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CIVIL LIBERTIES IN THE 21ST CENTURY:
The First Amendment Re-Examined

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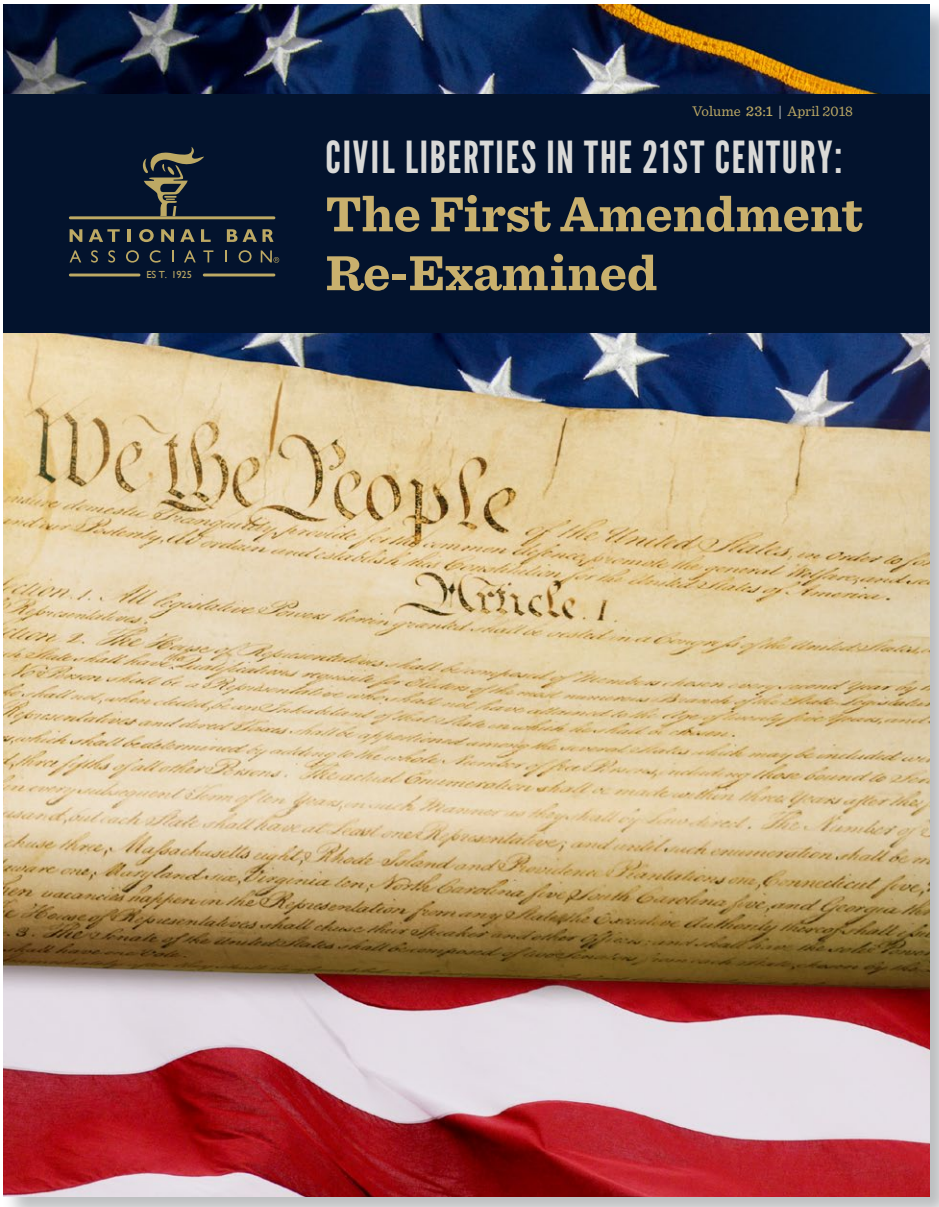

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Protecting Our Progress by Building the Future

BY JUAN R. THOMAS
75TH PRESIDENT, NATIONAL BAR ASSOCIATION

"The arc of the American story is long, it is bumpy and uncertain," Jeh Johnson, former United States Secretary of Homeland Security, General Counsel of the Department of Defense, stated, "but it always bends toward a more perfect Union." Indeed, the road has been bumpier since the 2016 Election.

A cornerstone of American democracy is the keen protection of civil liberties. Since President Trump has taken office, he has shaken the foundation of this American cornerstone. He has created an atmosphere that encourages, on a variety of levels, the violations of civil liberties. Unfortunately, African-Americans and other people of color disproportionally bear the burden of these civil rights assaults. For the benefit of all, our society must be vigilant in protecting those freedoms enshrined in our Constitution. This edition of the *National Bar Association Magazine* provides a contextual analysis of the First Amendment. Under the magazine's theme "The 21st Century: The First Amendment Re-Examined," articles such as "The Attack on Political Speech and Black Activism," "The Consequences of Hate Speech in the Aftermath of Charlottesville," and "Will Trumpism Lead Us to Fascism?" speak to real threats to our nation's democracy.

The work of the NBA is more important now than ever.

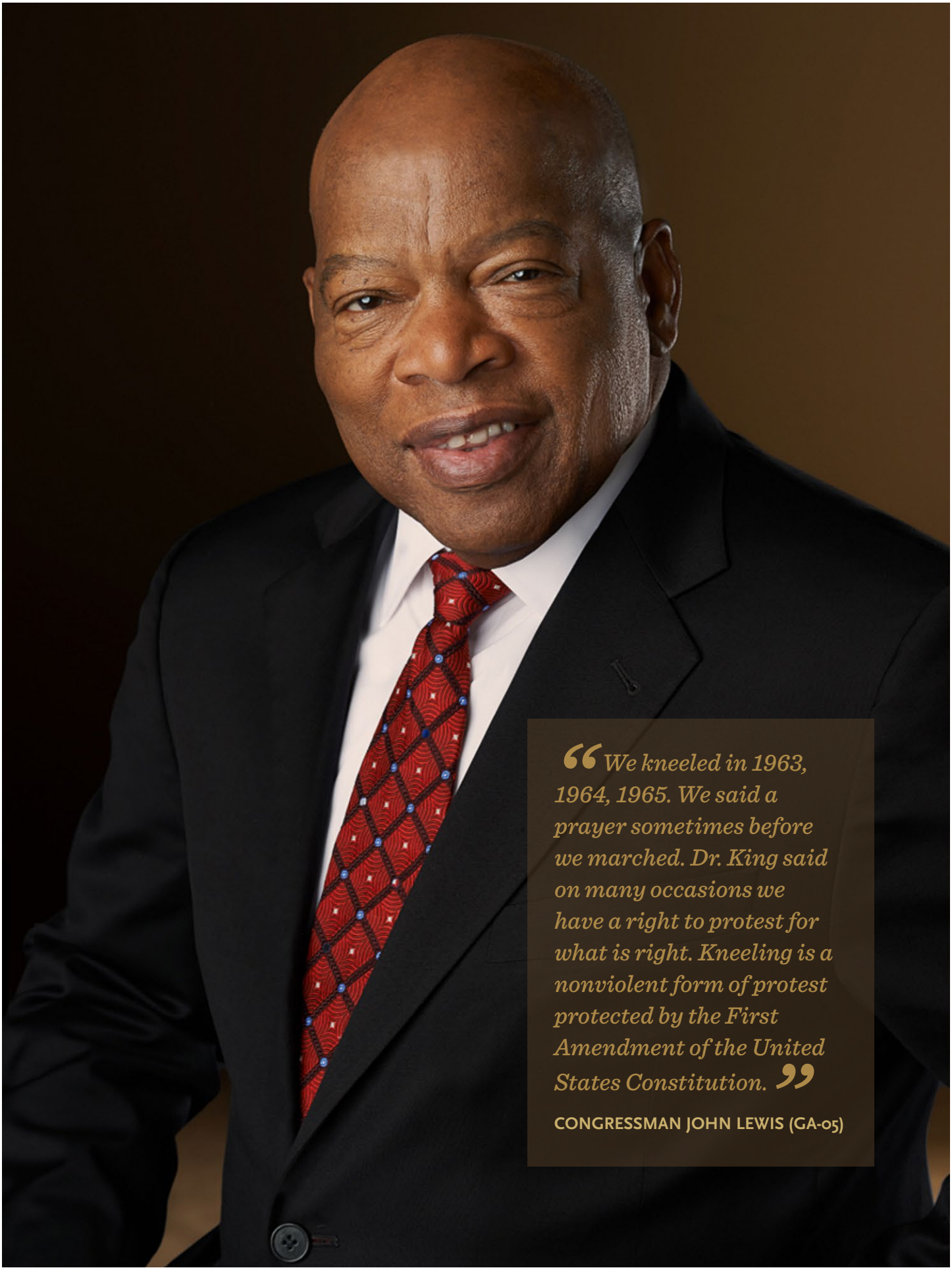
The work of the NBA is more important now than ever.

During times of uncertainty and instability, the NBA must focus on protecting the gains achieved by our trailblazing members such as Charles Hamilton Houston, Thurgood Marshall, Constance Baker Motley, and Johnnie Cochran.

Standing on the shoulders of these giants, it is imperative that we build on their accomplishments and not let their sacrifices be for naught. My Presidential theme for this bar year is "Protecting our Progress by Building the Future." This theme is rooted in three of my five initiatives, described below, that are designed to build on our legacy and allows the NBA to continue its work in advancing the mission of our Association:

1. **Law and Technology Initiative:** Creating opportunities for our Association to utilize the most up-to-date technology internally and for our members to develop partnerships and business relationships with important companies in the tech industry.
2. **Diversity & Inclusion – LGBTQ Initiative:** Developing programmatic initiatives that deepen our engagement with the LGBTQ African-American community.
3. **Leadership Academy:** Focusing on the NBA's internal leadership pipeline, enhancing and expanding our leadership training programs to keep our future leaders abreast of changes in board governance and leadership best practices.

