VOTING RIGHTS: A Bipartisan Voting Rights Act is Possible

Pursuing Justice at the 50th Anniversary of the March on Washington

Coming out of Hibernation: Criminal Justice Reform

A Novel Legal Strategy to Dismantle Structural Racism in Criminal Justice
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Inside & back cover photos courtesy Peter Stephan

MISSION STATEMENT

The Civil Rights Law section provides an opportunity for attorneys to interact and exchange information regarding the state of civil rights in America and abroad. The section functions as a think tank to advocate individual civil liberties and bring an end to systemic discriminatory practices that plague every facet of human existence. The section maintains a proactive stance towards the promotion and defense of civil liberties through litigation, agitation, education and legislation.

HISTORY

The National Bar Association was founded, in large part, as a civil rights organization. As its membership increased and its interests broadened the NBA saw a need for a section that would focus on civil rights issues exclusively. Accordingly, the Civil Rights Law section became one of the first sections formed by the NBA.

Under the leadership of Ernestine S. Sapp (1984-1988), the Civil Rights Law section became the first section of the NBA to recruit over 50 dues paying members and the first section to publish a monthly digest, "The Civil Rights Digest."

The late eighties was a developmental period for the section in which it sponsored a myriad of well attended events and seminars, addressing; voter litigation funds, fair housing, anti-discriminatory court practices and the like.

Today, the Civil Rights Law section has become an educational and advocacy tool that keeps NBA members, the public and lawmakers alike informed of the constitutional rights as well as operating as a watchdog for legislation that may threaten civil rights and liberties. Section members demonstrate for social causes, draft proposed legislation and host educational seminars for the public and practicing attorneys.
Letter From the Chair | Tanya Clay House

First, I would like to thank all of the members of the NBA Civil Rights Section for their hard work this year. I am consistently impressed by and grateful for the diverse perspectives and expertise our members bring to the work we do. This year has been a big year for the civil rights community and the NBA has been at the forefront.

This past summer, we celebrated the 50th Anniversary of the March on Washington for Jobs & Freedom, a march that was first conceived by A. Philip Randolph in the 1940s and which began an era of focused attention on addressing discrimination in our country. A focus we need to renew today. The March on Washington gave renewed momentum to efforts to pass civil rights legislation that would outlaw barriers to African Americans' right to vote. Next year, we will celebrate the 50th Anniversary of the Voting Rights Act, the law that transformed our democracy.

Of course, all of these Anniversaries are significant in their own right, but I want to highlight the Voting Rights Act because it undergirds all of our ability to chart our own path in this country. In the wake of the Shelby v. Holder decision, Members of both the House and Senate introduced the Voting Rights Amendment Act (H.R. 3899 and S. 1945) in order to repair what the Supreme Court broke. This legislation is a rare thing in this Congress -- it is bipartisan, just as every piece of legislation regarding the Voting Rights Act has always been. It was introduced by Congressmen Sensenbrenner, Conyers, Chabot and Scott in the House and Senator Leahy in the Senate. In this newsletter, there is more information about the VRAA, but I want two emphasize that we have a small window of opportunity to pass this bill so that the rights of minority voters will be protected. This is an issue of extreme urgency since we do not have a working Section 5 at this point. Furthermore, since we now have to be the eyes and ears of our community to ensure that discriminatory voting changes do not occur, it is essential that we mobilize to ensure that our community is trained on how to identify voting rights violations. This also means that the NBA needs to work to ensure that the African American community is just as engaged in this election as it was in the 2008 Presidential Election in order to protect the civil rights we all care about so deeply.

The Civil Rights Law section has been diligently working to host seminars throughout the year, including “Eliminating Implicit Bias in the Legal System,” during the Gertrude Rush Conference and upcoming seminars on the Supreme Court and hopefully education during the Annual Convention.

Additionally, we are excited to be working with the Young Lawyers Division to organize a Civil Rights Town Hall during the NBA’s National Convention in Atlanta, Georgia on criminal justice, education and voting rights issues. It is our goal through the town hall to empower the community to protect and participate in our democracy and engage NBA members to advocate for the issues we care about so deeply.

