

CONVERSATIONS WITH THE COALITION THAT PASSED THE RACIAL JUSTICE ACT:

FLOYD B. MCKISSICK, JR. INTERVIEW*

SPEAKERS: FLOYD B. MCKISSICK, JR.** & GENE NICHOL***

Floyd B. McKissick, Jr. was one of the architects of the Racial Justice Act and an absolute champion in pushing this legislation to enactment. His father, Floyd B. McKissick, Sr., was the lead plaintiff in the successful lawsuit to integrate the University of North Carolina School of Law, and he was also a renowned civil rights activist during the Civil Rights Movement. Growing up during that time shaped Floyd McKissick, Jr. into an active, engaged, and involved leader in the North Carolina Senate. In fact, during his tenure, Floyd McKissick, Jr. was honored with a myriad of awards, including the National Association for the Advancement of Colored People (“NAACP”) Trailblazer Award for Leadership (2009); the Legislator of the Year Award from the North Carolina Humane Society (2014); the Durham Committee on the Affairs of Black People’s Award for Strong, Passionate, and Effective Representation (2021); and many others. Floyd McKissick, Jr. currently serves as a member of the North Carolina Utilities Commission, and he recently took over as chair of the Durham Committee on the Affairs of Black People—Durham’s most prominent political-advocacy organization.

Floyd B. McKissick, Jr.

How’s it going this afternoon?

Gene Nichol

Good. How are you, Senator?

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Floyd B. McKissick, Jr.

Not too bad hanging in there, doing the best I can for an old son of a bitch, I guess. Keep going, going, going like the old Energizer Bunny. You know what I mean?

Gene Nichol

If you're an old son of a bitch, then I'm in trouble. I'll tell you that.

Floyd B. McKissick, Jr.

You're an older son of a bitch.

Gene Nichol

How do you like the Utilities Commission?¹ I'm grateful you would take some time from it.

Floyd B. McKissick, Jr.

I'm enjoying it. It's good work; it's very vigorous; it's intellectually demanding.

Gene Nichol

Well, we're all very grateful you [would] do this. This is a project to do, kind of, an oral history on the Racial Justice Act.² We're taping these interviews. And the *Law Review* is going to edit them and publish them. I think there are several theories for that. One, of course, is that we are increasingly losing some people who were very involved. What we really want is to get out of your mouth what happened, how it happened, why it happened.

So, to sort of start, you played, obviously, a very powerful role in the enactment of the Racial Justice Act. I want to begin by asking how you came to believe that such a statute was necessary [and] spend some time [talking] about what that coalition was like, how it developed, and what difference it probably

1. The North Carolina Utilities Commission was "created by the [North Carolina] General Assembly to regulate the rates and services of all investor-owned public utilities in North Carolina." *About the NC Utilities Commission*, N.C. UTILS. COMM'N, <https://www.ncuc.gov/Aboutncuc.html> [<https://perma.cc/S4XA-ZVAV>].

2. North Carolina Racial Justice Act, ch. 464, 2009 N.C. Sess. Laws 1213 (codified at N.C. GEN. STAT. §§ 15A-2010 to -2012), *repealed by* Act of June 13, 2013, ch. 154, sec. 5.(a), §§ 15A-2010 to -2012, 2013 N.C. Sess. Laws 368, 372.

made. So, first, tell me a little bit about your own journey on this: When did Floyd McKissick come to think that a Racial Justice Act was necessary for North Carolina?

Floyd B. McKissick, Jr.

Sure. I think in terms of my basic philosophical background and beliefs and growing up in a family, which was involved in civil rights. I even remember when my dad³ was involved in a case with this guy by the name of Marion Crawford⁴ when I was in eighth grade. [My dad was] trying to get a stay of execution on his behalf. I became intrigued about issues related to the death penalty and its constitutionality and whether it should exist in any form, and particularly the underlying racial implications of the way it was applied—disproportionately when it came to people seeking a death penalty when it came to African Americans.

I hadn't seen statistical data at that point in time—it was more anecdotal observations about if the victim was white and the alleged assailant was Black, [the] death penalty was likely going to be a part of that conversation and prosecutors were going to seek it. So, at that point in time, I had not seen data that supported what I would call my anecdotal observations related to the death penalty.

Now, once I got to the Senate, I became very active, engaged, and involved, and people looked at me for leadership on a broad variety of issues; whether they were entities that were nonprofit—such as [the] Land Loss Prevention Project—and things of that sort.⁵ As well as a broad variety of other Black economic development groups or interest groups that receive funding through [the North Carolina] General Assembly.

The Senate had a bad reputation for when those projects came up for funding, they would delete the funding from the budget. So, there were times

3. Floyd B. McKissick, Sr. was a renowned civil rights activist during the Civil Rights Movement of the 1960s. *Resolution: Honoring the Life of Floyd B. McKissick Sr.*, NAACP (2009), <https://naacp.org/resources/honoring-life-floyd-b-mckissick-sr> [<https://perma.cc/B2WE-Z5Q9>]. He was also the first Black student to be admitted to the University of North Carolina School of Law. *Id.* He was a leader in the Congress of Racial Equality (“CORE”) movement, served as legal counsel for North Carolina’s NAACP, and founded a law practice in Durham, North Carolina aimed at helping desegregation efforts. *Id.*; see also *Galleries: Floyd B. McKissick, Lawyer and Nationally Recognized Civil Rights Activist*, AND JUSTICE FOR ALL, http://andjusticeforall.dconc.gov/gallery_images/floyd-b-mckissick-lawyer-and-nationally-recognized-civil-rights-activist/ [<https://perma.cc/S5S7-A2UV>].

4. *Crawford v. Bounds*, 395 F.2d 297 (4th Cir. 1968).

5. The Land Loss Prevention Project (“LLPP”) is a nonprofit organization that serves “Black, indigenous, people of color and limited resourced farmers and landowners in North Carolina seeking to preserve their farms, homes, land and rural livelihoods.” *Services*, LAND LOSS PREVENTION PROGRAM, <https://www.landloss.org/services/index.html> [<https://perma.cc/WC5M-XTWF>]. LLPP provides “comprehensive legal services, technical assistance and community education.” *Id.*

when I would go and I would say, “Look, I’m going to file an amendment, and I’m going to put it in there, and I’m going to get the funding, and I’m going to put you guys on the spot.” And, of course, somebody [would] say, “Well, you know you’re going up against the majority leader, you’re going up against the president pro tempore of the Senate.” I became known as an advocate for issues related to housing and zoning, you name it—a broad variety of things.

So, having achieved a reputation within the Senate for being a champion of these types of issues, I had someone approach me about supporting and sponsoring the Racial Justice Act. There had been a version of the Racial Justice Act that had been filed.⁶ Well, it only was about three or four sentences, and it only applied to people that might have been potentially involved in capital cases moving forward. It did nothing about people that were on death row today.

Gene Nichol

Floyd, was that the bill that was introduced by Representative [Larry] Womble⁷ and Earline Parmon⁸ in the House in 2007?

Floyd B. McKissick, Jr.