We need you as members, supporters and allies to Protect our Progress. Together, we can continue to Build a Future that values the lives, work and contributions of all Americans. Thank you for allowing me to serve as the 75th President of the National Bar Association. It is truly an honor. I look forward to seeing you at the **93rd Annual Convention in New Orleans!**


"We kneeled in 1963, 1964, 1965. We said a prayer sometimes before we marched. Dr. King said on many occasions we have a right to protest for what is right. Kneeling is a nonviolent form of protest protected by the First Amendment of the United States Constitution."
CONGRESSMAN JOHN LEWIS (GA-05)

Congressman John Lewis:
Lessons of the First Amendment

BY LAVERNE LEWIS GASKINS

This country was founded upon the idea of freedom born out of protest, and its people have consistently employed freedoms protected by the First Amendment as a vehicle for change. Woven into the fabric of America is a rich history of protest. The Boston Tea Party. The Abolitionist Movement. The Triangle Shirtwaist Fire Protest. The Women's Suffrage Movement. The Montgomery Bus Boycott. The Anti-War Movement. Selma. The March On Washington. Our history belies the notion that 21st century protests are novel constructs that are an anathema to democracy. Our nation, driven by that inescapable spirit of progress, rests proudly upon a solid foundation of freedom of expression.

For some, the basic parameters of the protections afforded by the First Amendment are questionable. For many, the fundamental right to free expression, to protest, under the First Amendment, is pure. Those who question this right, should consider the journey of Congressman John Lewis, Representative of Georgia's 5th District, civil rights icon, and American hero.

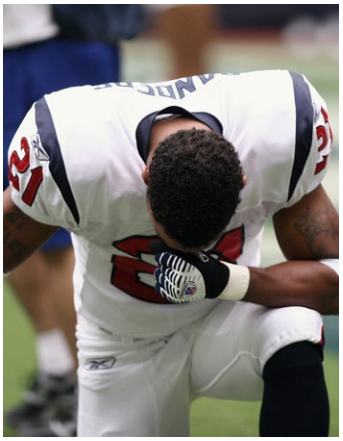
A recitation of Congressman Lewis' many contributions to civil rights in this brief article would be a disservice. However, it is important to note one event in Lewis' life that supports why our society must protect freedom of speech. According to his official biography, Congressman Lewis, while a college student, was involved in the Civil Rights Movement, and from 1963 to 1966 served as "Chairman of the Student Nonviolent Coordinating Committee ("SNCC"). "In 1964, Lewis, along with others, organized a march to bring attention to the issue of voting rights. What was supposed to be a peaceful march in Selma, Alabama, on March 7, 1965, deteriorated when "state troopers attacked the marchers in a brutal confrontation that became known as 'Bloody Sunday'. This seminal event contributed to the passing of the Voting Rights Act of 1965."[1]

When I contacted Congressman Lewis' office and shared the theme of this publication, I requested a statement. I was graciously provided an eloquent comment that is historic, relevant, timely, and serves as a lesson for all.

"We kneeled in 1963, 1964, 1965. We said a prayer sometimes before we marched. Dr. King said on many occasions we have a right to protest for what is right. Kneeling is a nonviolent form of protest protected by the First Amendment of the United States Constitution."

[1] https://johnlewis.house.gov/john-lewis/biography

Laverne Lewis Gaskins earned her J.D. from Florida State University College of Law. She is Editor-In-Chief of the *National Bar Association Magazine.* Her articles have appeared in a variety of state, national, and international publications. A Fulbright grant recipient in law, Gaskins has lectured in Hungary and Canada. In 2014, she presented a paper at the "Education and the Constitution at 20" conference in South Africa. In 2015, Gaskins attended the United Nations Economic and Social Council in Vienna, Austria as a representative of the American Bar Association. She is active with the State Bar of Georgia and practices law in Augusta, Georgia where she serves as the regional Augusta Vice President of the Georgia Association of Black Women Attorneys ('GABWA").



The Attack on Political Speech and Black Activism: What the NFL Protests Are Teaching Us About Civil Liberties and Civil Rights

BY KIMBERLEE GEE

Unless you have been living in a bubble, you are likely aware of the National Football League ("NFL") protests that have been taking place across the country. While these NFL protests commenced during the 2016 football season, they began to grow even more in scale and gained even more attention after President Donald Trump's comments at an Alabama rally referring to the players who kneel during the anthem as a sign of protest as "sons of bitches." During that same speech, President Trump demanded that the NFL team owners fire those players for their refusal to stand in front of the flag.

Although the President's comments were alarming to many of his constituents, certain individuals seem to vigorously support his position. According to the CATO Institute's 2017 "Free Speech and Tolerance Survey," 65% of Republicans say the NFL should fire players if they refuse to stand for the anthem. (Sixty one percent (61%) of Americans overall do not agree that NFL players should be fired if they refuse to stand for the anthem).[1]

Protests are as old as the country itself. However, the discussion concerning political speech, social justice and its intersection with workplace rights is currently taking on a heightened importance.

Given the political tenor in the country and the President's penchant for injecting himself into political controversies, it is unsurprising that political speech and debates about political issues are spilling over into workplace conversations more than ever before. According to the Society for Human Resources Management, 26% of responding human resources professionals reported an increase in the amount of employee political concern and expression during the 2016 election season.[2]

The First Amendment and the Civil Rights Movement: A Long, Storied Relationship

Using political speech as a form of activism to implement progressive policy change at the highest level of government is not a novel approach in the black community, however. The Civil Rights Movements of the 1950s and 1960s illuminates this point directly. The Civil Rights Movement started as a social movement by individuals who used their First Amendment right to protest as a means to petition their government to change its racist, unjust policies. By protesting, African-Americans were able to draw national attention to inequity which eventually manifested in the passage of legislation such as the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Civil Rights Act of 1968.

The African-American community has not only used political speech under the safeguard of the First Amendment to further social causes, but these social causes also shaped important First Amendment judicial precedent. The Supreme Court issued several rulings in the 1960s protecting civil rights advocates from criminal charges for engaging in First Amendment-protected activity. *Garner v. Louisiana,* 368 U.S. 157, (1961), for instance, was a pivotal civil rights case argued by Thurgood Marshall. In this case, Marshall challenged the convictions of five black students who engaged in sit-ins at all-white cafes in Baton Rouge, Louisiana. The Court overturned their convictions, with Judge Harlan finding in a concurring opinion that "sit-ins" as a form of protest was "as much a part of the free trade in ideas as is verbal expression, more commonly thought of as 'speech'" and is thus protected by the First Amendment.[3]

Political Speech in the Workplace: Is It Protected Under the First Amendment?

Some supporters and even some legal pundits have attempted to support the current-day NFL protests by asserting a similar First Amendment defense to kneeling before the flag. Their position begs two questions: 1) Is kneeling during the anthem for a social cause manifestly "political speech" and 2) if kneeling during the anthem is considered political speech, is it protected by the First Amendment.

To answer the first question, kneeling during the anthem can be viewed as a form of political speech. Although most of us interpret "speech" as a verbal expression, nonverbal communications that attempt to convey a particular message, also known as "symbolic speech," are protected by the First Amendment as well. The Courts have long held that symbolic speech (e.g., sit-ins, flag waving, demonstrations, and wearing protest buttons) is expressive conduct that is protected by the U.S. Constitution.[4]

Whether or not this form of political speech is protected by the First Amendment- and in the workplace specifically is a bit more complicated. Although many think that freedom of speech is an unfettered right, it is by no means absolute.

The constitutional right to free speech under the First Amendment refers to the government's inability to restrict an individual's free speech as a private citizen.[5] This constraint does not extend to private sector employers, including the NFL.

The extent to which an employee can engage in specific political speech or engage in specific conduct is ultimately determined by Federal statute and the local laws in the jurisdiction where the employee works. Some state constitutions do offer more First Amendment protection than the U.S. Constitution. Some jurisdictions also have local laws that specifically protect political speech or political affiliation.

Regarding political speech at work, the National Labor Relations Board has long interpreted Section 7 of the National Labor Relations Act to prohibit employers from interfering with employees who engage in political activity as long as it relates to the employee's working conditions.[6]

The NFL protests that are currently taking place, however, are unrelated to the player's working conditions. The players have been uniform in their message about what these protests represent: taking a knee during the anthem is a protest against police brutality in the black community and racial injustice. As such, this form of political speech is not connected to the player's working conditions and thus would not garner the protection of Section 7 of the NLRA.

In those instances where there is no local, state or federal law protecting the employee's right to free speech, the employer typically has wide latitude to ban political speech unrelated to working conditions by putting restrictions into the employment agreement or the employer's policies or code of conduct. In the case of NFL players, there is no rule, per se, that requires NFL players to stand for the national anthem. [7] The NFL Rule Book does, however, bar players from "...conveying personal messages either in writing or illustration, ... which relate to political activities or causes, other non-football events, causes or campaigns, or charitable causes or campaigns."[8]

What the NFL Protests Represent Vis-à-vis Black Activism and Political Speech

Although the First Amendment protections that apply to most political speech do not cover NFL protests, the backlash to these protests seems to represent a broader assault on political speech and neo-political activism emanating from the black community, particularly in the last few years.

Most people who oppose the NFL protests do not seem to have some particular allegiance to the First Amendment. In fact, many opponents have attempted to recast the take a knee protests as being wholly unrelated to "symbolic speech" about a social justice issue, but rather an irreverent and unpatriotic attack on the American flag itself. A reasonable person might suspect that the aversion to the NFL protests is ideologically motivated; the unwillingness to support the NFL protests is an unwillingness to support the "message" the NFL players are endorsing.

This antagonistic view of NFL players as malcontents and the NFL protests as illegitimate is a sentiment that is being expressed against many black activists all over the nation. This sentiment also seems to be having substantial implications in the suppression of political speech in the black community. This hyper-focus on black activism- and political speech that attempts to bring light to injustices facing the black community specifically-is not just misanthropic rhetoric, but is, in fact, well-documented.

In August 2017, the FBI's counterterrorism division issued a report that declared, since Michael Brown's killing in Ferguson, Missouri in August 2014, "black identity extremists" (referred to as "B.I.E") have emerged and pose a growing threat against law enforcement.[9] According to the report B.I.E.'s "perceptions of police brutality" are spurring an increase in "premeditated, retaliatory, lethal violence against law enforcement."[9] First, the term "black identity extremist" appears to be a newly-created designation that has no clear meaning. It is also a term that falsely presumes black people with "extreme" black identity politics are motivated to attack the police. This new designation created by the FBI is dangerous not only because it could have the effect of chilling lawful political speech, but also because it could result in the criminalization of a wide variety of nonviolent activists who happen to be black or at least are protesting issues affecting the black community.