I hope that you enjoy this Newsletter and subsequent updates from the Section. This newsletter focuses on a variety of issues, including the school to prison pipeline, racial disparities in criminal justice, voting rights and judicial and executive nominations. The Civil Rights Law section will continue to work across the sections and divisions to educate, support and prioritize civil rights issues throughout this 2013-2014 Bar year. Thank you.
Judiciary Corner: The Confirmation Process

By Kimberly Tignor
Public Policy Counsel,
Lawyers’ Committee for Civil Rights
Under Law

Despite the Senate’s decision to utilize the “nuclear option” and no longer require a super majority to end debate on judicial and executive nominees, nominees continue to endure record wait times to receive their floor vote. Executive-branch nominees have experienced an average waiting time (from nomination to confirmation) of 210 days while judicial nominees have experienced an average waiting time of 222 days.

One clear indicator of the Senate’s procedural breakdown is the record number of cloture petitions filed in this Congress. This past week, Senator Harry Reid filed his 116th cloture petition—put this in perspective the highest number of cloture petitions ever filed in one Congress is 139. The 113th Congress is well on its way to passing this record and there still remains nine months before it expires.

Earlier this month, the confirmation vote of executive nominee and NBA endorsee Debo Adegbile, the White House’s pick to head the Civil Rights Division of the Department of Justice, was further delayed by a failed cloture petition. One of the nation’s leading voting rights advocates, Adegbile was nominated in November of 2013—four months later he has yet to receive his floor vote despite the tremendous support his nomination received from Civil Rights groups across the country. Even more alarming is the very important role the Civil Rights Division plays in protecting voting rights—his leadership would be invaluable during both the 2014 and 2016 Elections.

By far the most numerous of all the positions a president gets to appoint are nominees to the federal judiciary. President Obama’s judicial nominees have endured wait times far longer than the last two administrations. Some nominees have waited over two years for a confirmation vote and continue to wait. Currently, there are 83 federal vacancies and 49 pending nominees. Even more alarming, 34 jurisdictions have been declared judicial emergencies, which means that each judge within that jurisdiction is facing a caseload of 600 cases or more. This translates to more than one-third of Americans, approximately 132 million people, are living in a jurisdiction where there aren't enough judges to hear cases. These courts enter decisions on issues ranging from voting rights to employment discrimination—issues that impact the day-to-day lives of all Americans.

The holds on President Obama’s nominees not only threaten the legacy of a more diverse and fair federal court, but also, prevents critical executive branch departments from serving and protecting the needs of the American people. This Administration has demonstrated its commitment to nominating qualified and diverse candidates; however, we will not benefit from this commitment if these nominees do not receive their up-or-down vote.
Pursuing Justice

Janaye Ingram, Acting National Executive Director at National Action Network.

National Action Network has positioned itself among the top civil rights organizations in the country and they did it by simply pursuing the old fashioned principles of justice and equality for all.

A little over six months ago, National Action Network took center stage, as a nation remembered the day that would serve to change the course of history. That day was August 28, 1963, and 50 years later, there would be a new call to action. At the center of the organizing was the baby of the civil rights family – National Action Network and in the center of it all, I found myself planning and organizing not only the largest march I had ever planned, but probably the most important march in years. In many ways, I see myself as NAN, a baby among so many others who were wiser and more experienced, yet, the march was a success and people generally walked away feeling as if they had been part of history again.

It was that moment that catapulted both NAN and me to the ranks of equal – NAN to being called one of the new Big Six by the President, and me being named Acting National Executive Director. Since then, NAN has continued its work of pursuing justice. Founded in 1991, the organization was started by a group of New York activists who wanted to create change in their communities. Chief among them was a minister who had been raised in the movement, Rev. Al Sharpton. Through the years, his style – a mix of northern bravado combined with the principles used by Dr. Martin Luther King, Jr., Rev. Joseph Lowery and Rev. Jesse Jackson – made him at one time one of the most reviled and now one of the most revered civil rights leaders in the nation.

But what started out as street protests and mass arrests has now transformed into something greater. Our internal motto is, “Demonstration into legislation.” It centers on the belief that we can not just be rebel rousers for the sake of issuing a complaint – we must be purposeful and intentional about our work and our intended outcome. We must play a game of chess, not checkers and we must make an impact on the communities we serve.