I think so, yeah. It was [a] very abbreviated bill [and] didn’t say much of anything. Vernon [Malone]⁹ was supposed to be doing something with it in the

6. H.B. 1291, 148th Gen. Assemb., Reg. Sess. (N.C. 2007).

7. Larry Womble was a representative in the North Carolina House of Representatives who represented District 71 from 1995 to 2013. *Larry Womble*, BALLOTPEDIA, https://ballotpedia.org/Larry_Womble [<https://perma.cc/MC9K-5AJM>]. He was a “public-school teacher and administrator, community organizer, alderman, and state representative.” *WSSU Remembers Alumnus and Former N.C. State Rep. Larry Womble*, WINSTON-SALEM STATE UNIV. (May 19, 2020), <https://www.wssu.edu/about/news/articles/2020/05/wssu-remembers-alumnus-and-former-n.c.-state-rep.-larry-womble.html> [<https://perma.cc/52B2-QAWP>]. He is most known for his work advocating for the victims of North Carolina’s forced sterilization program and for the role he played in supporting the Racial Justice Act. *Id.*

8. Earline Parmon represented District 72 in the North Carolina House of Representatives from 2003 to 2013, and then as a senator in the North Carolina Senate she represented District 32 from 2013 to 2015. *Earline Parmon*, BALLOTPEDIA, https://ballotpedia.org/Earline_Parmon [<https://perma.cc/C8GF-ZWRM>]. She was the first African American woman in Forsyth County elected to serve on the North Carolina Senate and, prior to that, she was a school principal. Todd Luck, *Earline Parmon, Winston-Salem Public Servant, Dies at Age 72*, CHRONICLE (Mar. 17, 2016, 12:00 AM), <https://wschronicle.com/winston-salem-public-servant-dies-age-72/> [<https://perma.cc/KQ3Q-LD64>]. She was known for her commitment to fighting for justice and for her community. *Id.*

9. Vernon Malone was a senator in the North Carolina Senate from 2003 until 2009, when he died while in office. Lisa Sorg, *Sen. Vernon Malone has Died*, INDY WK. (Apr. 18, 2009), <https://indyweek.com/news/archives-news/sen-vernon-malone-died/> [<https://perma.cc/HG2Z-Y773>]. He represented District 14, a district that, at the time, encompassed part of Wake County. *Id.* Malone served Raleigh and the surrounding communities his entire career by guiding the desegregation of the

Senate. I remember one day we were meeting in Senate Democratic Caucus, and he brought up, “Well, what are we going to do with this bill?” They said we’re not going to hear it [and] he said, “Oh, okay.” That was the extent of his advocacy. It was like no fight whatsoever, you know? I mean, no advocacy, no impressing upon members the need for this [bill].

So, I was asked to take [the new version] up. I said, “Okay, I’m going to take it up.” But I was sitting there looking at what had been used before, and I was talking to a colleague and a friend, Dan Clodfelter,¹⁰ who was a senator from Charlotte. Dan [Clodfelter] is somebody who believed in the death penalty. I was opposed to the death penalty, but you had the two of us coming together. And one day, Dan [Clodfelter] and I started talking about what we could do with that bill.

Gene Nichol

I’ve heard from people that [Dan] Clodfelter was a good force in this, but I’m surprised at that.

Floyd B. McKissick, Jr.

That’s how it came about. Dan [Clodfelter] and I were pretty good friends. We saw a lot together, [and] when it came to issues with land use and zoning things—all types of issues—there were some parallels in our thinking and our thought process. So, when Dan [Clodfelter] and I started talking about this, we worked up a version, and then we said, “Let’s get Ken Rose on the phone.”¹¹ So, we did a conference call with Ken Rose, Dan [Clodfelter], and myself. And we started going through potential changes and potential revisions and ways we could actually give the bill some teeth, which included putting in a provision where, once the bill passed, for people on death row today, there would be this

Raleigh and Wake County public schools as a school board member and by advocating for social justice as a state senator. Barry Malone, *Vernon Malone—Brief Biography* (2017), <https://demo.wakeed.org/wp-content/uploads/2023/06/Vernon-Malone-Biography.2017.pdf> [<https://perma.cc/NY3V-62RX>].

10. Dan Clodfelter was a senator in the North Carolina Senate from 1999 until 2014, when he was named mayor of Charlotte, North Carolina. *Dan Clodfelter*, BALLOTPEdia, https://ballotpedia.org/Dan_Clodfelter [<https://perma.cc/LV7T-AQZA>]. He represented District 37, a district that, at the time, encompassed part of Mecklenburg County. *Id.*

11. Ken Rose was instrumental in getting the Racial Justice Act enacted and he was also “a key player in North Carolina’s lethal injection litigation, which has kept executions on hold here for more than a decade.” “Fearless & Relentless”—Ken Rose Retires After 35 Years on Death Penalty’s Front Lines, N.C. COAL. FOR ALTS. TO DEATH PENALTY (Jan. 11, 2017), <https://nccadp.org/ken-rose-retires-cdpl/> [<https://perma.cc/JVL9-2NW8>]. Ken Rose had a long career as an attorney defending death row inmates, who were often “damaged by poverty, racism, mental illness, intellectual disabilities, or abuse.” *Id.*; see also Ken Rose & Gene Nichol, *Conversations with the Coalition that Passed the Racial Justice Act: Ken Rose Interview*, 103 N.C. L. REV. F. 200, 200 (2025).

one-year window for them to file a petition seeking relief under the Racial Justice Act. That was the only way you could impact people who were already adversely impacted.

Gene Nichol

The initial proposal was just to be prospective, right?

Floyd B. McKissick, Jr.

Just prospective. That's it. So, Dan [Clodfelter] and I and Ken [Rose] worked on rewriting that bill, and that was the version that actually got later introduced.

Gene Nichol

And did that version include, from the first, the idea of being able to prove discrimination by statistics and data?

Floyd B. McKissick, Jr.

We did have language in there to that effect. I can remember different versions of it. Some of them looked at [having only data from] prosecutorial districts. Some of them looked at [having only data from] judicial districts. Some of them looked at prosecutorial districts and those that were contiguous to those districts, in terms of the data set that might be used. And then, the biggest contention was dealing with statewide data and whether statewide [data] would be a part of it.

So, we worked on different versions that had different sets and subsets for data that would be used. At that point in time, you had some Republicans that you could get on board, depending upon the way that language looked. So, you probably got—I'm going to think—about five Republican votes in favor of the original version of the bill that we were able to get out of the Senate and over to the House.

Gene Nichol

But you eventually lost all the Republican votes, right?

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Floyd B. McKissick, Jr.

Yes, we did, and that's because once it got over to the House, as I recall, we had the judicial districts, prosecutorial districts and county, but not statewide data. That's what it was, based upon my recollections.

Gene Nichol

And when I read Judge Weeks's¹² opinions that turned out to be very important data.¹³

Floyd B. McKissick, Jr.

Yeah, well, yeah. So, [statewide data] was in the one version of the Senate. But as I'm recalling, the one that passed did not have the statewide [data]. Then, we put it back in when it got to the House. And there, I also worked with Bill Faison¹⁴ to work on the bill. Bill [Faison] was a force over on the House side. And Bill [Faison] and I [had] actually worked together [when] I worked with his firm when I first came back [to] North Carolina.

Bill [Faison] and I had a working relationship from those days. And he was in [the North Carolina] House, so Bill [Faison], and I worked on the Racial Justice Act, and we put back in provisions that had come out of a Senate version. Some were what I call unofficial versions that we were just moving and circulating among members. We added a lot of that data back in there, as I recall, about the statewide statistics. And when we got that back in there, that led to pushback in the Senate, where you lost Republican support. You lost *the* Republican support. That was the killer, to be honest with you.

Gene Nichol

Besides [Dan] Clodfelter, who were your main partners in the Senate working on this?

12. Gregory Weeks was a judge for the Fourth Division of the Superior Court of North Carolina and "oversaw some of North Carolina's first hearings on whether racism played a part in death sentences" following the passage of the Racial Justice Act. Joe Killian, *Veteran NC Judges: State's Bail System is a "Scam," "Immoral," and in Need of "Massive Change,"* NC NEWSLINE (Apr. 4, 2018, 2:08 PM), <https://ncnewsline.com/2018/04/04/veteran-nc-judges-states-bail-system-is-a-scam-immoral-and-in-need-of-massive-change/> [https://perma.cc/Z8A7-3LEG].

13. Order Granting Motion for Appropriate Relief at 3, *State v. Robinson*, No. 91 CRS 23143 (Super. Ct., Cumberland Cnty., Apr. 20, 2012), *vacated*, 368 N.C. 596, 780 S.E.2d 151 (2015).

14. Bill Faison was a member of the North Carolina House of Representatives from 2005 to 2013, representing District 50. *Bill Faison*, BALLOTPEdia, https://ballotpedia.org/Bill_Faison [https://perma.cc/KJ5X-7D7N].

Floyd B. McKissick, Jr.

There weren't any. It was just [Dan] Clodfelter and me. That's it.