Just in the last year, the ACLU has shown support or represented Black Lives Matters activists in First Amendment matters or against matters of police agency surveillance at least five times between January and August.[10]

Not only have figureheads most closely associated with the Black Lives Matter movement been targeted for their activism and their political speech, but the Black Lives Matter movement itself, as well as the "#BlackLivesMatter" hashtag (a marker used on Twitter to flag posts about a similar topic), have also been sued in Federal District Court.[11] The complaint was filed by an anonymous police officer in Baton Rouge, Louisiana, and alleges, bizarrely, that both the movement and the hashtag were responsible for injuries he sustained while responding to protests in July 2016. The Judge dismissed the lawsuit with a scathing ruling asserting that neither the Black Lives Matter movement nor the Black Lives Matter hashtag could be sued:

> ***" 'Black Lives Matter,' as a social movement, cannot be sued..."***
>
> ***"For reasons that should be obvious, a hashtag — which is an expression that categorizes or classifies a person's thought — is not a "juridical person" and therefore lacks the capacity to be sued..."***
>
> ***"Plaintiff's attempt to bring suit against a social movement and a hashtag evinces either a gross lack of understanding of the concept of capacity or bad faith."*** [11]

In addition to attempts to suppress political speech through targeting movements and activists associated with those movements, legislation has been introduced that monetarily penalizes activists for their involvement in protests and demonstrations. Senate Bill 754- also known as the "Commonwealth Response Cost Reimbursement Act" -was introduced just four days after the demonstrations in Charlottesville, Virginia (but seems to be spurred by the protests of the Dakota Access Pipeline). The bill would hold protesters liable for public safety costs associated with demonstrations.[12] What is most appalling is that the bill applies the liability selectively, only recovering costs from individuals engaged in a specific kind of activity.[12] Even the President has threatened to remove a not-for-profit tax break from the NFL if it continues to allow its players to kneel during the anthem.[13] It is worth noting that President's Trump threat will not likely come to fruition since the NFL has not received the tax break the President threatens to remove since 2015. However, the NFL does receive tax exemptions on municipal bonds used to build stadiums.[13]

What to Expect Moving Forward?

Political speech is a powerful instrument because it fosters political change and holds our elected officials accountable for the ways that our laws and policies tend to fail those most marginalized. If the past is any indication of the future, there may be a further effort to marshal resources to quash political speech and black activism. There may even be a further uptick in legal complaints against black activists for protesting injustices that face the black community.

The implications of suppressing political speech for causes that some find disagreeable or unsympathetic, is, in and of itself, a form of inequality. It is important that we work to resolve the underlying problem that these protests, and political speeches are meant to address rather than working to smear activists or silence political expression altogether. Even if the NFL protests are not covered under the First Amendment, they are an illumination of how vigilant we need to continue to be in the days ahead in ensuring that our rights to political advocacy and political speech are not censored or stifled in any way.

ENDNOTES

1 The State of Free Speech and Tolerance in America Attitudes about Free Speech, Campus Speech, Religious Liberty and Tolerance of Political Expression (October 31, 2017), Cato Institute Retrieved from https://www.cato.org/survey-reports/state-free-speech-tolerance-america#60

2 Election 2016 in the Workplace: HR Reports Some Political Volatility at Work, SHRM Survey Shows (June 19, 2016), Society for Human Resource Management Retrieved from https://www.shrm.org/about-shrm/press-room/press-releases/ pages/political-activities-at-work-survey.aspx

3 *Garner v. State of La.*, 368 U.S. 157, 201, 82 S. Ct. 248, 271, 7 L. Ed. 2d 207 (1961)

4 *Tinker v. Des Moines, Independent Community School District*, 393 U.S. 503 (1969) (In this seminal case, several students were suspended for wearing black armbands to protest the Vietnam War; the Court ruled that this was considered "symbolic speech" and is protected by the First Amendment.)

5 U.S. Const. am. 1., "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances."

6 29 U.S.C. § 157; See also 5 Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 564–65 (1978)

7 Kansas City Star, *There Is a False Rumor About the National Anthem in the NFL Rulebook,* (Sept. 25, 2017). (The NFL Game Operations Manual merely states that "...all players must be on the sideline for the National Anthem and...*should* stand at attention, face the flag, hold helmets in their left hand, and refrain from talking." (emphasis added))

8 National Football League Rule Book, Rule 5, Section 4, Article 8 (2017); *see also* https://operations.nfl.com/the-rules/2017-nfl-rulebook/

9 The FBI's new U.S. Terrorist Threat: Black Identity Extremist (October 6, 2017), Foreign Policy Retrieved from http://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/ ; *see also* https://www.documentcloud.org/documents/4067711-BIE-Redacted.html

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11 *Doe v. McKesson,* Civil Action No. 16-00742-BAJ-RLB

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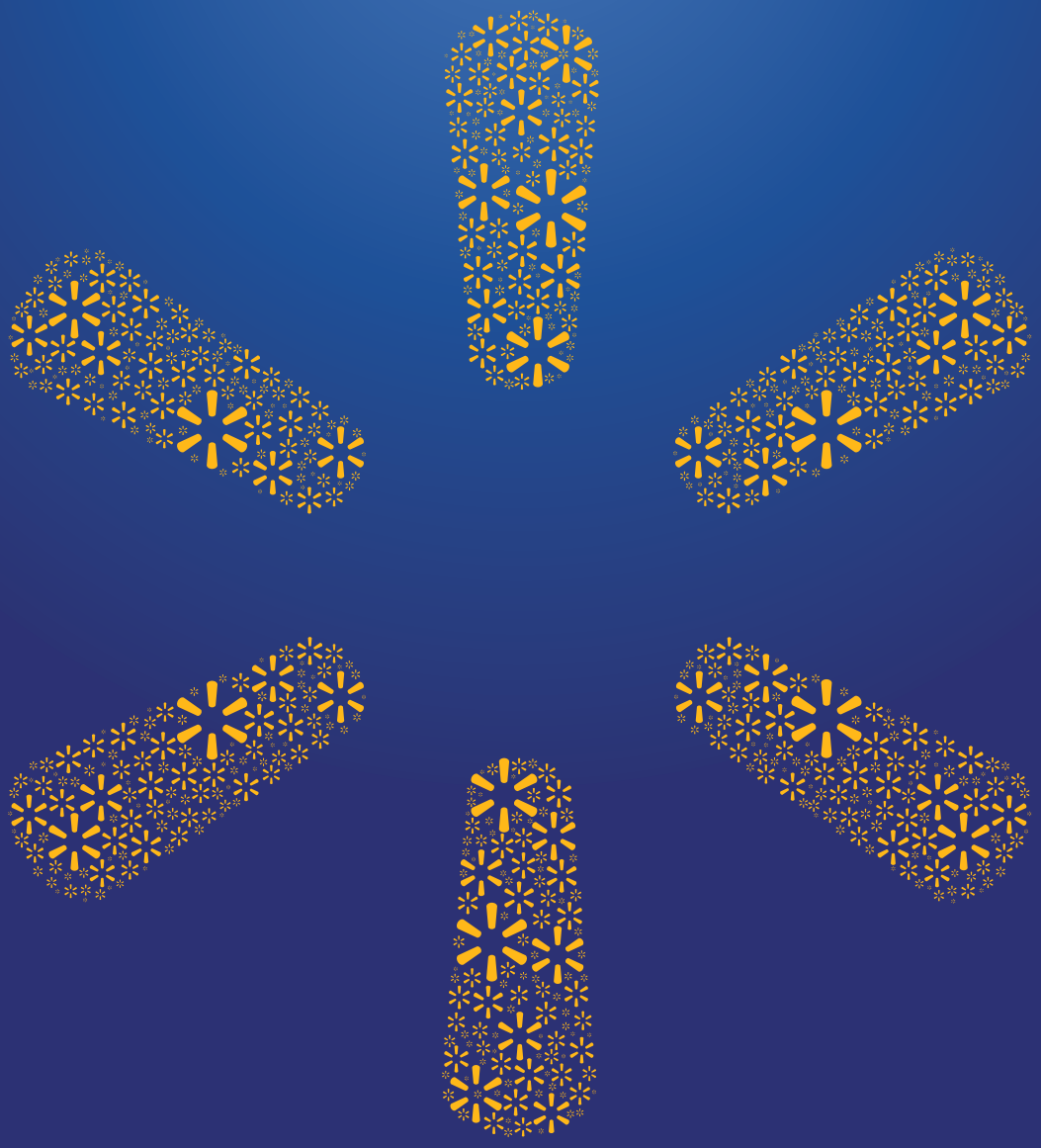
Kimberlee Gee is the founder of Kimberlee Gee Legal, a legal outsourcing and consulting firm based in the Washington, D.C. Metro area, and has been working in the field of labor and employment law for fourteen years. Kimberlee Gee Legal is a motions practice that provides legal research and drafting services to small firms and busy solo practitioners in the field of labor and employment law. She also provides employment counseling on a variety of emerging labor and employment law and human resource matters, risk management and compliance services to budget-conscious small business owners looking to manage their workforce and avoid costly litigation.



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The First Amendment: Speeches, Sit Ins and Sitting Down

BY LOUIS. J. BOSTON JR,
Chair, Veterans Affairs and Military Law Section, National Bar Association

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

On January 21, 2017, Women's Marches were hosted across the globe as people joined to protest issues they believed needed a voice. On that same day, the Veteran's Affairs and Military Law Section (VAMLS) of the National Bar Association hosted a symposium in conjunction with the Alexandria-Mount Vernon Chapter of Jack and Jill of America and the University of the District of Columbia focusing on the First Amendment in Washington, DC. Jack and Jill of America, Inc., is a membership organization of mothers, dedicated to nurturing future African American leaders by strengthening children through leadership development, volunteer service, philanthropic giving and civic duty. The symposium audience consisted primarily of teenagers. The goal of the symposium was to provide teens with an understanding of the First Amendment, its importance in the Civil Rights Movement, and its continued importance in advocating for change as part of their completion of leadership modules focused on legislation and advocacy.