With nearly 80 chapters throughout the country and growing, we are continuing to build on the momentum found after the march. We have continued to rally and demonstrate against policies like Stop and Frisk and laws like Stand Your Ground. But we have also done things that don’t garner a lot of press or attention. We have partnered with our sister organization, Education for a Better America (EBA) to focus on college access and success. We have used our chapter network to engage the community on ACA enrollment and we have partnered with other organizations like the Lawyers Committee for Civil Rights Under Law and the Leadership Conference for Civil and Human Rights to build support for a new voting rights bill.

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While we are only a 23 year old organization, we have achieved a lot. However, there is still much work to do and we plan to continue to lift the bar for ourselves, while leveling the standards of justice and liberty for our communities. Each year, we convene to create our action agenda and we focus on the myriad issues where inequalities still exist. This year, we will be in New York from April 9th – 12th talking about the aforementioned challenges and many more. We make it a free convention so that those who need the information most can have access to it. We hope you will visit our website and join us to see just how we are pursuing justice.

Janaye oversees NAN’s action agenda and legislative advocacy work under Founder and President, Rev. Al Sharpton. Prior to joining NAN, she held various positions with nonprofits in New York and New Jersey focused on fundraising and development, marketing, communications and government relations for several nonprofits.

She holds a Bachelor of Arts in Psychology from Clark Atlanta University and a Master of Science in Nonprofit Management from The New School University.
Conventional wisdom among some liberals, conservatives, and moderates is that a "polarized Congress" will never update the Voting Rights Act. The Voting Rights Act bill introduced today in Congress, however, shows that a bipartisan update is possible.

Last June, the U.S. Supreme Court scaled back part of the Voting Rights Act. The Act required that all or parts of 15 states (many in the South) preclear their changes to election rules with federal officials. The Court ruled that the formula that determined which states had to preclear their changes was unconstitutional because it was based on election data from the 1960s and '70s, and the decision effectively released those 15 states from preclearance.

The new bill responds to the Court's decision by tying preclearance to recent discrimination. For example, the bill would require that a state with five or more Voting Rights Act violations in the last 15 years to preclear new election law changes.

While the new bill would require that fewer states preclear changes, the new bill expands nationwide some of the functions served by preclearance.

For example, before the Court's decision, preclearance deterred discrimination in covered states because bad actors knew their voting changes would be reviewed. The new bill attempts to deter bad activity by requiring that states and localities nationwide provide public notice of particular election changes (I discussed this in my Harvard Law Review Forum essay, "Voting Rights Disclosure"). Also, the new bill allows a judge to require that a state violating the Voting Rights Act preclear new election law changes moving forward.

Before the Court's decision, preclearance allowed federal officials to block unfair rules before they were used in actual elections and harmed voters. The new bill attempts to prevent harm to voters nationwide by making it easier for voting rights lawyers to go into court and obtain a preliminary injunction blocking an unfair election rule before it is used in an election.

Despite the naysayers, a bipartisan Voting Rights Act update is possible. Some dismiss Congress as too polarized to pass a Voting Rights Act. All past renewals of the Voting Rights Act were signed into law by a Republican president, however, including the 2006 renewal. Others believe that instead of preventing discrimination, an updated Voting Rights Act should explicitly prohibit restrictive state photo ID requirements and other rules that many Republicans favor. This move, however, would only fuel partisan divisions.

No doubt, anti-civil rights ideologues will try to fuel polarization and undermine the Voting Rights Act by framing it as a partisan Democratic effort (which it is not). Despite the fact that Republican opposition to the bill would stimulate minority voter turnout and backlash in the 2014 midterm elections, a few conservative extremists may try to scare Republicans away from supporting the bill by threatening them with labels (e.g., "RINO"). Some liberals may use similar rhetoric from the other side (e.g., "sellout") because the new preclearance coverage formula does not include states like Alabama and treats ID differently than other election changes in certain limited circumstances. These concessions, however, may be necessary to satisfy the states' rights concerns of the Roberts Supreme Court and the political concerns of Republican members of Congress.