Gene Nichol

I take it there were more people involved on the House side, right?

Floyd B. McKissick, Jr.

[Bill] Faison was involved. You did have Larry Womble in the background. But they were just supportive of the concept. They were not involved with any of the details, whatsoever.

Gene Nichol

And Joe [Hackney]¹⁵ was supportive right from the get-go?

Floyd B. McKissick, Jr.

Joe [Hackney] was supportive, yeah. He lent his support through the person from his office working with me on it, and [through his work] with Bill [Faison] on it. Bill [Faison] offered some good lawyerly observations. It was kind of jointly, collaboratively, coming together—even making the name of the bill something that could not be modified. It was a big, long name.¹⁶ I remember

15. Joe Hackney “served 32 years in the North Carolina House of Representatives.” *Joe Hackney, EPTING & HACKNEY ATT'YS L.*, <https://eptingandhackney.com/hackney.shtml> [<https://perma.cc/7A4A-LZBY>]. He was Speaker of the House for several years and “also served as Majority Leader, Speaker Pro Tem, and Minority Leader before retiring from the House in 2012.” *Id.*

16. The name of the senate bill that was ratified was:

An act to prohibit seeking or imposing the death penalty on the basis of race; to establish a process by which relevant evidence may be used to establish that race was a significant factor in seeking or imposing the death penalty within the county, the prosecutorial district, the judicial division, or the state, to identify types of evidence that may be considered by the court when considering whether race was a basis for seeking or imposing the death penalty, including statistical evidence, and to authorize the defendant to raise this claim at the pretrial conference or in postconviction proceedings; to provide that the defendant has the burden of proving that race was a significant factor in seeking or imposing the death penalty and to provide that the state may offer evidence to rebut the claims or evidence of the defendant and in doing so to use statistical evidence as well as any other evidence the court deems relevant and material; to provide that if race is found to be a significant factor in the imposition of the death penalty, the death sentence shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole; to provide that this act is effective when it becomes law and applies retroactively, that motions under this act for those currently under a death sentence

there was a big, long provision, and we did it that way to avoid too many amendments coming forth, that type of thing.

But when it got back from the House to the Senate, that's when the real fight began. And when I say the fight began, I had to really, really work hard, because I had a president pro tempore that did not understand the uniqueness and sensitivity of what [the Racial Justice Act] meant to the African American community. As well as the majority leader, who felt like it would be the kiss of death if it passed in the form that it was.

Gene Nichol

That [majority leader] was Senator [Tony] Rand?¹⁷

Floyd B. McKissick, Jr.

Senator [Tony] Rand, oh yeah. Now, Tony [Rand] and I had known each other for years. We had a relationship, and he respected me enormously, and I respected him enormously. And [Tony Rand and Marc Basnight¹⁸] wanted me to just let it die. I mean, Tony [Rand] was known for being very ruthless and very vindictive.

I was very strong in terms of advocacy and saying, "Look, you know, African Americans are always there as a loyal voting bloc every election cycle whenever you call upon us, whatever you need from us." We passed an antibullying bill, which was important to many people who were concerned

shall be filed within one year of the effective date of this act, and that motions for those whose death sentence is imposed on or after the effective date of this act shall be filed as provided in this act.

S.B. 461, 149th Gen. Assemb., Reg. Sess. (N.C. 2009).

17. Tony Rand, "a Democrat, served in the state Senate from 1981 to 1988 and again from 1995 to 2009. For much of his tenure, he was the Senate majority party leader, chairman of the Senate Rules Committee and a right-hand man for Senate President Pro Tem Marc Basnight." Paul Woolverton, *'We've Lost a Giant'—Former State Sen. Tony Rand Dies at 80*, FAYETTEVILLE OBSERVER (May 1, 2020, 11:13 AM), <https://www.fayobserver.com/story/news/state/2020/05/01/l-squowersquove-lost-giant-squo-mdash-former-state-sen-tony-rand-dies-at-80/41756059/> [https://perma.cc/33U2-6X26 (staff-uploaded archive, dark archive)].

18. Marc Basnight "entered politics in 1977 as a member of the state transportation board and a fundraiser for Democratic Gov. Jim Hunt, and in 1984, he was elected to the state Senate." Rob Christensen & Danielle Battaglia, *Marc Basnight, One of NC's Most Powerful Senate Leaders, Has Died*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/article248136430.html> [https://perma.cc/26YA-KKDY (staff-uploaded archive, dark archive)] (last updated Dec. 31, 2020, 10:36 AM). He went on to "serve[] in the Senate for 26 years, the last 18 as president pro tempore." *Id.* During that time, he was "widely considered the most powerful man in North Carolina." Catherine Kozak, *A Coastal Reporter Remembers the Late Sen. Marc Basnight*, COASTAL REV. (Aug. 19, 2022), <https://coastalreview.org/2022/08/a-coastal-reporter-remembers-the-late-sen-marc-basnight/> [https://perma.cc/P2MM-TFYF].

about issues related to people's sexual orientation and gender identity. I went through a long series of bills that we had passed. I said, "It's time that we get a return for our support and our loyalty and for what we have done, and this is important to the African American community, and this is important to me, and I'm not going to let it die." I said, "We can put it up for a vote, and if I win, I win. If I lose, I lose. I will accept that fate. I will accept that fate, whatever that fate tends to be."

Understand that at that point, I think we only had six or seven African American members in the Senate, and that was about it. We had some conservative Democrats that were members, and they came from some very challenging districts that might have put them in trouble if they supported the bill, and I let them know—for people from those districts—they didn't have to support the bill as long as I had a majority. So, I kept counting my votes and counting my votes. Jeremy Collins¹⁹ was representing [the North Carolina Coalition for a Moratorium]²⁰ back then. He was supposed to have been staying on top of the headcount, but his headcounts—in terms of people voting for it—and mine were very different, and I could see that the numbers were not what he thought they were.

So, we had a pretty strong and serious meeting among the Democratic members—the Senate Democratic Caucus—and laid out the cards for what we needed to do in terms of supporting the Racial Justice Act in the modified form that had come back from the House and what it meant. I remember Charlie Dannelly,²¹ who was [a] state senator out of Mecklenburg County. Charlie [Dannelly] did not say an awful lot. He was kind of quiet, but he was well

19. Jeremy Collins was the director of the "N.C. Coalition for a Moratorium" on the death penalty. Dan Kane, *In N.C., Death Penalty Gets Rarer*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/state-politics/article10354208.html> [<https://perma.cc/Q5D5-GPC9> (staff-uploaded archive, dark archive)] (last updated Sept. 22, 2009, 7:58 AM) (quoting Jeremy Collins: "At some point we are going to have to look at our standards of decency . . . Do we continue to execute people under our old laws?").

20. The North Carolina Coalition for a Moratorium encompassed "all North Carolinians committed to reforming the death penalty in our state." *What Was the North Carolina Coalition for a Moratorium?*, N.C. COAL. FOR A MORATORIUM, <https://www.ncmoratorium.org/> [<https://perma.cc/MYH8-ZVUF>]. It was "based in Durham, NC [with] activities [that] extend[ed] throughout the state via the Western North Carolina Coalition for a Moratorium and the Eastern North Carolina Coalition for a Moratorium." *Id.* Today, the North Carolina Coalition for a Moratorium operates as the North Carolina Coalition for Alternatives to the Death Penalty, "a statewide coalition of member organizations and individuals committed to ending the death penalty and creating a new vision of justice." *Mission & History*, N.C. COAL. FOR ALTS. TO DEATH PENALTY, <https://nccadp.org/mission-history/> [<https://perma.cc/FAU2-R7ZM>].

21. Charlie Smith Dannelly began his political career "in 1977 when he was elected to the Charlotte City Council, where he served until 1989. In 1995, he was elected to the North Carolina Senate, representing the 38th District." Jalon Hill, *Community Honors a 100-Year-Old Charlotte Trailblazer, Charlie Smith Dannelly*, Q CITY METRO (Aug. 19, 2024), <https://qcitymetro.com/2024/08/19/100th-birthday-charlie-smith-dannelly/> [<https://perma.cc/Q6ZJ-WYDW>]. Charlie Dannelly also "served as Deputy President Pro Tempore and was a member of several key committees." *Id.*

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regarded and well respected among Senate members. So, he was vocal in his support for the bill at that time, too.