As a section comprised largely of combat veterans and former service members, VAMLS has a special appreciation for what it means to fight for the freedoms of ALL people in this nation and the rights bestowed upon its citizens. Many of us in the VAMLS have friends that were killed or injured protecting these rights. Therefore, we believe it is our duty to educate future leaders of this country by engaging in discussions about constitutional rights and sacrifices made to protect them. As service members who are lawyers, we believe it is imperative to educate the next generation about the law and to ensure that they are able to apply the law in a manner that protects themselves, others, and the common values of this nation. It is our hope that the symposium instilled in the young people the desire to become defenders of the Constitution.

During the symposium, we focused on the First Amendment and explored constitutional and unconstitutional limitations on freedom of speech and expression. The panel discussion and workshop consisted of the following: Professor Stephen Wermiel, Esquire, American University - Washington College of Law; Mr. Anson Asaka, Esquire, Associate General Counsel, NAACP; Ms. Erica Puentes, Student Activist, University of Maryland; Mr. Scott Woods, Esquire, Department of Commerce; and Mr. Erick Tyrone, Esquire, The Tyrone Law Group. Jamie Boston, Chair of the Veterans Affairs and Military Law Section, served as moderator and challenged the teens, to express their views on a few issues related to the First Amendment. The teens, who are our next generation of leaders, and who are entrusted with the power to make a difference, shared their thoughts on the First Amendment. Below are some of the responses from the teens to a few questions.

Why are all forms of expression important in a democracy?

Briana: *All forms of expression are important in a democracy because the foundation of a democracy stems from the people it represents.*

Scott: *All forms are important because they require the voices of all-American citizens, and you use those voices to inform people and give them many perspectives on a topic.*

Solenne: *They are important because it gives a push and pull in the democracy.*

Kayla: *Thus, it allows everyone to participate in decision making when they express their views.*

Morgan: *If the citizens of the United States aren't granted certain liberties and freedoms, and are restricted by the government, we could no longer consider ourselves a democracy.*

Why do you think there are limits to free speech/expression?

Kayla: *Some people may not like what you want to say. They may get offended.*

Lauren: *There are limits to free speech to keep people safe.*

Skyelar: *There are limits so that people can protest and express their ideas peacefully instead of damaging property and injuring people.*

Briana: *There are limits to free speech/expression because certain topics in society can be viewed as controversial and/or offensive. So, the government limits things to help sustain a population as opposed to creating uproar and violence within a society.*

How have organizations such as the NBA, NAACP and others impacted free speech?

Solenne: *The National Bar Association has been a cornerstone for protecting free speech of those protesting to ensure equality.*

Briana: *Organizations like the NAACP have impacted free speech through creating an environment that is comfortable for people of all cultures and backgrounds.*

Skyelar: *They have impacted free speech by doing sit-ins, boycotts and freedom rides and have provided people with options of peaceful ways of standing up for what they believe.*

Scott: *Although it is not where we want it to be, free speech for African- Americans has come a long way from what it used to be. Organizations such as these have made it well known that they will continue to fight and will not be content until justice is done.*

Morgan l: *They have impacted freedom of speech by influencing people to stand up for causes.*

How has social media impacted the ability to express your ideas and advance causes you may support?

Briana: *I think social media has allowed me and others to become aware of many ideas throughout the world and it has allowed us to see a variety of people's perspectives on different topics.*

Lauren: *Social media allows people across the world to express ideas and causes to support.*

Morgan: *Social media allows us to express our ideas by making it easier to communicate with others. With social media, you can create and join causes.*

Solenne: *Social media provides forum to distribute ideas and get them to a large group of people in a short amount of time.*

While the teens were concerned about the negative implications of free speech, they were clear that there must be a balance in the right to expression. They were adamant that not all unfettered speech is protected by the First Amendment. The time with the teens solidified their understanding of the power they have in utilizing their First Amendment Rights to advocate for justice and their power to make a difference in this world!

Louis James Boston Jr., otherwise known as "Jamie", is a seven-time elected NBA Chair of the Military Law Section (now known as the Veterans' Affairs and Military Law Section). He is a graduate of the Washington College of Law, and is a former WCL Student Bar Association President and past recipient of the ***Joseph H. Hairston Alumni Award.*** He received his baccalaureate degree in Political Science from The Johns Hopkins University. He served on Active Duty for nearly 12 years in the Army Judge Advocate General's Corps. MAJ Boston's received numerous awards and decorations including: the Bronze Star Medal, Combat Action Badge, Meritorious Service Medal (4x), Army Commendation Medal (3x), Army Achievement Medal, Meritorious Unit Commendation, National Defense Service Medal, Iraqi Campaign Medal with 2 Campaign Stars, Global War on Terrorism Service Medal, Korean Defense Service Medal, Army Service Medal, and the Overseas Service Ribbon (2x). Upon retirement from the United States Army, Jamie served as an Assistant Attorney General for the State of Maryland. In 2016 he began serving as an Associate Counsel for the Office of General Law Office of the General Counsel for the United States Patent and Trademark Office.

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The Consequences of Hate Speech in the Aftermath of Charlottesville: An Employer's Guide to Handling Rally-Attending Employees

BY JANAY M. STEVENS

In the aftermath of the events in Charlottesville, Virginia, a Twitter account with the handle @YesYoureRacist solicited the assistance of the general public to identify rally attendees based on photographs. The Twitter detective tweeted: "If you recognize any of the Nazis marching in #Charlottesville, send me their names/profiles and I'll make them famous." Unsurprisingly, many rally attendees were quickly identified, along with their educational institutions and/or places of employment. For employers, this raises an interesting question: "Does my employee who participates in a white supremacist/neo-Nazi rally enjoy any job protections from his/her participation?" "It depends."

Although public-sector workers generally cannot be terminated for their exercise of speech, many union contracts require "just cause" to terminate and some employees have employment contracts that control grounds for termination. Federal law does not offer any protections for employee hate speech in the private sector, except in limited circumstances where the employee may otherwise be engaging in a protected activity. Thus, for private sector employers not subject to off-duty conduct state law protections, it is not per se illegal to fire workers if what they choose to do or say in their free time reflects poorly on your business.

Employers and employees alike are probably asking: "But what about the Constitutional right to free speech?" The First and Fourteenth Amendments offer little protection for individuals who engage in hate speech and are fired by their private employer. Although "hate speech" in and of itself may be protected (except for fighting words or true threats of illegal conduct or incitement) a private employer is equally protected when it "speaks" by terminating its employee. Private-sector employers do not have to allow employees to voice beliefs they or other workers may find offensive. While public employers have additional constitutional considerations, even public sector employees may lose the protection of the Constitution when he/she attends and participates in something as extreme as a white supremacist/Neo-Nazi rally. For instance, in *Lawrenz v. James,* 1995 U.S. App. LEXIS 801 (11th Cir. 1995), the Eleventh Circuit Court of Appeals affirmed a decision finding that a public-sector correctional institution's interest in the efficient operation of a correctional facility outweighed a public-sector correctional officer's First Amendment right to wear, off-duty, a T-shirt adorned with a swastika and the words "White Power."

Employers must also consider whether the National Labor Relations Act (NLRA) offers any protection to both union and non-union employees engaged in this or similar off-duty conduct. While the NLRA's primary concern is unionized workers, Section 7 also protects nonunion workers when they engage in "concerted activities for the purpose of . . . mutual aid or protection." As of late, the National Labor Relations Board has taken an expansive view of Section 7, recently commenting that a picketing worker who made racist comments, with no overt gestures, directed towards a group of black replacement workers was protected. The Board reasoned that one of the necessary conditions of picketing is confrontation and that impulsive behavior on the picket line is expected, particularly when it is directed against non-striking employees. In affirming the Board's decision in *Cooper Tire & Rubber Co. v. National Labor Relations Board,* 866 F.3d 885 (8th Cir. 2017), the Eighth Circuit Court of Appeals noted the picketing employee's statements were not violent in character, did not contain overt or implied threats, and were not accompanied by threatening behavior or intimidating actions toward the replacement workers. The employee's speech was protected because it was non-disruptive and occurred while the employee was engaging in protected activity (picketing). In the case of Charlottesville, it would be difficult for a rally participant to argue that his or her behavior under the circumstances was non-disruptive, non-threatening and/or not intimidating.

To be certain, private employers have a right to hold employees accountable for their viewpoints and to make employment decisions based on those actions, particularly where employers have a good faith belief that an employee's viewpoints or actions may create a hostile work environment for other employees. However, as with any termination, employers should proceed with caution. Employers should not blindly trust a Twitter-verse investigation and should instead conduct their own investigation before making any employment-related decisions. Moreover, public sector employers or employers who operate in a state subject to off-duty conduct statutes or one that does not follow the standard at-will employment doctrine, should consult with legal counsel before proceeding with discipline or other employment-related decisions. Finally, employers must not forget that if the to-be-disciplined employee also falls into a protected class, there may be potential exposure with respect to a separate or inter-related discrimination claim.

Janay M. Stevens is a member of Dinsmore & Shohl LLP's Labor and Employment, Janay has experience counseling and guiding public and private employers in both employment and traditional labor law matters. She defends employment lawsuits including claims of wrongful discharge, discrimination, hostile work environment and harassment, wage and hour violations, breach of contract, and violations of non-competition covenants, as well as advises on best practices in hiring, firing, and other disciplinary decisions, conducting internal investigations, and maintaining effective and compliant employee policies and procedures. Janay regularly represents clients in state and federal court, before the Equal Employment Opportunity Commission, the Ohio Civil Rights Commission, and other similar state agencies throughout the country. She routinely works with in-house counsel and legal departments, as well as human resources personnel and company executives to analyze each matter and strategize the best course towards a meaningful resolution. Understanding that each client has different needs and objectives, Janay is passionate about learning her client's business and industry, and gaining insight to their operations.

New Orleans after Hurricane Katrina in 2005

Achieving the "Justice" in Environmental Justice: Why Diversity in Environmental Law Is Vital

BY MARYAM HATCHER AND BEN WILSON

"Environmental Law impacts *other* people" is a refrain we have heard throughout the years from law students and young attorneys of color questioning the value of pursuing a career in Environmental Law. The idea that environmental issues are unimportant to the Black community or other communities of color has been touted as one of the reasons why there is a dearth of environmental attorneys of color.[1] In reality, Environmental Justice is poised to be the great civil rights issue of the 21st century. This is very much *our* issue.