I recognize that today was just the first step, and that passage is not guaranteed. I also recognize that the bill is far from perfect. The bill, however, is an important first step, and it includes measures that are real building blocks for an approach that protects voters. Further, introduction of the bill rebuts the rhetoric of pundits who claimed, without any evidence, that the update was "stalled." It is far from naive or foolhardy to recognize that this Congress could update the Voting Rights Act.


All past renewals of the Voting Rights Act were signed into law by a Republican president, including the 2006 renewal.
Criminal Justice Corner: A Novel Legal Strategy: Use Public Documentation Forum to Dismantle Structural Racism in Criminal Justice

By Cynthia Robbins!

On November 6, 2013, Congressman Elijah Cummings (Maryland) convened a Public Documentation Forum: Beyond Jail: Toward Justice and Opportunity in Baltimore (Beyond Jail or The Forum). Congressman Robert “Bobby” Scott (VA) and Dr. Iva Carruthers of the Samuel DeWitt Proctor Conference (Chicago) co-convened the Forum. More than 350 people witnessed brief presentations by some 15 experts – researchers, scientists, advocates, clergy, state government leaders, affected young people and their families.

The nearly three-hour Public Forum presented data, testimony, and reports in support of Maryland (the State) officials choosing to drop current plans to construct or renovate additional jail cells in Baltimore City for young people who are charged as adults, which I’ll call the “Jail Choice”. The experts documented that Maryland could instead redirect the $104 million previously appropriated to construct said jail toward a “Smart Choice” to fund alternatives to incarceration and opportunities in the very neighborhoods that are home to more than 70% of the young people arrested in Baltimore annually.

In about a month, the US Department of Justice (DOJ) will return to ascertain how Maryland has decided to implement its 2007 agreement to remedy the deplorable conditions for teenagers charged as adults and held in the Baltimore City Detention Center (BCDC). Maryland has reduced from nearly 100 to fewer than 15, the number of teenagers charged as adults at BCDC. There are more than enough vacant cells in the existing juvenile jail, Baltimore City Juvenile Justice Center, (BCJCC) and some of these teens with adult charges are already being held there. The Beyond Jail Campaign notes that if Maryland pursues the trend of holding only those who are a danger to the community or themselves in the existing, habitable, juvenile jail cells, it can even further reduce the number of incarcerated children. Studies commissioned by the State recommend reduced incarceration.

Maryland can choose to redirect the monies it has already approved and appropriated at different times for rebuilding this unnecessary jail to instead fund alternatives to incarceration and to improve the blighted, primarily African American Baltimore neighborhoods that so typically serve as the recruitment ground for the jail. Toward that end, the Forum also offered a unique financing tool called the Maryland Opportunity Compact, which has already redirected more than $22 million of state funds and leverage about $34 million overall.2

The Beyond Jail Public Documentation Forum was held as a social action, organizing event which can be part of a legal strategy tool to assist communities in meeting the requirement for injured parties to prove discriminatory intent as set forth in Washington v. Davis, 426 U.S. 229 (1976). The burden to prove intent has become a virtually insurmountable barrier to judicial relief for challenges stemming from the systematic injurious and discriminatory practices and policies of governmental agencies—even despite indisputably disproportionate and discriminatory effect. This strategy relies on City of Canton v. Harris, 489 U.S. 378

1. Cynthia Robbins, Esq. Independent Consultant to the Safe and Sound Campaign, Nonprofit Organizational Development, Philanthropy and Education; Co-Founder, TRUSAs Racial Justice Initiative, www.RacialJusticeInitiative.org; Former Executive Director, See Forever/Maya Angelou School; Former Staff Attorney and then Board Chair, District of Columbia Public Defender Service; Former Senior Program Officer, Eugene and Agnes E. Meyer Foundation, Founding Director, Public Counsel’s Urban Recovery Legal Assistance; Co-Founder East Palo Alto Community Law Project; Stanford Law School, JD; Harvard University, AB cum laude. CRobDC@gmail.com

2. The centerpiece of the Opportunity Compact is a negotiated signed agreement with state agency and a third party that commits the state to use a portion of the savings leveraged by an alternative program, to sustain and grow the alternative. A one-time private seed investment is made to provide an alternative program to people who would otherwise be taken into state custody (prison; juvenile confinement) with the aim of producing a better outcome for less cost. Currently, three Opportunity Compacts are operating in Maryland, each producing significant savings to sustain the alternative programs while posting results far better than those achieved by the traditional State custodial institutions. See www.SafeandSound.org.