Gene Nichol

Did Tony Rand ever come around?

Floyd B. McKissick, Jr.

Only after the Senate, in our Democratic Caucus, voted to support the bill when it came up on the calendar. It was agreed that we would take it up in the caucus, and whatever the caucus decided to do, that was what we would do. I was very vocal and passionate in my presentation to our caucus members and was not reserved in the words that I used. I was very direct. And those were not tones that you typically saw within our caucus.

Gene Nichol

Would you mind just describing a bit of what that speech was like?

Floyd B. McKissick, Jr.

I went through every aspect of the death penalty and the way it had historically been used and why [the Racial Justice Act] was important and what [it] would allow. And [I] said, basically, "It doesn't matter whether you're opposed to the death penalty or whether you support the death penalty. The Racial Justice Act is needed and it's necessary because we need to know that when the death penalty is imposed, that it's free of racial bias." And that's how I got [Dan] Clodfelter on board, too.

Gene Nichol

I've seen you quoted before with that sentence, and it made me wonder if that was basically the elevator [pitch] version of what the statute was: Whether you're for the death penalty or against it, you [have] to be opposed to having a death penalty that's based on race, or at least that is affected on race. This is the one thing we all ought to be able to agree on.

Floyd B. McKissick, Jr.

Agree upon and embrace. That's what got people like [Dan] Clodfelter on board. That's what got John Snow²² on board and a number of others who really were pro-death penalty. They were not anti-death penalty. You had to talk about [how the Racial Justice Act] is about justice and equality and not having the decision made to pursue the death penalty or the decision to impose the death penalty based upon race. That's the only way you're going to get the votes.

Gene Nichol

From what I read, it sounds like the governor was adamant to present it that way too—"I'm not opposed to the death penalty [or] for the death penalty, but we got to have a fair death penalty."

Floyd B. McKissick, Jr.

That's exactly right. [Beverly] Perdue²³ was a friend. I can remember one time when we were talking about [the] Racial Justice Act, I said, "Bev, I need to talk to you, make sure where you are with this thing, and what we need to do, and what it's looking like." She said, "Alright, I'm headed to the airport." She'd swing by the General Assembly in her big suburban and I'd pop in and ride with her to the airport, and somebody would give me a ride back.

She was, by all means, somebody who was more of a centrist to conservative [views]. She was a centrist, a conservative Democrat. So, it was that kind of mood, that kind of environment. Those were the type of things I had to appeal to and let them know how African American members had come through on issues that were important during that legislative session and in other recent legislative sessions that they might not have felt as intense about.

But, we had [the] caucus meeting, and the caucus voted in favor of supporting the bill when it came up on the floor, and even John Snow indicated that he would support it up in the western part of the state. I said, "Well, John, you don't have to. You're in a tough district. I don't want to see you lose. I don't

22. John J. Snow, Jr. was a senator in the North Carolina Senate from 2005 to 2011 representing District 50. *John Snow (North Carolina State Senator)*, BALLOTPEdia, [https://ballotpedia.org/John_Snow_\(North_Carolina_state_senator\)](https://ballotpedia.org/John_Snow_(North_Carolina_state_senator)) [<https://perma.cc/6FSM-B8KH>].

23. Beverly Perdue was a public-school teacher before starting her political career as a member of the North Carolina House of Representatives. *Beverly Perdue*, NAT'L ASSESSMENT GOVERNING BD., <https://www.nagb.gov/about-us/board-members/beverly-perdue.html> [<https://perma.cc/UEH4-GAJY>]. She then served "five terms in the North Carolina Senate before she was elected as the 32nd Lieutenant Governor. She then became the 73rd governor of North Carolina from 2009 to 2013, the state's first female chief executive." *Id.*

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want to see you compromise. I think we got the votes.” [Same thing with] Charlie Albertson²⁴ from down [in] the eastern part of the state. I said, “Charlie, if you’re in a trouble district, don’t feel like you have to support it, as long as I got enough votes to get this thing out of here.” You [have to] understand, out of the thirty-two or [thirty]-three Democrats we had back then, there were only seven of us that were really kind of progressive members and that was about it.

Gene Nichol

How big was your margin, then? How many Democrats could you lose?

Floyd B. McKissick, Jr.

Well, we had enough. We didn’t lose any, in the end, I think. I don’t remember the final vote count, but we did okay. We had enough votes to get it through.

Gene Nichol

You never worried much about whether the governor would sign it?

Floyd B. McKissick, Jr.

No, I was not worried about the governor signing it. No, in fact, I think I had had some conversations with her, and she was okay with the bill. But, you know, it was probably an earlier version of the bill. But Bev [Purdue] was pretty good about these things. She understood the importance of it, and I think she also understood the need to address concerns of African Americans as a significant part of her voting bloc.

24. Charlie Albertson “served 11 terms as a Democrat representing Duplin County in the state legislature before retiring in 2011. Nicknamed ‘The Singing Senator,’ he performed songs at campaign rallies and recorded jingles for UNC-TV, the N.C. Department of Transportation and the N.C. Department of Agriculture.” Paige Masten, Opinion, *Former NC Lawmaker Says Gun Violence ‘Breaks My Heart.’ So He Wrote a Song.*, CHARLOTTE OBSERVER, <https://www.charlotteobserver.com/opinion/article275417381.html> [<https://perma.cc/UDX6-XPGK> (staff-uploaded archive, dark archive)] (last updated May 16, 2023, 12:27 PM); see also THE SINGING SENATOR (PBS North Carolina 2024); Denver Hollingsworth, *Meet Charlie Albertson, the Singing Senator*, PBS N.C. (July 22, 2024), <https://www.pbsnc.org/blogs/lifestyle/meet-charlie-albertson-the-singing-senator/> [<https://perma.cc/HPX4-H8TY>].

Gene Nichol

I read that when you introduced it, you did a press conference, probably with Larry Womble and Earline Parmon, and y'all had some [Black] death row exonerees with you there. Do you remember that?

Floyd B. McKissick, Jr.

I can remember Darryl Hunt²⁵ being over there, and Chris Mumma²⁶ was around, and People of Faith Against the Death Penalty.²⁷ Yeah, that whole group was active and involved. But, you know, we had a couple of press conferences over a period of time. It's hard to kind of separate them in my mind as to when some of them might have occurred.

I think there was even a press conference where Dr. Barber²⁸ was there, but that might have been when it was over in the House. I remember Dr. Barber being very passionate about the House version of the bill versus the Senate version. And I didn't have a problem with that—I mean, I did what I needed to do to get it out the Senate to go to the House, knowing that we might tweak it further when it got to the House.

25. Darryl Hunt was “arrested, charged, and convicted of a 1984 North Carolina murder he didn’t commit. Although DNA results proved his innocence in 1994, it took another 10 years of legal appeals to exonerate him.” *Darryl Hunt*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/darryl-hunt/> [<https://perma.cc/7UT7-R2Q7>].

26. Chris Mumma serves as the Executive Director of the North Carolina Center on Actual Innocence. *Leadership and Staff*, N.C. CTR. ON ACTUAL INNOCENCE, <https://nccai.org/about-us/leadership/> [<https://perma.cc/BP6N-BLWL>]. She is also responsible for the “establishment of the only Innocence Inquiry Commission in the United States.” *Id.* She is the “lead litigator” of the North Carolina Center on Actual Innocence, and she “dedicates her passion for justice to representing those fighting for their freedom, policy reform focused on increasing the reliability of convictions, and contributing her expertise to others across the country in investigation and reform.” *Id.*

27. People of Faith Against the Death Penalty was “[f]ounded in North Carolina in 1994” with a mission “to educate and mobilise faith communities to act to abolish the death penalty in the United States,” particularly in the South. *People of Faith Against the Death Penalty*, WORLD COAL. AGAINST DEATH PENALTY, <https://worldcoalition.org/membre/people-of-faith-against-the-death-penalty/> [<https://perma.cc/53RD-6R22>].