Accordingly, it is important for the legal community to understand the meaning of Environmental Justice. The Environmental Justice movement addresses the reality that the individuals who live and work in America's most polluted environments are disproportionately poor people and people of color.[2] This injustice is not by happenstance. In fact, Environmental Justice advocates have long argued that communities housing large populations of impoverished people and people of color are targeted to host facilities that cause the most negative impacts to the environment.[3] Also, communities with limited financial resources often lack the infrastructure to nimbly weather the impacts of modern day natural disasters, like the devastating effects of Hurricane Katrina in 2005 and Hurricane Maria in 2017. Environmental Justice seeks to address this imbalance.

Attorneys of color have a vested interest in Environmental Justice because their communities are being directly impacted. Consequently, their voices are essential to correct environmental injustices. Unfortunately, Environmental Law lacks the diversity required to give those voices the megaphone that they need.

The lack of diversity in Environmental Law mirrors the absence of diversity in the Bar as a whole. To be sure, the law has been described as the least diverse profession in America.[4] While there have been no formal studies on the specific racial demographics of the field of Environmental Law, the lack of diversity has been anecdotally observed for many years by Environmental Law practitioners. Organizations like the American Bar Association, the National Bar Association and the Environmental Law Institute have implemented initiatives to promote diversity in

the field, including diversity fellowships and action plans to enhance diversity in Environmental Law.

Unlike other areas of the law, Environmental Law is a relatively new specialty that burgeoned when the first set of federal environmental statutes were passed in the 1970s. Decades later, Environmental Law remains fertile ground for young attorneys to develop a thriving practice. When Department of Justice alum, Quentin Pair; Earth Justice VP of Litigation, Patrice Sims; Holland & Knight Partner, Nicholas Targ; and Beveridge & Diamond Chairman, Ben Wilson, began their respective environmental practices, Environmental Law was still in its infancy. With a hope to bring more attorneys of color to the field, they launched an Environmental Law program at Howard University School of Law 12 years ago. Working with Daria Neal of the Department of Justice, they have helped bring in a new generation of Environmental Attorneys of color by teaching Environmental Law and Environmental Justice at Howard and establishing an Environmental Justice Clinic there.

Recruiting and *retaining* talented attorneys of color is essential to help correct the disproportionate impact that vulnerable communities face as it relates to pollution, unsafe drinking water, and other environmental problems. Advocacy groups like the Southern Environmental Law Center lead the charge in fighting for Environmental Justice. However, diversity is needed throughout the different sectors of Environmental Law, not just public interest organizations.

For example, environmental attorneys of color in the local, state and federal governmental agencies are needed to help develop and enforce policies that protect the environment for *all* citizens. Similarly, attorneys of color working for corporate environmental health and safety legal departments can ensure that their companies' actions are not damaging the environments of the nation's most vulnerable populations. Further, the transboundary impacts of Environmental Justice are increasingly being felt around the world, and therefore it has become an issue of international importance. If attorneys of color have a seat at the table, they can address and help remedy the problem of certain communities being targeted for environmentally-hazardous conditions or otherwise facing the health consequences of environmental injustice.

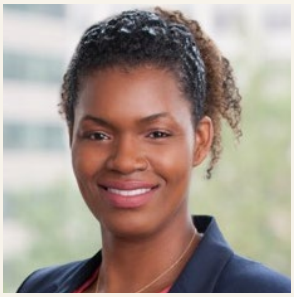
Environmental Justice is an issue that deeply impacts people of color, which means that Environmental Law cannot be relegated to the "others" in society. It is time that we recognize environmental injustices for the civil rights issues that they are and lead this emerging movement as we led it in the 1960s. Without our voices ringing loud and clear, the Environmental Justice we seek will continue to elude us.

[1] Paula J. Schauwecker, *Diversity in Environmental Practice: How Are We Doing?,* Natural Resources & Environment, Vol. 26, Number 3, Winter 2012.

[2] Natural Resources Defense Council, https://www.nrdc.org/stories/environmental-justice-movement.

[3] *Id.*

[4] Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That,* Washington Post (May 27, 2015).



Maryam Hatcher is an Associate at Beveridge & Diamond, P.C., a 100-lawyer firm focused on environmental and natural resource law and litigation. Ms. Hatcher represents corporations, trade associations, and municipalities in trial-level and appellate litigation arising under a broad range of federal and state environmental laws. In recognition of her achievements, she was named as a 2017 Rising Star in Environmental Litigation by the Washington D.C. Super Lawyers. Maryam is a 2012 graduate of Howard University School of Law, where she served as Editor-in-Chief of the ***Howard Law Journal.***

Ben Wilson is the Chairman of Beveridge & Diamond, P.C., a 100-lawyer firm focused on environmental and natural resource law and litigation. He represents major corporations, developers, and municipalities in complex litigation matters involving Clean Water Act enforcement, wetlands development, Superfund and environmental justice matters. Mr. Wilson has received numerous awards and accolades for his tireless advocacy for diversity and inclusion in the legal profession. Further, Mr. Wilson has served as a pro-bono Adjunct Professor of Environmental Law and Environmental Justice at Howard University Law School for over a decade.

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Litigation Funding Supported Major Civil Rights Successes

BY EMILY KENISON

Non-party funding of litigation is no longer a novel way to support access to the courthouse. Litigation funding has experienced exponential growth and acceptance in the legal profession. A recent study by the ALM Media reported that nearly 36% of U.S. law firms used litigation finance in 2017, compared with 28% the previous year and a mere 7% in 2013.[1] Yet, this growth has come with growing pains, as legislatures, lawyers, clients, and funders alike analyze the changing landscape and define the ethical scope and potential use of such funding. While the litigation finance landscape is further developed, it is useful to recognize and highlight the history of litigation finance in the United States, its major contribution to the significant successes achieved by the Civil Rights Movement, its promotion of justice, and its protection under the First Amendment.

The Sixth Amendment's provision for the right to an attorney in the criminal justice system[2] does not extend to the civil justice system; to access the civil justice system, one needs money.[3] During the Civil Rights Movement, African Americans often did not have the financial means to access the civil justice system and combat the discrimination they faced. Organizations, most notably the NAACP Legal Defense and Education Fund (the "NAACP-LDF"), became not only the coordinator for the legal assault on discrimination, but also the piggy bank for such litigation.[4]

In other words, the NAACP-LDF was (and still is) within the definition of a non-party funder. During the Civil Rights Movement, the NAACP-LDF was the vital non-party funder that financially supported the two-decades long judicial fight against officially enforced public segregation, culminating in the landmark 1954 U.S. Supreme Court decision, *Brown v. Board of Education*.[5]

The decision in *Brown,* which unanimously overturned the "separate but equal" doctrine of legally sanctioned discrimination,[6] is described as "the most important American government act of any kind since the Emancipation Proclamation."[7] When its ruling came down, the political and social backlash was severe. Several politicians orchestrated a "Massive Resistance," part of which included Virginia's adoption of a 13-statute proposal titled the Stanley Plan. One of the provisions of this statute expanded Virginia's definition of champerty to include non-party funders, thus effectively prohibiting organizations like the NAACP-LDF from funding civil rights cases, and deliberately impeding African American's access to the civil justice system.[8]

In response to the Stanley Plan, the NAACP-LDF sued then-Attorney General of Virginia, Robert Button, on the grounds that the statute's provision prohibiting non-party funders was a violation of their First Amendment rights. In *NAACP v. Button,* the U.S. Supreme Court agreed, holding that "Virginia's champerty and maintenance laws violated the First Amendment because litigation—and the sponsorship of it—is a vehicle for expressing viewpoints."[9] With this ruling, the NAACP-LDF could continue to fund the litigation used to reshape racial justice, including, amongst others, *Watson v. City of Memphis* (1963),[10] *Loving v. Virginia* (1967),[11] and *Griggs v. Duke Power* (1971).[12]

As the NAACP-LDF has repeatedly shown, non-party litigation funding can further the most paramount of public goods. The fact that the funding for a case comes from someone other than the person named in the complaint does not change the facts of the lawsuit, the law, how the jury will interpret the evidence, or how the judge will rule. Non-party funders facilitate plaintiffs' access to the civil justice system, and ensure that defendants are judged appropriately. This vital access to justice should be the foremost consideration in any conversation about non-party funders and their relationship to the legal profession.

[1] Randolph J. Evans and Shari L. Klevens, The Growing Acceptance of Litigation Finance (Oct. 9, 2017), https://litigationfinancejournal.com/growing-acceptance-litigation-finance/.

[2] U.S. Const. amend VI.

[3] In 2009, the average federal civil case cost is approximately $15,000. This cost can increase drastically if expert testimony is involved. For instance, medical malpractice claims often have numerous experts, and thus can easily exceed $100,000. See, Binyamin Appelbaum, Investors Put Money on Lawsuits to Get Payouts, N.Y. Times (Nov. 14, 2010), http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all.

[4] Jason M. Wilson, Litigation Finance in the Public Interest, 64 AM. U. L. REV. 392 (2014)

[5] Id.

[6] 347 U.S. 483 (1954).

[7] See, The Racial Glass Ceiling: Subordination in American Law and Culture (Roy L. Brooks 2017) at 30, quoting Judge Louis Pollak, who had been an advisor to the NAACP-LDF lawyers.

[8] 371 U.S. 415 (1963).

[9] Id.

[10] The U.S. Supreme Court ruled that segregation of public parks is unconstitutional. 373 U.S. 526 (1963).

[11] The U.S. Supreme Court ruled that laws banning interracial marriage are unconstitutional. 388 U.S. 1 (1967).

[12] The U.S. Supreme Court ruled that tests for employment or promotion that produce different outcomes for different races are prima facie to be presumed discriminatory. 401 U.S. 424 (1971).

Emily Kenison is Legal Counsel and Funding Director at Law Finance Group ("LFG"), a litigation finance company founded in 1994 that has funded over 1,000 cases nationwide and has advanced over $500M. Emily specializes in structuring financing transactions for attorneys and law firms that seek an advance on their anticipated attorneys' fees in their portfolio of cases. She also crafts non-recourse advances to attorneys and/or their clients for late-stage prejudgment cases, settled cases, and judgments on appeal. Before joining LFG, Emily was an Associate at Morgan, Lewis & Bockius LLP in the Corporate & Business Transactions practice group. She earned her J.D. from New York University School of Law and her B.A. from Barnard College, Columbia University.