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The United States has the highest incarceration rate in the world. With only 5 percent of the world’s population, the U.S. holds 25% of the world’s prisoners. The rise in incarceration is a recent trend: the U.S. prison population rose by almost 800% since 1970. A total of 6.98 million people were under the supervision of the adult correctional systems – which includes those on probation and parole – at yearend 2011, equating to 1 in every 34, or 2.9% of adult residents in the U.S.

Table 1: Changes in Correctional Populations 1980-2011

The most distinguishing characteristic of mass incarceration in America is its prolific and persistent racial disparities. Statistics consistently show that blacks and Hispanics are imprisoned at a disproportionately higher rate than whites in both the federal and state systems, in all age groups, and for both male and female inmates. Blacks and Hispanics are disproportionately represented in the prison population at all ages. An astounding 8% of black men of working age are now behind bars, and 21% of those between the ages of 25 and 44 have served a sentence in prison or jail at some point in their lives. If trends continue, one in three black men, and one in six Latino men, can expect to serve time in prison.

One would expect the prison population to track crime rates. In fact, the rise in prison population over the last 40 years has been accompanied with a drastic reduction in violent crime nationwide. The major reason for the increase in prison populations, at least since 1990, has been longer lengths of imprisonment. The adoption of truth in sentencing provisions, combined with mandatory minimum sentencing, reductions in the amount of good time a prisoner can receive while imprisoned, and more conservative parole boards, have significantly impacted the length of stay in prison. Other big contributors include heightened federal enforcement activity between 1998 and 2010, especially in the areas of immigration and weapon offenses, and higher conviction rates in federal cases, especially in drug cases. There is a loose consensus that the U.S. government’s “war on drugs” was the primary driver of these collective causes.

Federal prison inmates accounted for 14% of the nation’s 1.6 million prisoners in 2012. Almost 216,000 federal inmates are behind bars, and nearly half (48%) of inmates are serving time for drug offenses. Unlike some state systems, the federal prison population continues to rise.

Two bipartisan bills are now under consideration in Congress that would start to address these systematic problems in the federal system from both the front and the back end of the system. The Smarter Sentencing Act was introduced last year in the Senate by Richard Durbin (D-IL) and Mike Lee (R-UT) and in the House by Representatives Raul Labrador (R-ID1) and Bobby Scott (D-VA3). The bill would reduce mandatory minimums for some nonviolent drug crimes; it would make the Fair Sentencing Act – which reduced the sentencing disparity between crack and powder cocaine which was widely acknowledged as racially discriminatory – retroactively applicable to those sentenced under the former laws; and it would modestly expand the federal “safety valve,” which allows judges to issue a sentence below the statutory mandatory minimum in certain limited circumstances.

The Recidivism Reduction and Public Safety Act was introduced in the Senate by Sheldon Whitehouse (D-RI) and John Cornyn (R-TX). The bill reforms the federal prison system by requiring the Bureau of Prisons to assess the recidivism risk of all inmates and to offer programming that has been shown to reduce the likelihood that inmates will...
ROBBINS
(Continued from page 9)

(1989), which said that intent can be inferred when government policymakers decide among alternatives to follow an injurious course of action, such as discrimination, demonstrating a “deliberate indifference” to rights protected by the United States Constitution and federal laws.

The Public Documentation strategy contends that public officials' failure to use knowledge about demonstrably effective, more expedient and less expensive alternatives that reduce or eliminate an injury such as disproportionate incarceration constitutes “deliberate indifference” and, therefore, gives rise to liability under 42 USC §1983. When official decision-makers have had formal notice of racial disparity other violations of civil rights and federal law, and also of alternatives that are more effective and less costly, we contend that the failure to use these alternatives represents “intentional disregard” of injury to the fundamental Constitutional rights of youth of color in the juvenile delinquency system, which meets the Washington v. Davis intent burden.

