what we now think of as the Civil Rights Act and its key pieces, but that's precisely what its history has been. I think we see that being borne out in modern times. This is a topic that we should discuss in more detail, because I think we're going to see it cropping up more and more over the next few weeks.

Jill ([00:54:51](#)):

I agree.

Barb ([00:54:54](#)):

All right, and we've got one last question. This one came from a lot of different sources, Krista in Chelsea, Michigan at Blue Jinx, Mark in Jerusalem, and Gio in Plymouth, Massachusetts all asked a variation on this question about, "Cy Vance now has not only access to witnesses, but he has documents. He's had much of this for some time, and now he has Donald Trump's tax returns and business records. What can we expect next?" Jill, let me direct that one to you.

Jill ([00:55:23](#)):

I think that people should not be anxious for immediate indictments, that going through millions of pages of financial information is going to take time, because you don't want to bring a case that you don't have a very high probability of winning a conviction. I think that that requires a lot of details be developed. The information may or may not prove, you mentioned earlier, money laundering, bank fraud, insurance fraud, tax evasion. I started my career in organized crime, and the most famous case of tax fraud was Al Capone.

We couldn't get him on murder and other crimes that he was known for, but he was brought down on tax case. There's a very good chance and there's live testimony from at least Michael Cohen, his former lawyer, and possibly there are people from within the Trump organization who are testifying and working with Cy Vance. I think there is a chance that this will lead to some criminal indictment, but I think it may take a little longer than people are thinking. They think, "Well, he got it," and they also think that people will see those tax returns.

No one will see those tax returns unless they are produced as part of evidence in a trial. They were given to the grand jury. That is secret, and no one outside of the prosecution and the grand jury will see them unless they are evidence in a courtroom.

Barb ([00:57:08](#)):

Joyce or Kim, anything to add on the Cy Vance documents?

Joyce ([00:57:12](#)):

I think Jill is exactly right when she says we shouldn't think something will happen quickly. This is a million pages of documents. I think that Cy Vance's team, and you know he's brought on a former Southern District of New York prosecutor with expertise in complex financial cases. He's hired an outside forensic consulting firm, not things that you do if you don't think that you've got a good case on your hands. But at the same token, the government has an obligation to go through all of this material to make sure that there's nothing exculpatory, nothing that's an excuse for this conduct.

They would actually have to turn that over to defendants. Although, often we hear the Vance investigation discussed as though its only target is the former president, there's actually a pretty wide array of potential defendants, the president's children, employees of his business, perhaps people who helped prepare returns or obtain loans. Cy Vance will have to go through this complicated dance prosecutors do of deciding who's going to be a witness and who's going to be a defendant. That's where this case might have the potential to reach the president or the former president or those close to him.

It will be through the narrators who give life to this million pages worth of documents. Jill references Al Capone. I always really liked to have an accountant as my narrator because they could explain what happened, who knew stuff. Who was driving the truck? You have to know what people intended, so you have to know if in fact, values were being adjusted for taxes or to get loans in favorable ways. Who was directing that? A little bit of work ahead of Cy Vance, but I think we'll ultimately see indictments.

Kim ([00:58:55](#)):

I think my sisters are exactly right on that, both in the timing and the scope that this won't just involve the president, that this can involve a lot of people around him. Just a reminder, I think most of our listeners know that this is just one bit of ongoing litigation in both civil and criminal courts that involve the president that could touch the president that we will be watching and we will be updating you all on every week in our podcast.

Barb ([00:59:22](#)):

Joyce, just to be clear, no relation to Cy Vance?

Joyce ([00:59:26](#)):

Despite the internet rumors that were married or twins or whatever people come up with, no, no kin.

Barb ([00:59:32](#)):

No kin. I love it when Joyce talks Southern. I saw somewhere on Twitter when you tweeted something about Cy Vance getting these records that this was a case you'd have your eye on, someone accusing you of bias with your family member. I had to chuckle at that. No relation, folks. Joyce Vance is purely objective.

Joyce ([00:59:52](#)):

No pillow talk.