28. Dr. Rev. William J. Barber, II is:

President and Senior Lecturer of Repairers of the Breach; a Professor in the Practice of Public Theology and Public Policy and Founding Director of the Center for Public Theology and Public Policy at Yale Divinity School; Co-Chair of the Poor People’s Campaign: A National Call For Moral Revival and Bishop with The Fellowship of Affirming Ministries. . . . Bishop Barber served as senior pastor of Greenleaf Christian Church, Disciples of Christ for thirty years and as president of the North Carolina NAACP from 2006–2017, and on the National NAACP Board of Directors from 2008–2020.

Our Founder, REPAIRERS BREACH, <https://breachrepairers.org/about-us/our-founder/> [<https://perma.cc/3399-JULY> (staff-uploaded archive)].

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Gene Nichol

[Do you] remember what the difference was between the two?

Floyd B. McKissick, Jr.

Statewide data, I'm thinking, was the main component, at the time. There might have been some other provisions. I'd have to go back and see what they were. But I know we had put in the one-year window before it left the Senate.

Gene Nichol

When you were thinking about how you got it started and what you chose to do, there had been a Racial Justice Act in Kentucky,²⁹ right?

Floyd B. McKissick, Jr.

Yeah, it was a two-sentence bill. It said nothing.

Gene Nichol

What [was] y'all's opinion on the Kentucky bill?

Floyd B. McKissick, Jr.

I didn't think much of it. I think it was the only other Racial Justice Act in the country. And I think it was like one paragraph.

Gene Nichol

And I think that it didn't allow statistics and data, and you couldn't prove things on a statewide basis, certainly? In fact, you could only sort of show discrimination in your particularized case.

Floyd B. McKissick, Jr.

That's what I'm remembering, as well. Yeah, it was radically different. [The North Carolina Racial Justice Act] was far broader, more expansive, and

29. KY. REV. STAT. ANN. § 532.300 (2024); see also Justin R. Arnold, Note, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky's Racial Justice Act*, 12 WASH. & LEE J. C.R. & SOC. JUST. 93, 102–07 (2005) (outlining the passage of the Kentucky Racial Justice Act and how it paved the way for other bills to follow).

the only similarities would have been the names. But if you looked at them in terms of substantive differences, they were vastly, vastly different.

Gene Nichol

I have studied a little bit, very modestly, North Carolina's history of race and the death penalty and how horrifying it is. Did that history affect your views about the statute or, maybe, how you sold the statute to folks, or was it not widely known?

Floyd B. McKissick, Jr.

I would say, "probably not widely known" is a good way of putting it. I relied more upon appealing [to] the fact that we needed to do it—even if you support the death penalty, we need to be free of racial bias. That was the only way to build a coalition broad enough to get it through. You had to, almost, accept from the outset that there were people who believed in the death penalty and the need for that type of punishment, who you needed to have a vote from. If you said you were just against the death penalty, it would have died. You would have never gotten a broad enough base of support to have a Racial Justice Act.

Gene Nichol

My old friend and colleague Jack Boger³⁰ had, as I recall, done a study with another [professor] at UNC, which had looked at the use of the death penalty and race in North Carolina.³¹ And [the study] had documented the sort of shocking disparities, particularly with looking at the white victim side of it. Was that sort of part of the conversation, or not?

Floyd B. McKissick, Jr.

The fact that if there was a white victim and an alleged assailant who was Black—that was definitely stated by me on many occasions. But in terms of actually pointing back to documents and studies, there wasn't a need because, I

30. John Charles Boger "joined the UNC Law faculty in 1990 and served for 27 years, until his retirement in 2017 as Wade Edwards Distinguished Professor of Law." *John Charles Boger*, UNC SCH. L., <https://law.unc.edu/people/john-charles-boger/> [<https://perma.cc/3372-WMQF> (staff-uploaded archive)]. His areas of expertise included civil rights and discrimination and constitutional law. *Id.*

31. Isaac Unah & Jack Boger, *Race and the Death Penalty in North Carolina*, reprinted in DEATH PENALTY INFO. CTR. (2001), <https://deathpenaltyinfo.org/resources/publications-and-testimony/studies/race-and-the-death-penalty-in-north-carolina> [<https://perma.cc/2RSS-BEJD>].

think, almost everybody accepted that as a precept.³² That it happened often enough that it ought to give us all concern. So, it wasn't as if it was debated, but it was something that had to be said. It had to be articulated, and you had to say it more than once, and do it in a way that people really, seriously got it. You had a core of people there with intrinsically good values in terms of not wanting to see that type of racism tolerated in the criminal justice system. So, you could do it that broadly and build that base.

Gene Nichol

I wanted to delve into a little bit this notion of the coalition that came together to support [the Racial Justice Act]. There was a North Carolina Coalition for a Moratorium, at first, and then there was the Center for Death Penalty Litigation,³³ [and] People of Faith Against the Death Penalty. Then, very importantly from several sources that I've heard, Reverend Barber entered the fray with the [National Association for the Advancement of Colored People] ("NAACP")³⁴ and the [Historic Thousands on Jones Street] ("HK on J") coalition.³⁵ That sort of upped the energy and the juice, in terms of helping to secure [the Racial Justice Act's] passage. Is that the way you would describe things too, Floyd?

32. That is, everyone accepted as a precept that the death penalty was disproportionality sought in circumstances where the victim was white, and an alleged assailant was Black. *Id.*; see also FRANK R. BAUMGARTNER, MARTY DAVIDSON, KANEESHA R. JOHNSON & ARVIND KRISHNAMURTHY, DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 69–86 (2017) (finding that “when a black male kills a white female, odds of execution nationally are more than 10 times greater than when a black male kills another black male”); Liza Smith, *Anti-Death Penalty Project Aims to Raise Awareness of, Combat Capital Punishment*, DAILY TAR HEEL (Oct. 10, 2023), <https://www.dailytarheel.com/article/2023/10/university-anti-death-penalty-project> [<https://perma.cc/7DKS-3N9P> (staff-uploaded archive)] (quoting Frank Baumgartner: “It just fits into a historical narrative about the need to protect the flower of southern womanhood from ravaging Black men. . . . It’s ridiculous—and the idea that it is still so apparent in the statistical patterns today—I think should give us all pause.”).

33. The Center for Death Penalty Litigation is “a non-profit law firm that represents people on North Carolina’s death row and serves as a clearinghouse for accurate and timely information about the North Carolina death penalty.” *About*, CTR. FOR DEATH PENALTY LITIG., <https://www.cdpl.org/about/> [<https://perma.cc/U5KH-ZUYG>].

34. The North Carolina State Conference of the North Carolina chapter of the National Association for the Advancement of Colored People’s (“NAACP”) work “is rooted in racial equity, civic engagement, and supportive policies and institutions for all marginalized people.” *About*, NAACP, <https://ncnaacp.org/mission-vision/> [<https://perma.cc/4TRY-GJA2>]. The organization is “committed to a world without racism where Black people enjoy equitable opportunities in thriving communities.” *Id.*

35. The Historic Thousands on Jones Street (“HK on J”) was a march first called for by the North Carolina State Conference of the NAACP in 2007 “to support [a] 14-point public policy strategy” that included abolishing the death penalty, which the movement characterized as racially biased. HISTORIC K (THOUSANDS) ON JONES STREET, N.C. NAACP 1–2 (2007), <https://ncnewslines.com/wp-content/uploads/2007/01/hkonj-flyer.pdf> [<https://perma.cc/8MWR-THQK>].

Floyd B. McKissick, Jr.

I think that it was good to have that energy and enthusiasm.

Gene Nichol

But it was also more straightforward, political decision-making?

Floyd B. McKissick, Jr.