Maryland has already seen the positive effects of the Opportunity Compact, which enables official decision makers to redirect funds from ineffective and high cost programs such as the intended jail, prisons and juvenile treatment centers, disproportionately populated by people of color; instead to known alternatives and basic opportunities. Only with a reduction in rate of disproportionate mass incarceration will the public sector have the capacity to improve the lives of those who cycle in and out of the penal system and redirect the public resources to increase basic opportunities to all residents, thereby dismantling structural racism to move Beyond Jail Toward Justice and Opportunity in Baltimore and throughout our nation.

<table>
<thead>
<tr>
<th>Population</th>
<th>1980</th>
<th>2011</th>
<th>% Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Population (millions)</td>
<td>227</td>
<td>311</td>
<td>37%</td>
</tr>
<tr>
<td>Prisons</td>
<td>319,598</td>
<td>1,504,150</td>
<td>371%</td>
</tr>
<tr>
<td>Probation</td>
<td>1,118,097</td>
<td>3,971,319</td>
<td>255%</td>
</tr>
<tr>
<td>Parole</td>
<td>220,438</td>
<td>853,852</td>
<td>287%</td>
</tr>
<tr>
<td>Jails</td>
<td>182,288</td>
<td>735,601</td>
<td>304%</td>
</tr>
<tr>
<td>Total</td>
<td>1,840,421</td>
<td>6,977,700</td>
<td>279%</td>
</tr>
</tbody>
</table>

reoffend when released. In exchange for successfully completing recidivism-reduction programming, certain inmates may receive earned-time credit toward prerelease custody.

After decades of “tough on crime” rhetoric, bipartisan support for reforms like these were unimaginable just a few years ago. The growing budget of the Bureau of Prisons – now almost $7 billion per year, comprising about a quarter of the Department of Justice’s budget – has caught Democrats’ and Republicans’ attention alike and fueled a change of heart.

Attorney General Eric Holder has made criminal justice reform a major priority for his remaining time in office. In August 2013, the Department of Justice announced its “Smart on Crime Initiative,” which aims to make the federal criminal justice system more fair and efficient. Attorney General Holder issued new rules providing for federal prosecutors to reserve mandatory minimum sentences for the most serious drug offenders. He has also publicly addressed the need to reform indigent defense systems and felony disenfranchisement laws around the country. In February, the Deputy Attorney General called on public defenders to work with the private bar to identify and submit for consideration clemency petitions for nonviolent low-level drug offenders. As spring finally hits the District, advocates continue to work to ensure the snowball effect of these initiatives bloom into meaningful reform.

Originally from Duluth, Minnesota, Hallie holds a Bachelor of Arts from Northwestern University and graduated from the University of Michigan Law School in 2013.

1. Human Rights Campaign; last updated July 12, 2011.
2. www.BlackEnterprise.com/BlackLGBT
3. Human Rights Campaign; last updated July 12, 2011.
The Lawyers’ Committee formed in 1963 by President John F. Kennedy to involve the private bar to address racial discrimination. The principal mission of the Lawyers’ Committee is to secure, through the rule of law, equal justice under law.

Lawyers’ Committee for Civil Rights Under Law is a Proud Supporter of the Civil Rights Section of the National Bar Association.

www.lawyerscommittee.org
The National Bar Association, Civil Rights Law Section Congratulates

Spencer Overton

On his recent appointment as

Interim President and CEO

The Joint Center

For Political and Economic Studies
Civil Rights Justice Wants You!

Are you interested in writing a substantive law article on an issue in Civil Rights?

Would you like to submit photos or a Letter to the Editor?

We would like to hear from you! Please contact us at:
c/o Tanya Clay House
Lawyers' Committee for Civil Rights
1401 New York Ave. NW, Suite 400
Washington, DC 20005

Civil Rights Section Calendar

1) Civil Rights Town Hall
Sponsored by the Civil Rights Law Section and the Young Lawyers Division
July 26, 2014—10:00 a.m. - Noon
Marriott Marquis—Atlanta, GA

2) CLE Panel: Supreme Court Review – Civil Rights Cases of the 2013-14 term
July 30th, 2014—2:15 p.m. - 3:45 p.m.
Marriott Marquis—Atlanta, GA.

3) CLE Panel: Education as a Civil Right Breakfast
Sponsored by the American Federation of Teachers
July 31st, 2014—8:30 a.m. - 10:00 a.m.
Marriott Marquis—Atlanta, GA