Brand Names ... Matter! The First Amendment Trumps Trademark Law As Offensive Brands are Deemed Free Speech Amidst Backdrop of Hate and Cultural Brand Marginalization

BY CHRISTINE C. WASHINGTON

Ev'rybody shout this trademark, ev'rybody sing this tune: a watermelon, razor, a chicken and a coon! From "The Coon's Trademark" composed by Tom Logan and performed by Bert Williams & George Walker, pictured below circa 1898.

Baylor University Crouch Fine Arts Library - Frances G. Spencer Collection of American Popular Sheet Music

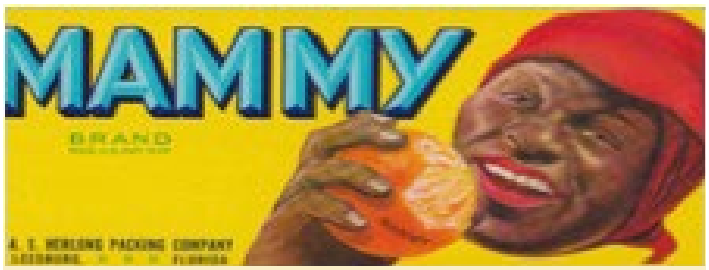
Intellectual property ("IP") is usually viewed as an objective body of established, albeit evolving, law. As a general rule, IP is largely unaffected by the politics of race and ethnicity. 2017–2018 will, no doubt, be remembered as the "game changer" – a period of racially infused IP issues.

In the aftermath of *Matal v. Tam,* trademark/brand owners now have *carte blanche* to register any word or phrase that can function as a trademark– even if it's derogatory and offensive to an entire race or segment of the population. See 582 U.S. ___, 137 S.Ct. 1744 (2017) where 15 U.S.C. §1052(a) (the statute that bans offensive trademarks from registration) was dismantled in the interest of the First Amendment and the preservation of free speech.[1]

This is the backdrop: Embers of racial tensions smolder nationwide and completely ignite in places like Charlottesville, VA. Rounding out the hate-filled landscape, undocumented persons (notably those of the darker hue) live with the constant fear of deportation .... if a certain commander in chief had his druthers, back to the "[expletive] holes/houses" from whence they come.[2] Meanwhile, social media explodes on a monthly basis in response to photos that memorialize the phenomenon known as "cultural (mis) appropriation /disparagement" e.g., indigenous American and African costumes in a Victoria Secrets fashion show, complexion-shedding by Dove, monkey monikers by H&M, cornrows by Katy Perry, and of course, the magic Pepsi can used by Kendall Jenner to create world peace and instant-justice for all at a Black Lives Matter rally).

The irony is that attempts to legally redress the exploitation (or diminution) of another's heritage are virtually unheard of in the United States because they are thought to be unenforceable. Cue the Supreme Court balancing act in *Tam:* free speech vs. the desire to keep offensive marks off the trademark registry. The First Amendment won.

It is not *necessary* for a brand owner to register a trademark on the federal registry of the United States Patent and Trademark Office ("USPTO") in order to exercise his exclusive rights. However, doing so confers quantifiable benefits and business advantages. Historically, the USPTO has used Section 2(a) of the Lanham Act to bar trademarks that "disparage ... or bring ... into contempt or disrepute" any "persons ..." from the federal trademark registry. 15 U.S.C. §1052(a). When Simon Shiao Tam, founder of an Asian American band, sought registration of the band's name "THE SLANTS," the USPTO refused registration under section 2(a) because the term is historically used to disparage people of Asian descent. He appealed and in July, Section 2(a) was unanimously struck down as a violation of a "bedrock First Amendment principle: (that) Speech may not be banned on the ground that it expresses ideas that offend."

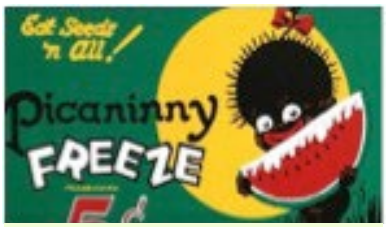


S. Herlong Company. Reproduction of citrus packaging label using "MAMMY" as a trademark. Categorized as "Black Memorabilia" available for purchase on eBay.

The Tam Court's analysis centered primarily on a careful, if not belabored, finding that trademark registrations (and the benefits they confer) do not constitute government speech and, secondly, on a reading of Section 2(a) that is too broad to withstand even low-level, commercial speech scrutiny. Sorely missing was an in-depth discussion of the familiar but often misunderstood "exception" to First Amendment protection - the one that denies the shield when speech or actions are incendiary. Yelling "fire" in a crowded theater is the old example; more recent cases, e.g., *Brandenburg v. Ohio,* 395 US 444 (1969) (where a Ku Klux Klan leader's right to call for violence, in the abstract, was protected) require "*imminent* lawless action". Depending on context and speaker, I submit that the use of the "N-word" is a fairly consistent pre-cursor to violence. As an African American,

I would certainly view a burning cross as an imminent threat. The Court interpreted it a little differently in *VA v. Black*, 538 U.S. 343 (2003). Query whether recollections of the summer of 2017 shed new light on cross-burning.

Ironically, Justice Alito, who wrote the *Tam* opinion, was the lone dissenter in *Snyder v. Phelps*, 562 U.S. 443 (2011), another First Amendment case where the majority ruled against a plaintiff citing offensive speech as the basis of an emotional distress claim. In his dissent, Justice Alito observes that *"commitment to free and open debate is not a license for ... vicious verbal assault ... (I)t is not necessary to allow the brutalization of innocent victims like petitioner."*[3] It is hard to reconcile these opposing views on offensive speech – unless you conclude that the Court is simply unaware of the "vicious" and "brutal" etymology of, e.g., the N-word in the context of recent American history. (What happened to the "empathy standard"?)



Hendler's Company. Reproduction of 1920s tin ad using PICANINNY as the dominant element of a trademark. Categorized as "Black Memorabilia" available for purchase on Amazon.com.

"The Liberation of Aunt Jemima and Uncle Ben," from the Raje Series by Renee Cox 1998.

The implications of the "Slants Case" are far-reaching. The owner of the Washington REDSKINS said that he was "thrilled" by the decision.[5] The challenges waged by indigenous Americans against the team's name will presumably be dismissed by the Fourth Circuit when it re-opens *Pro-Football, Inc. v. Blackhorse,* 112 F.Supp. 3d 439 (E.D.Va 2015), appeal docketed, No. 15-1874 (4th Cir. Aug. 6, 2015). So, the take away is: get ready; applications for trademarks containing the "N-word" are already on file and we can reasonably expect that some will mature to registrations. The registrants/owners of these marks may not necessarily be African Americans – indeed, it is not unreasonable to imagine the entrepreneurial bigot who opens, e.g., a fruit/watermelon stand under the moniker "N-word Melons" or a hardware store that prominently features a hanging noose in its logo design. If we are relying on the marketplace to reflect on and police our collective sensibilities, we may soon look back at Aunt Jemima's bandana as tame in retrospect. [N-WORD], TOPSY, MAMMY, PICKANINNY, SAMBO, DARKIE were well-received and widely supported trademark brands that were used to sell tobacco, oranges, confections, chocolate milk, toothpaste, etc. – some are still in existence. Others have either outlived the mores of good taste or morphed to adopt less offensive trademarks (e.g., DARKIE is now sold in Japan as DARLIE toothpaste). What happens in the wake of Tam ... in the current client of racial diminution and heritage occlusion?

Dicta in the *Tam* opinion may present a ray of hope. Whereas Justice Alito opined that even if, *arguendo,* the act of registration imbues government sanctioning, "the government has no authority to discriminate against some words and messages that it finds troubling." Query: if municipalities fund confederate parks and monuments (a type of government speech), must they now make room for the likenesses of, e.g., Nat Turner, Marcus Garvey, Geronimo, Crazy Horse, etc. adjacent to Mssrs. Robert E. Lee, Jefferson Davis, Stonewall Jackson? If the bar is now "anything" ... as long as there is no discrimination ... the door is open and swinging.

[1] *At the end of the year, the Federal Circuit extended Tam's First Amendment protection to scandalous and immoral marks like expletives and vulgar terms. In re Erik Brunetti, Case No. 2015-1109 Fed. Cir. December 15, 2017.*

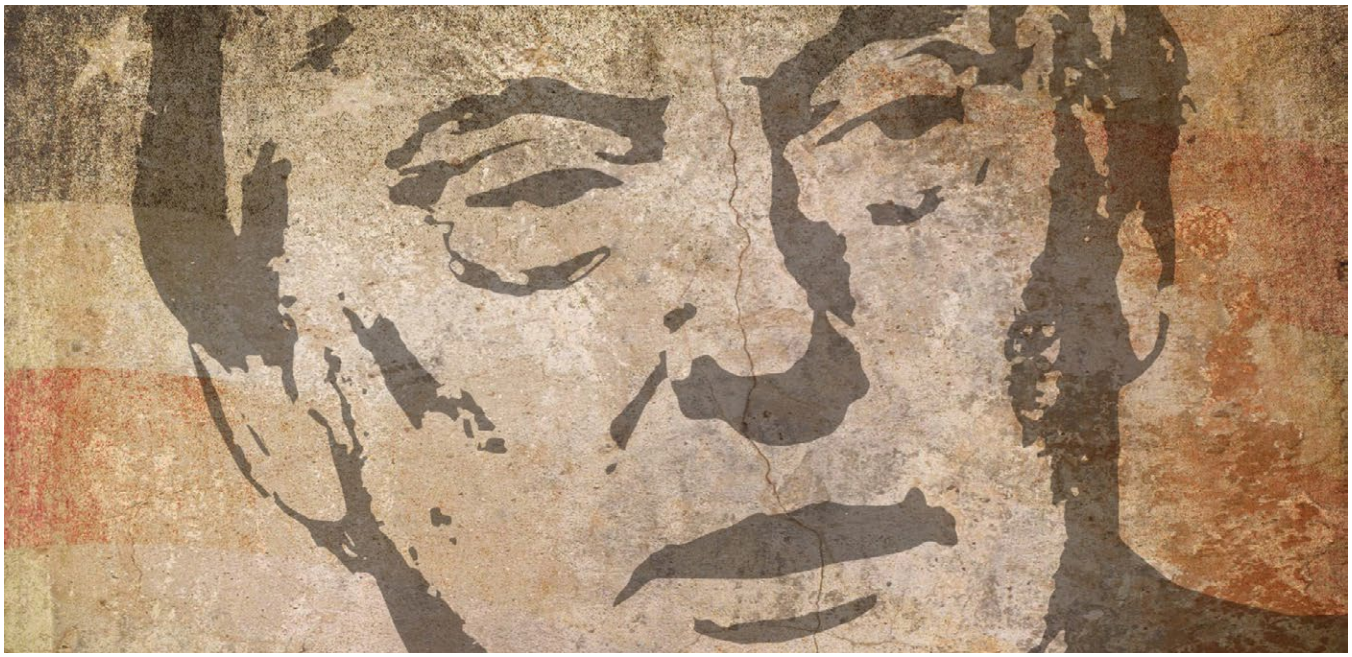
[2] On January 11, 2018, the President of the United States is alleged to have referred to certain African, Caribbean and/or Latin American countries using an unbelievably vulgar and base term.