It was really, down hard, political decision-making and working through that process, the nuance of the making of the sausage that you're about. I don't think that those groups in their press conferences were really persuading the Senate members and House members, to be candid with you. I mean, I think it was good to have that support, but, if anything, I know once Dr. Barber was criticizing the bill after it got out of the Senate, there were a lot of people in the Senate at one point you had to talk to and say, "Don't let this get to you. You did the right thing. You did the courageous thing. Don't let the criticism make you want to back away from the bill."

There were some people ready to back away from the bill if they were going to be criticized like that—what they thought was a good thing and a courageous thing and the right thing to do. And that was when the bill had passed the Senate and gotten over to the House. Whereas, previously, you had a bill that said basically nothing that couldn't even get heard in the Senate. So, you had to build a base to get it out, and then once you got it out, you could enhance it, you could improve it, you could bring it back. But there were some people who were not taking well through the criticism. It almost alienated some of them, to be candid. Some of them feeling like, "We did a lot of work. We did this, we did that." And they had. [The bill] had gone further than it [had] ever gotten in the past.

Now, can we do better? The answer is absolutely yes, and we did. We enhanced it, we improved it, we brought it back. But I think that was just a result of the way things work at the [North Carolina] General Assembly. A lot of times there's a bill, [and] you say, "Let's just get it out the Senate, we'll get it in the House, and work on it." And that's what you do. Or you say, "Let's get it out the House, we'll get it in the Senate, and we'll work on it." So, I would say it was a lot more political maneuvering. I think the coalition was good because it heightened attention and elevated the profile of the bill. So, in that respect, it was a positive thing because you did have a multicultural coalition coming together. That was important and that was significant, and I think, symbolically, that was a very, very positive thing.

Gene Nichol

I've been looking this year—in part, because of the sixtieth anniversary of the Civil Rights Act—at the 1964 Civil Rights Act³⁶ and the Racial Justice Act. And both of them are stunning to present eyes and ears because they're both so ambitious, so earth-changing, so singular, and both involved outside forces and then very strategic inside choices, like you're talking about, in order

to achieve success. And I suppose that's just an indication you likely frequently need both of those things?

Floyd B. McKissick, Jr.

Exactly. You need to have them both, and it's critical to have them both. And I think that having the coalition of groups was very, very positive, and particularly the multiracial component of it, of people coming together. It was nice to see those coalitions, nice to see the people present, nice to see them coming to the chamber and listening. I'm sure that some of the groups made the rounds to the offices of members. They needed a lot of persuading. They might have appeared to have been on board to get them out of their office.

Gene Nichol

Let me shift gears for just a second and talk about the opposition to the bill.

It was important for you guys to say, "Whether you're for the death penalty or against the death penalty, we need a fair death penalty." The reverse of that—I think [Paul] "Skip" Stam,³⁷ and some others were saying—"This is just a covert attack on the death penalty itself—it's a way of getting the moratorium on the death penalty, it's a pretext about the death penalty and race." So, was that a big part of their debates—these folks are just out to kill the death penalty, and they can't get the death penalty killed straight up, so they're doing it through the [Racial Justice Act]?

36. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h).

37. Paul "Skip" Stam was first elected to serve as a member of the North Carolina House of Representatives in 1989 and again in 2003, serving his eighth and last term in 2015–16. *Welcome to My Policy Website!*, PAUL STAM, <https://paulstam.info/> [<https://perma.cc/RZ4G-KFKT>]. During that time, he "served as the House Republican Leader (2007–2010), the House Majority Leader (2011–2012), and the Speaker Pro Tem (2013–2016)." *Id.*

Floyd B. McKissick, Jr.

Well, I think for folks like Paul Stam, that would be an accurate assessment. And I think there's some people who also did not believe that there was racial bias. They didn't buy the underlying concept. They were not convinced that it was true. So, they were not supporters for two reasons, perhaps. First, they were big advocates of the death penalty, but secondly, they did not believe in the racial bias aspect, whatsoever. That was their worldview, that was their reality, and that's the way they saw things through their lenses. It's just the way things are.

Gene Nichol

Would you just describe, as the architect of it, how the Racial Justice Act is designed to work, what kind of cause of action it gives you, and why?

Floyd B. McKissick, Jr.

The purpose of the bill was to say that race should not be a factor in a prosecutor's decision to bring a death penalty case or, likewise, in a jury's decision to impose the death penalty. There was language in there where you could have brought something up from the outset, not just waiting for relief after the fact.

One of the critical things was putting in that window of time where folks on death row at that time—I think it was like 159 or 160 people—would have one year to file a potential claim if they felt they were entitled to relief. So, I think that provision became the one that was the most significant in impacting those that were on death row.

And it wasn't a "get out of jail for free card." It was basically saying that if your petition seeking relief under the Racial Justice Act was successful, the only thing that happened is that, rather than being potentially exposed to [the] death penalty, you're now going to remain in jail for the rest of your life without the possibility of parole.

To be candid with you, if I would have had my preference, I would have preferred to have come back in a few years and provided for a new trial.

Gene Nichol

Could you talk about that for a minute? Because it did occur to me that there's a claim of inconsistency there in that you require showing that race had an impact on the trial and then you don't demand a new trial.

Floyd B. McKissick, Jr.

Yeah, I would have preferred to have had language there that basically said a person was entitled to a new trial. But had that language been there, the bill would have never passed. Dead on arrival.

You [have to] be politically sophisticated enough to know what is going to be politically feasible and possible that you can get enacted. And then, perhaps, if politics [had remained the same]—if you had not seen a Republican majority come in and later a Republican supermajority—there would have been a potential, in my mind, of going back and revisiting [the Racial Justice Act] to say why not give these people a new trial, rather than just say that they remain in jail the rest of their life without possibility of parole.

Now, obviously they would have had tremendous pushback from the district attorneys if that had been in there from the outset, but there was pushback from the district attorneys from the beginning. I mean, they fought this. The [North Carolina Conference of District Attorneys]³⁸ didn't want anything to do with the Racial Justice Act and what it was suggesting about the conduct of prosecutors in our state.

Gene Nichol

Could you describe, in a little more detail, what the opposition from the district attorneys was like?

Floyd B. McKissick, Jr.

Well, they were very vigorous in their opposition. They did not believe [the Racial Justice Act] had any basis in reality and felt that it was unnecessary and would produce a lot of work for district attorneys to have to prepare for an onslaught of cases. They didn't know how many cases there would be, and I had no idea how many cases it would be. I did not envision that virtually everybody on death row would file a claim for relief.

Gene Nichol

You didn't think that was going to happen?

38. The North Carolina Conference of District Attorneys “was established as a state agency in 1983.” *About the Conference*, N.C. CONF. OF DIST. ATT’YS, <https://www.ncdistrictattorney.org/about/> [<https://perma.cc/KA5R-3Y2J>]. Its mission is “[t]o serve the offices of the District Attorneys in their pursuit of justice and improvement of the administration of criminal law for the benefit of the people of North Carolina.” *Id.*

Floyd B. McKissick, Jr.

I didn't think that was going to happen. When I found out it had happened, I said, "Holy shit, we're going to get pushback."

Now, if you had told me that fifty percent might have filed, I would have said, "That's feasible." But I did not envision virtually everyone doing so.

Gene Nichol

Including the white defendants, right?

Floyd B. McKissick, Jr.

That's exactly right, yeah. So, is that something I envisioned? No.

When I found out that is what had occurred, I said, "Ho-ly." I knew, right then, that [the Racial Justice Act] was going to be reconsidered. That there would be tremendous pushback to modify the bill. And you just had to be ready, you just had to be prepared because the mood was going to change.

And it did change, a variety of things changed that caused that to happen—you had change in the makeup of the General Assembly. I think you ended up with—on the House side—five conservative Democrats who were voting to override the governor's vetoes on occasion. That type of thing.

Gene Nichol

And a majority on the Republican side, too.

Floyd B. McKissick, Jr.

Exactly. So, I mean, the whole nature of the political ball game changed. But yeah, the [North Carolina] Conference of District Attorneys were adamant in their opposition, vocal in their opposition, and did all that they could to kill the bill, and they were used to getting their way. They were used to getting their way.