Barb ([00:59:56](#)):

I think this is a significant development though. As you all know, financial records are the key to any white collar or fraud case. You have to have the numbers before you can put anything together, so really critical thing. We heard Michael Cohen testified before Congress that President Trump had a habit of playing loose with his numbers that when he wanted something like a loan, he padded his revenues to make them look high. When he wanted to avoid tax liability, he made the numbers look low, and so you can't have it both ways.

One thing that I'm sure investigators will be looking at is whether for the same tax year, he's using the same number when he had different purposes. That could be one of those situations where you either committed fraud or tax violations, but you can't have different numbers on the same documents. It'll be really interesting to see how that plays out.

Jill ([01:00:49](#)):

When you talk about the scope of it, one of the real key issues has been whether three quarters of a million dollars paid his consulting fees to daughter Ivanka was a legitimate expense that could lead to something major. Barb, you just mentioned the financial records, which I think people forget. They are focused on tax returns, but really, the tax returns are clean documents. In order to understand them, you need to see the books and records that underlie them, the memos, the emails that were exchanged about how to record certain things. That's what's going to really lead to a prosecution decision, I think.

Barb ([01:01:33](#)):

All right, things for us to keep our eyes on as the week's unfold. That's it for this week. Thank you for listening to #SistersInLaw with Joyce Vance, Jill Wine-Banks, Kimberly Atkins, and me, Barb McQuade. 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 can find the links in the show notes. To keep up with us every week, please subscribe to #SistersInLaw on Apple podcasts, Spotify, or wherever you listen. Please consider giving us a five star review. We love to read your comments. See you next week with another episode, #SistersInLaw.

Jill ([01:02:17](#)):

When I first started trying cases in Michigan and Detroit, one of the agents who worked for me, I was having trouble linking with because I'm not a big drinker, and they'd all go drinking. I would order a Sloe Gin Fizz, and be laughed at.

Joyce ([01:02:32](#)):

I never had that problem with my agents.

Jill ([01:02:36](#)):

But he was a flyer, and so he said, "Why don't go flying?" I actually went up and flew with him, and then when I was general-

Barb ([01:02:43](#)):

Not after the Sloe Gin Fizz.

Jill ([01:02:45](#)):

He wasn't drinking Sloe Gin Fizzes. I did learn to drink beer. That was my way of being one of the guys. I did take a helicopter controls. I had taken a bigger plane, a mohawk, and the pilot had said to me, "Oh, we're at 30,000 feet. There's nothing you can do that I can't fix before it's too late." I felt really confident flying that plane, and when I came back out of the cockpit, I sort of said, "Well, so how was everything, guys?" Nobody had noticed that I had had control. Then I got cocky, and when they asked me if I wanted to take the helicopter, and it was a Black Hawk, which has a glass bottom.

You're really aware of how close you are to the ground. I didn't last more than a few minutes, and I said, "Please, take this back." It was just too scary to see how close to the treetops you were. That was lots of [crosstalk 01:03:39].

Joyce ([01:03:38](#)):

My criminal chief actually got a picture of me in the helicopter with that big helmet on my head. When I left the office, one of the things that they did was they made a photo montage. I didn't even know the photo existed, and that was the first one they showed. Of course, all the young people in the office knew the brand [inaudible 01:03:58]. They were like...

Jill ([01:04:00](#)):

I tried to get a picture of me doing ejector seat training as part of my book, but they wouldn't put that in. I also flew in. I can't think of the name of the plane, but it's an intelligence plane. It goes really low to take quick pictures, and then it does a circle upside down to get out of being that low. When they tell you you don't know you're upside down in a plane, that is bullshit. You know you are upside down. There's no way. I can't remember where I did that, but I also did an overflight near North Korea, because the army was changing what it thought the troop strength was of North Koreans, and Carter wanting to withdraw troops, and so I was sent to see whether they were playing with the intelligence numbers or not.

They took me up to observe this, and that's scary, because if they make wrong move into airspace, you know you'll be shot down. It was fun.

Barb ([01:05:05](#)):

This transcript was exported on Feb 28, 2021 - view latest version [here](#).

Wow.

Joyce ([01:05:06](#)):

Jill has lived a very interesting life.

Kim ([01:05:06](#)):

Yes.

Barb ([01:05:06](#)):

She has an interesting life.

Joyce ([01:05:08](#)):

We need to hear more about this.