[3] See also *United States v. Stevens,* 559 U.S. 460 (2010) (8-1 decision) (Alito, J. dissenting) where, in response to the majority's decision to strike down a law prohibiting so-called "crush videos" (which depict the literal "crushing" of a small animal by someone in high heels) Alito opined that the law was "enacted not to suppress speech, but to prevent horrific acts of animal cruelty — in particular, the creation and commercial exploitation of ... a form of depraved entertainment that has no social value."

[4] A phrase originally ascribed to, then-Senator Barack Obama in the context of judicial hearings and later used to describe Alito's justification for voting against the statutes at issue in the referenced First Amendment cases. See John Paul Rollert, "Sam Alito: Setting the 'Empathy Standard' for the Supreme Court," HUFFINGTON POST - THE BLOG, March 16, 2011.

[5] Erik Brady, USA TODAY SPORTS, June 19, 2017.

Christine C. Washington, Esq. is an accredited trademark and intellectual property law expert. A graduate of Howard University School of Business (1988), Duke University School of Law (JD), New York University School of Law (LL.M. – IP), Christine has practiced in the in-house counsel and law firm environments. She's protected some of the world's most famous consumer brands (e.g., Kraft, Marlboro, Prestone Products) and guided the brand development efforts of well-known celebrity names in music, film/TV, the fine arts, sports and online media. Her first book, ***"Lock-It! Brand Protection & Leveraging Strategies for Creatives, Techies & Entrepreneurs,"*** was published in the Summer of 2017.



Will Trumpism Lead Us to Fascism?

BY FREDERICK K. BREWINGTON

In these dark days, as we watch the erosion of our civil, constitutional and human rights take place before our very eyes, I am reminded of the lessons that history can teach us about these very troubling current events. The attack in Charlottesville marks a point in our country that is a direct result of a fanned flame that has not been extinguished. Lives have been lost amidst the cries of white supremacy and the diminishment of human life. America's general response has been a lukewarm suggestion that we take a timeout, rather than a clear rebuke of the lack of respect that has given new birth to a growing faction that sees strong-arm tactics and brutal force as the answer to everything.

The person now occupying 1600 Pennsylvania Avenue has all but issued an executive order instructing those who have sworn to protect and serve to disregard their oaths of office and target persons based on their race, color, and accent. Further, he has encouraged public servants and private actors to engage in acts of abuse and intentional cruelty. His actions are clearly alarming. Bombastic rhetoric, rather than well-reasoned words of diplomacy, is now a daily occurrence as The United States standing on the world stage declines. Our president's current encouragement of the use of force, violence, and reckless disregard of people's civil rights in place of rational thought is not unlike the actions that gave birth to the Nazi regime. That government met any form of opposition with its Gestapo (secret state police), which suppressed the voices of that opposition. That is the same regime which claimed the calculated attempt at genocide was necessary for national and cultural security to make Germany *great again*. Have we lapsed into new-millennium ignorance? Have we grown so amnesic that we have forgotten the battles in the 1960s here in the United States? These were battles that pitted the skin-ripping forces of fire hoses and bloodthirsty attack dogs of our own government against those who dared to oppose oppression. These were struggles where police and politicians flexed their power as though it were an iron glove against those who sought to have what the "American dream" promised. Our foremothers and fathers testified with their bodies that the "dream" had evolved into what both Martin and Malcolm coined an "American nightmare." The use of these and other dream-snatching acts of brutality was, by all measures, officially sanctioned terrorism against the people of the United States.

Contrary to what conservatives claim, opposition against the emergence of a military state and refusing to denounce who we are as a country, and how we came to be who we are, is not anti-American. Stating disapproval of bullying, as well as disapproval of cavalier talk about the use of nuclear weapons that sets the stage for a worldwide armed conflict is not being weak. Taking a stand against daily insults to truth-telling and opposing boldface lies does not equate to supporting gang violence. Taking a firm stand for truth and hard earned rights is not about encouraging lawlessness and is not disregarding the need for the proper protection of life, neither is it agreeing to the destruction of property and community. It is, however, about not letting ourselves be lured by the prescription of social Novocain, which provides a false sense that harm is not being done to the flesh of our democracy. We cannot be made to believe that, if we simply let the erosion go for a little bit we can recover later. What faces us today is as close as America has been to a turn toward Fascism[1].

With a president who has adopted the "Fuehrer principle," thinking he is above the law, we find ourselves looking down the barrel of a loaded White House which is ultimately preparing to pull the trigger. The free press has been labeled as "fake" while being denied access to information that the country has an absolute right to know. The replacement of independent and credentialed public servants with devious narcissistic persons who are required to give a blood pledge to the person and not the people is, and must be more than, a warning sign for us all. The revolving door in the White House showing the entrance and exit of persons at the highest level of our government on a weekly basis is a glaring example of instability that is fertile ground for a claim that there is no need for checks and balances. It must be viewed as a distress call for all good men and women to come to the aid of what we know is good and what we know is right.

There is a battlefield being staged before our very eyes. The danger is that if there is no attempt to prevent this setup, this battlefield may very well become the burial ground of our republic. From the travel ban leveled against persons based on their religion to the dehumanization of referring to young black and brown persons as "animals"; from the declaration that transgendered persons are too much trouble to have serve our country in the military; to the loosening of regulations that will encourage the contamination of the water supply and the destruction of the environment in and around communities of color; from the refusal to make the wealthy pay their fair share of taxes and for the repair of infrastructure to the belittling and abuse of women without apology or shame; and from the reckless use of offensive and crass language at the highest level of government to the disregard of diplomatic protocol that places our nation on the verge of war, the staging is nearly complete. These are but a few of the underlying themes that have been introduced by the cast of a dangerous reality show who have come to realize that they can never be turned off. As the ratings from those watching go up (whether in agreement or not), the actors on this stage feast on their own notoriety and play this deadly platform out day by day and, seemingly, hour by hour. They play out that next subplot that will stir the pot and ignite the race, color and class conflagrations that can only be the real intended outcome of the behaviors I have described. In short, while the rich get richer, the divide between those who have all and those who have little widens.

As Americans, we must acknowledge the fact that, in the past year, our nation has been in a chaotic freefall. It can only recover by employing a strong dose of counter-Trumpism, which is otherwise known as respect, integrity, truth and a relentless focus on not accepting what has entertained some since the middle of January 2017 as being normal or appropriate. Instead, there must be a dynamic and organized resistance against the destruction of what we have managed to shape through half a millennium, during which we have been challenged with revolution; brutalization of native peoples; civil war; the sin of slavery; subjugating classism; demeaning racism and thinly cloaked gender abuse. We cannot let our ability to learn from our own history slip away like water. Doing so will provide fertile ground for the emerging Fascist elements to take strong root.

We cannot delude ourselves. As a nation, we are in very deep trouble. America has a person in our highest office that has bragged about committing criminal sexual assault; has encouraged law enforcement to intentionally abuse persons with whom they engage; and has treated the U.S. government like his personal candy store, into which he has invited his friends, despite his campaign promises of "draining the swamp." The tactic of placing domestic opponents and other nations in a state of fear is being adopted, hate group by hate group. The creation of fear through the use of domestic terrorism is intended to silence. We can ill afford to be silent. If voices of dissent, rationality and reason don't rise up now and speak loudly, clearly and convincingly into the proverbial national microphone, the danger is that our future rights and ability to do so will be mowed down and crushed for generations to come.

[1] Fascism is a form of radical authoritarian nationalism, characterized by dictatorial power, forcible suppression of opposition, and control of industry and commerce, that came to prominence in early 20th-century Europe. The first fascist movements emerged in Italy during World War I, before it spread to other European countries. As opposed to liberalism, Marxism, and anarchism, fascism is usually placed on the far right within the traditional left-right spectrum. (Turner, Henry Ashby, "Reappraisals of Fascism." *New Viewpoints,* 1975. p. 162, states fascism's "goals of radical and authoritarian nationalism"; Larsen, Stein Ugelvik, Bernt Hagtvet and Jan Petter Myklebust, *Who were the Fascists: Social Roots of European Fascism,* p. 424, "organized form of integrative radical nationalist authoritarianism"; https://www.merriam-webster.com/dictionary/fascism; Roger Griffin, *Fascism*. Oxford, England: Oxford University Press, 1995. pp. 8, 307; Aristotle A. Kallis, *The Fascism Reader.* New York, New York: Routledge, 2003. p. 71)

Frederick K. Brewington is a civil rights attorney and principal attorney in the Law Offices Of Frederick K. Brewington based in Hempstead, New York. He has handled cases involving racial harassment and discrimination, police brutality and misconduct, voting rights, housing discrimination and fair representation in government. He serves on the Board of Governors for the Touro College Jacob D. Fuchsberg Law Center, and is a Board Member of E.R.A.S.E. Racism. He is also an adjunct professor of law at Touro College Jacob D. Fuchsberg Law Center in Central Islip, New York. Mr. Brewington is also the recipient of the New York State Bar Association's 2017 Haywood Burns Civil Rights Award, as well as many other honors and awards.

SAVE THE DATE!