In fact, it was interesting because I guess they weren't used to somebody with the drive and the fight to push things the way I was pushing stuff. And I didn't mind pushing it because I was independent. There wasn't somebody writing a paycheck for me. I had my own law practice. Nobody was going to direct me and tell me what to do. There was nobody in the background telling me that this wasn't smart. I mean, the only thing I knew [was] that I was fighting a battle that needed to be fought, and if I lost that battle, that would

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be okay. It would be an honorable thing to have tried and attempted if I was not successful.

I think many people in my position would have felt intimidated by the powers [that] be and would not have fought so hard, whether it was the majority leader, the president pro tempore, or the Conference of District Attorneys.

Gene Nichol

Do you remember what the floor debates were like in the Senate?

Floyd B. McKissick, Jr.

You know, I think we had more debates getting it out of the Senate than when it came back. When it came back, we did all the fighting in the Senate caucus, for the most part.

Gene Nichol

So, I was [going to] ask, the real fight would have been in the caucus?

Floyd B. McKissick, Jr.

In the caucus, yes, rather than on the floor.

Gene Nichol

And those were quite spirited, I assume?

Floyd B. McKissick, Jr.

They were quite spirited. Now, there was spirited debate between Thom Goolsby³⁹ and myself, which is, I'm sure, in the archives of transcripts from the Senate. You would [also] see spirited debate when it came up for revision and then for repeal.

39. Thom Goolsby, an attorney who manages a criminal defense and personal injury law firm in New Hanover County, served as a member of the North Carolina Senate representing District 9 from 2010 to 2014, a district which at the time, included New Hanover County. *Thom Goolsby*, BALLOTEDIA, https://ballotpedia.org/Thom_Goolsby [<https://perma.cc/6CRS-F5ZS>]; *About Thom Goolsby*, GOOLSBY L. FIRM, <https://www.goolsbylaw.com/about> [<https://perma.cc/HU3B-69LL>].

Gene Nichol

Let me back up a little bit on and hit some of the specifics of the bill.

Why was it thought necessary to allow statistics and data disparities, unrelated to the particular case, in the Racial Justice Act application on a statewide basis, too? Turning to data and statistics, [as] you've already indicated, caused some real grief in some potent quarters. Explain why it was necessary, Senator.

Floyd B. McKissick, Jr.

Well, it was necessary to be able to use data that was statistically quantifiable [and] that could verify what we believed to be the case, anecdotally. For example, in exclusion of people from juries: I think we anecdotally knew that African Americans that were qualified were being stricken, but to the extent that it could be quantified and validated, was a wholly different factor. And if we could use statistics to show that, it would be insightful to a judge. It creates this inference that you can draw from in conducting your analysis and looking at, kind of, the totality of the circumstances. The statistical data could accurately quantify what we intuitively thought or believed to be the case, but [what] we could not substantiate otherwise. Does that make sense?

Gene Nichol

Yeah, it does. The first time I read Judge Weeks's marvelous and powerful opinion,⁴⁰ I was shocked how much it seemed like some graduate student's data discourse. I mean, it [included] so much sophisticated discussion of this statistical analysis and everything, just not what you expect to see in a judicial opinion.

Floyd B. McKissick, Jr.

No, you wouldn't. And I remember reading it as well, and I can remember quoting from Judge Weeks's decision in debate on the Senate floor when the bill was coming up for repeal or modification, as the case might have been. I thought it was an excellent decision.

It was very powerful and extremely well written. It was excellent to go there and find a couple of passages that were particularly persuasive and put that information into the record. Use it as best you could, even though you knew how the vote was going to end up in the end. You still had to fight. You

40. Order Granting Motion for Appropriate Relief, *supra* note 13, at 167.

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don't surrender. You don't give up just because you might be outnumbered. You just [have to] have that fight in you, man.

Gene Nichol

[Did] the United States Supreme Court open or [give] an invitation for state legislatures to look at this empirical data and statistical proofs in the *McCleskey*⁴¹ case?

Floyd B. McKissick, Jr.

Yeah, it was the *McCleskey* case. It's been a long time since I've seen *McCleskey*, but, yes, it opened up that door. In fact, Paul Stam would always talk about *McCleskey*.

Gene Nichol

He probably liked *McCleskey*, but not the invitation.

Floyd B. McKissick, Jr.

No, not the invitation.

Gene Nichol

It's interesting to think you could almost have seen that case as pointing to an obligation for state legislators to be serious about these issues in a way that the United States Supreme Court was unwilling to be serious. I wasn't crazy about that invitation. I thought they were just trying to pass the buck.

Floyd B. McKissick, Jr.

It could have been read that way, absolutely. But, you know, the right legislature reading it and then coming up with what we did—it was interesting.

Gene Nichol

They didn't expect anybody to take them up.

41. *McCleskey v. Kemp*, 481 U.S. 279, 284 n.2 (1987).

Floyd B. McKissick, Jr.

No, I don't think anybody thought they'd take them up on it. And since we did it, I know there's a California Racial Justice Act,⁴² but I've never gone back to read it, and I don't know how far it goes.

Gene Nichol

I'm a constitutional law person myself, and I wondered if you guys thought of it this way: What [the Racial Justice Act] does is it takes cases like *McCleskey*, which demand a showing of subjective intent of discrimination,⁴³ which is virtually impossible to prove, and moves the standard away from that particularized intention to a framework that's a lot more like what's used in the 1964 Civil Rights Act, where you can prove massive disparity based on data. And that kind of shifts the burden in recognition that it's almost absurd to demand that people prove subjective motive from folks [when] it's almost got to come out of their lips. And it's not going to come out of their lips, in the same way that in the employment context people are not going to say, "Oh yeah, we don't hire applicants who are Black." But then you look at the data, [and] it's so overwhelming, and it kind of shifts the burden to justify it. And I thought the Racial Justice Act kind of works that way. Were you conscious of borrowing a little bit from the civil rights legislation legacy?

Floyd B. McKissick, Jr.

I'd like to say that we were, but in reality, I think, we were just trying to uniquely craft something that we thought would work, to be candid with you. I'd like to say that we consciously thought about that, but in reality, we didn't.

Gene Nichol

I doubt that would have helped you in some corners, anyways. But actually, the framework is similar.

42. California Racial Justice Act of 2020, ch. 317, 2020 Cal. Stat. 3705 (codified at CAL. PENAL CODE §§ 745, 1473, 1473.7); see also *Racial Justice Act Symposium*, 29 BERKELEY J. CRIM. L. 1 (2024).

43. *McCleskey*, 481 U.S. at 292 ("Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.' A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination 'had a discriminatory effect' on him. Thus, to prevail under the Equal Protection Clause, *McCleskey* must prove that the decisionmakers in *his* case acted with discriminatory purpose." (footnotes omitted) (first quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967); and then quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985))).

Floyd B. McKissick, Jr.

It's similar, yeah, but I can't say [that] when I was working with [Dan] Clodfelter or Bill Faison or any of the staff at the General Assembly that were attorneys [that we were thinking about that framework]. You can't imagine how many different versions [of] this bill there actually were floating at different points in time that didn't make it into the actual mainstream as an official amendment. But I don't recall that analogy consciously being drawn at that time. Even though, I think that hearing your articulation of it, it does make sense. And maybe somewhere there was unconsciously a desire, or at least an awareness, that led to some of it being structured that way, but not something being articulated and conscious in our stream of thought.

Gene Nichol

Floyd, did you all think about and approve—or even solicit—the notion that the Racial Justice Act might be used to allow a white defendant to challenge the exclusion of Black folks from the jury? Did you think about that?

Floyd B. McKissick, Jr.

I cannot say that we thought about it when the bill was being written. At the same time, when the claim came up—or came to be—it forced you to think about it [at] that time. Is this feasible? Is this possible? Is this a legitimate articulation of what we were designing [the bill] to do?

Gene Nichol

So, Floyd, we haven't had any executions, I think, in North Carolina since 2006.

Floyd B. McKissick, Jr.

I think that's correct.