2018 ACS National Convention

Washington, D.C. June 7-9, 2018

The American Constitution Society is pleased to announce that **U.S. Supreme Court Justice Sonia Sotomayor** will be in conversation at our 2018 Convention with her former law clerk and ACS national board member Professor Melissa Murray on Friday, June 8th.

On Thursday evening June 7th, we will honor **Dahlia Lithwick** with our **Progressive Champion Award** and former **Chief Justice of the Supreme Judicial Court of Massachusetts Margaret H. Marshall** with our **Lifetime Achievement Award**.

We will hold skills-building **workshops** on Saturday, June 9th focused on how attendees can engage the current moment. Stay tuned for further updates!

NATIONAL BAR ASSOCIATION®
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93RD ANNUAL CONVENTION & EXHIBITS

JULY 28 - AUGUST 3, 2018
NEW ORLEANS, LA

BRILLIANCE IN THE BIG EASY

New Orleans is a city rich with culture, history and traditions. Between sessions, get your fill of award-winning cuisine, soak up the art, architecture and music. After the sun goes down, you can network with members into the night with the many events we have planned. Let's get down to business then get down in the Big Easy!

NBA 93RD ANNUAL CONVENTION & EXHIBITS

The National Bar Association (NBA) Annual Convention & Exhibits is the largest gathering of African-American lawyers, judges and law students in the United States. It is the premier showcase to establish professional relationships, discuss trending legal, social justice and economic issues. In addition, the convention offers professional development through a robust NBA sponsored Continuing Legal Education Program.

YOU'RE INVITED

On behalf of the National Bar Association ("NBA"), I extend to you a warm invitation to join myself and the Board of Governors during the 93rd NBA Annual Convention at the Hilton New Orleans Riverside! With New Orleans celebrating its 300th Anniversary, our Convention this year will be a truly special event!

The Presidential theme for this bar year is "Protecting our Progress by Building the Future." The programs and initiatives the Board and I have designed and launched this year, build on our proud legacy and enable the NBA to continue its work in advancing the mission of our community and our Association. This year's Convention will be a culmination of our work.

Each year we gather at our Annual Convention to hone our legal skills, network, fellowship, celebrate member's accomplishments, and advance the mission of the NBA. In the preliminary agenda, you will see our hallmark programs and events:

- 5 days of CLEs led by a faculty of leading authorities from across the country on the hot topics facing our members, clients and the legal community;
- Our various networking events - Judicial Council Thurgood Marshall Luncheon, Hall of Fame Luncheon, YLD Junius W. Williams Awards Lunch, 40 Under 40 Awards Gala and Annual Gala Reception & Dinner - where we fellowship and celebrate the accomplishments of leaders in the profession;
- Our Presidential Showcases that provide thought leadership on key NBA initiatives; and finally
- Our pipeline programs - the Youth Enrichment Program and Dr. Martin Luther King, Jr. Advocacy Competition.

This year, we are introducing a few changes to the Convention. These changes will create a more unified, streamlined, cost-effective, member-driven Convention experience:

1. The Convention Schedule is streamlined: CLE, events and programs will minimally overlap so you do not have to rush to each activity.
2. The Exhibit Hall will feature member-driven services including: a Member Lounge where members can recharge, network and attend professional development focused sessions (how to improve your LinkedIn profile, tips to improve your resume, professional photo sessions) and an NBA Member Services Booth featuring the NBA Store.
3. We will host a Leadership Development Workshop for Board members and future leaders of the NBA.
4. Members will be able to participate in a two-day Career Fair.
5. Attendees will be able to find all Convention information on the NBA Convention App; limited edition Souvenir Convention Books will be available for purchase.
6. In advance of the Plenary Session on Monday, July 30th, you will be able to attend an Information Session to learn about the Amendments of the By-Laws and Constitution and the Resolutions;
7. Instead of an Opening and Closing Plenary Session, you will attend one Plenary Session on Monday; There will be a special session on Sunday to learn about amendments to the By-Laws and Resolutions.

For questions about the Convention, please e-mail annual.convention@nationalbar.org.
I look forward to seeing you in New Orleans!

Juan R. Thomas, President

JULY 28TH

SAT

ARRIVE

8:00 AM - 5:00 PM	Registration
9:30 AM - 5:00 PM	ADR / Dispute Resolution Civil Trial Advocacy Boot Camp

JULY 29TH

SUN

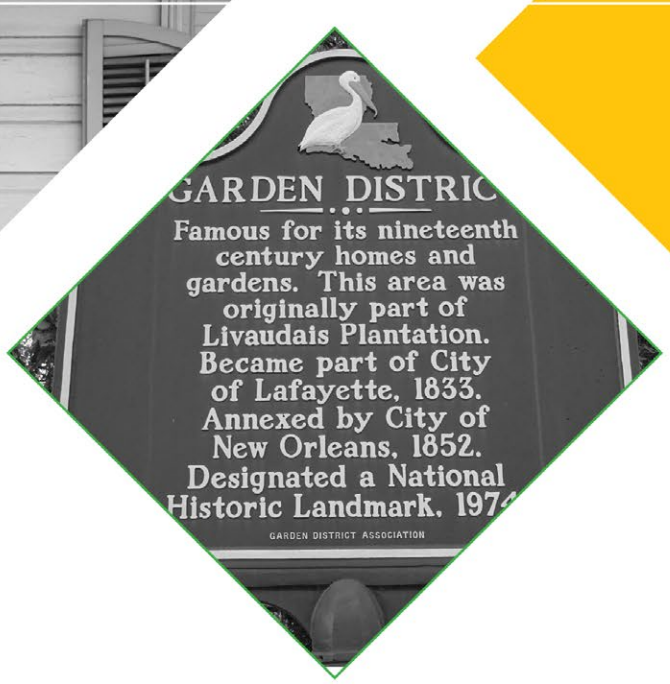
7:00 AM - 5:00 PM	Exhibit Hall/Registration/Member Lounge/ Lifetime Member Lounge
7:00 AM - 10:00 AM	Prayer Breakfast/Necrology
9:00 AM - 4:00 PM	Nominations Committee Meeting
10:00 AM - 11:00 AM	First Time Attendees Orientation
10:30 AM - 12:30 PM	Information Session about By-Laws and Resolutions
10:30 AM - 3:00 PM	Board of Governors Meeting
1:00 PM - 3:00 PM	Continuing Legal Education
3:30 PM - 4:30 PM	Presidential Showcase (CLE)
4:45 PM - 6:00 PM	Division Meetings

JULY 30TH MON

7:00 AM - 5:00 PM	Exhibit Hall/Registration/Member Lounge/ Lifetime Member Lounge
7:00 AM - 9:00 AM	Fraternities/Sororities/Law School Breakfasts
8:00 AM - 10:00 AM	Continuing Legal Education
10:30 AM - 11:30 AM	Presidential Showcase
11:30AM - 12:30PM	Section Meetings
1:00 PM - 5:00 PM	Plenary Session - Annual Meeting; Candidates Forum
5:15 PM - 6:15 PM	Regional Meetings
7:00 PM - 9:30 PM	Opening Session and Reception
10:00 PM - UNTIL	Candidates' Party

JULY 31ST TUES

7:00 AM - 6:00 PM	Exhibit Hall/Registration/Member Lounge/ Lifetime Member Lounge
7:00 AM - 9:00 AM	Fraternities/Sororities/Law School Breakfasts
TBD	Energy Forum/ Civil Rights Forum/ Corporate Counsel Leadership Summit
8.00 AM - 5.00 PM	NBA Elections
8:00 AM - 10:00 AM	Continuing Legal Education
10:15 AM - 12:15 PM	Continuing Legal Education
12.30 PM - 2.15 PM	Judicial Council Thurgood Marshall Luncheon
2:30 PM - 4:30 PM	Continuing Legal Education
7:00PM - 9:30PM	President's Reception & Presidential Showcase



AUGUST 1ST WED

7:00 AM - 6:00 PM	Exhibit Hall/Registration/Member Lounge/ Lifetime Member Lounge
7:00 AM - 9:00 AM	Fraternities/Sororities/Law School Breakfasts
8:00 AM - 10:00 AM	Continuing Legal Education
9:00 AM - 5:00 PM	Career Fair
10:15 AM - 12:15 PM	Continuing Legal Education
12:30 PM - 2:15 PM	Young Lawyers Junius W. Williams Awards Luncheon
2:30 PM - 4:30 PM	Continuing Legal Education
TBD	International Law Forum/ Health Law Forum
6:00 PM - 9:00 PM	40 Under 40 Awards Gala

AUGUST 2ND

THURS

7:00 AM - 1:00 PM	Exhibit Hall/Registration/Member Lounge/ Lifetime Member Lounge
7:00 AM - 9:00AM	Fraternities/Sororities/Law School Breakfasts
8:00 AM - 10:00 AM	Continuing Legal Education
8:00 AM - 5:00 PM	Career Fair
10:15 AM - 12:15 PM	Continuing Legal Education
12:30 PM - 2:15 PM	Hall of Fame Luncheon
2:30 PM - 4:30 PM	Presidential Showcase
4:30 PM - 6:00 PM	NBLSA Speed Networking Event/Dr. Martin Luther King Drum Major for Justice Advocacy Competition
7:00 PM - 10:30 PM	Gala Reception & Dinner
10:30 PM - UNTIL	Afterglow *Hosted by the New York City Tourism Board*

AUGUST 3RD

FRI

9:00 AM - 12:00 PM Board of Governors Meeting

LAISSEZ LES BON TEMPS ROULER!

HOTEL

Please reserve you room today at the Hilton New Orleans Riverside, located at Two Poydras Street, New Orleans, LA 70140.* Reserve online at https://bit.ly/2GrV44Z or by phone at 504-561-0500 by Saturday, June 24, 2018.

ROOM RATES:

Room Type	Single	Double	Triple	Quad
Standard	$ 168.00	$ 168.00	$ 168.00	$ 168.00
View	$ 179.00	$ 179.00	$ 179.00	$ 179.00
1 Bedroom Suite	$ 339.00	$ 339.00	$ 339.00	$ 339.00

Suites are reserved for NBA dignitaries and are granted only by NBA headquarters.

**One night's deposit required. Deposit is refundable up to 72 hours before start of reservation.*

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