Gene Nichol

How big [of] a role do you think the Racial Justice Act has played in that record?

Floyd B. McKissick, Jr.

I think it's played a significant role slowing things down. Likewise, the whole issue existed about the mixture of medications that should be used, and likewise, the oath that doctors take, in terms of administering these medications, as kind of a toxic cocktail, to execute people.⁴⁴ There's been so many things that played in that role, but I think that the Racial Justice Act has been a significant factor.

Gene Nichol

I read [that] at one of the hearings—I guess one of the ones Judge Weeks did—that Bryan Stevenson⁴⁵ said this: “Eradicating racial bias in our courtrooms requires a break with the past.”⁴⁶ I assume that you agree with that?

Floyd B. McKissick, Jr.

Yeah, absolutely. And it's interesting, because I have spoken, off the record, with a person who's a superior court judge as well as a justice from our Supreme Court [of North Carolina], not currently serving. In fact, neither one of them are currently serving today, but they called me over to say, “Thank you. Thank you. Thank you for filing that bill and getting it enacted because we all know as judges what's going on in these courtrooms.” Interestingly enough, yeah. And I heard the same thing from somebody who had been previously on the Supreme Court [of North Carolina]: “It was a bill that needed to be filed. We all knew what was going on as judges; we didn't do anything about it.” It was a bill that needed to be passed.

44. BAUMGARTNER ET AL., *supra* note 32, at 195–214 (2017) (surveying different methods of execution, including lethal injection, and discussing the legal and social challenges that have been raised against lethal injection as a method of execution, including the “refusal of medical professionals to participate in executions”).

45. Bryan Stevenson is the “founder and Executive Director of the Equal Justice Initiative, a human rights organization in Montgomery, Alabama.” *Bryan Stevenson*, EQUAL JUST. INITIATIVE, <https://eji.org/bryan-stevenson/> [<https://perma.cc/8D6V-55GM>]. Bryon Stevenson is a “widely acclaimed public interest lawyer who has dedicated his career to helping the poor, the incarcerated, and the condemned.” *Id.* See generally BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (reflecting on efforts to overturn the wrongful conviction of Walter McMillian for the murder of Ronda Morrison).

46. Bryan Stevenson, *NC Supreme Court Should End Racial Bias in Jury Selections*, NEWS & OBSERVER, <https://www.newsobserver.com/opinion/article234076852.html> [<https://perma.cc/QC3F-MG82> (staff-uploaded archive)] (last updated Aug. 25, 2019, 7:48 AM) (“Eradicating racial bias in our courtrooms requires a break from the past. It will take courage and sustained effort. And, yes, it will be difficult. But nothing less than the integrity of our courts and our commitment to true justice is at stake. At a time of much division and conflict, we should all be united in our support of the proposition that racial bias in jury selection is unacceptable in North Carolina.”).

Gene Nichol

Along those very lines, I noticed that when it passed, Joe Hackney said that he'd spent his life in North Carolina courtrooms, and he'd seen the subtle impact of race the whole time that he practiced law, and it was his hope that [the Racial Justice Act] could begin to end that day.⁴⁷ Kind of echoing what other folks were saying. Then, I saw that Phil Berger⁴⁸ said that this law has nothing to do with justice and nothing to do with guilt or innocence—kind of taking a different view.⁴⁹

Our mission is to look at the enactment of the Racial Justice Act, but I wanted to violate that for just a minute, since you were in the fray when it was repealed. Would you mind talking a little bit about—from your point of view, just your opinion—why you think it was repealed?

Floyd B. McKissick, Jr.

Well, I think first of all, you had a new Republican, conservative majority that [was] in place. They did not believe in racial bias in our courtrooms, they did not believe the bill was necessary, and you had tremendous pressure from the Conference of District Attorneys to repeal it because of all the work that they were having to put into these Racial Justice Act claims or cases at the time. As I believe, it was kind of a convergence of those factors that led to its repeal. [The Racial Justice Act] was very short lived.

Gene Nichol

Despite the fact that the empirical studies had found this intense history of discrimination, and then, the first four cases come up and it's proved out the wazoo—I guess one [response to] that is that we need to fix the racially biased

47. *NC Gov Signs Law on Race Bias Test in Death Cases*, WCNC CHARLOTTE, <https://www.wcnc.com/article/news/local/nc-gov-signs-law-on-race-bias-test-in-death-cases/275-374753148> [https://perma.cc/22L6-3ECM] (last updated Nov. 1, 2009, 3:07 PM) (quoting Joe Hackney: "I've spent most of my life in courtrooms across North Carolina and I have seen the subtle impact of race in our courtrooms . . . [The Racial Justice Act] opens the courtroom door for those who believe that they can show that it had an impact on their case.").

48. Phil Berger "was first elected to the State Senate in 2000. His colleagues elected him minority leader in 2004, and President Pro Tempore in 2010 after Republicans won a Senate majority for the first time since the 19th Century." *About Senator Phil Berger*, PHIL BERGER N.C. SENATE, https://www.philberger.org/about_phil_berger [https://perma.cc/LZ8K-PE8U (staff-uploaded archive)].

49. *NC Gov Signs Law on Race Bias Rest in Death Cases*, *supra* note 48 (quoting Phil Berger: "Make no mistake, this law has little to do with justice and nothing to do with guilt or innocence. For the first time in North Carolina, the statistical composition of the inmates on death row will outweigh the facts of a particular case in the determination of punishment.").

system or another is we just need to kill the messenger and make sure that we don't know of this intense racial discrimination reflected in our own house?

Floyd B. McKissick, Jr.

And I think that's an excellent characterization. They [would] rather bury their heads in the sand, like the proverbial ostrich puts [its] head in the sand and pretends that nothing's going on around. And I think that's it. They did not want to acknowledge the validity of the data and statistics. It was there; cases had been heard; [the North Carolina] Conference [of] District Attorneys is embarrassed by what's coming out. They're embarrassed by these little *Batson* cheat sheets that tell the prosecutors in the classes when their district attorneys get together and they get instructions about what you use and all the *Batson* objections.⁵⁰ They're embarrassed by what's coming out in the cases that are being heard, and they don't want to see it heard. You got a receptive General Assembly who is conservative, who doesn't believe in discrimination to start with, and, notwithstanding the data, they don't want to see the cases heard at all. They want to repeal it all. And that essentially motivated—inspired them to do what they could do as expeditiously as they could do it.

Gene Nichol

And when they go into their caucuses, rather than having a raucous fight like you guys might have had, they have all white caucuses almost all the time.

Floyd B. McKissick, Jr.

I think that would be fair to say. Certainly, on the Senate side, it would have been all [white]. [There] might have been one Black Republican on the House side.

Gene Nichol

Floyd, you're now retired from the Senate [and] on the Utilities Commission, but, for folks like me, you are famous for your successful work on and after the Racial Justice Act, which is surely [one of] your great career accomplishment[s]. But your successful work on expungement, second chance

50. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). For an example of a "*Batson* cheat sheet," see Defendant-Appellant's Brief at 10, *State v. Tucker*, 385 N.C. 471, 895 S.E.2d 532 (2023) (No. 113A96-4); see also Jacob Biba, *Did Prosecutors Use a 'Cheat Sheet' to Strike Black Jurors in North Carolina Death Penalty Case?*, APPEAL (Sept. 4, 2018), <https://theappeal.org/did-prosecutors-use-a-cheat-sheet-to-strike-black-jurors-in-north-carolina-death-penalty-case/> [<https://perma.cc/HEH6-Q96K>].

initiatives, looking at the impact that a biased criminal justice system has on people's lives moving forward—you were surprisingly successful on that, obviously, [given you were] able to get bipartisan support on that front. How come? Why is that so different than the revisited Racial Justice Act?

Floyd B. McKissick, Jr.

Well, the thing that I did with a lot of those expunction bills was to try to find that common ground that we could find. And I'm a very persistent son of a bitch. If I have as a goal to get something done, I really work hard to do it. And I try to build those bridges of communication and understanding where there may be a Republican member of the Senate or the House where we may be 180 degrees apart—polar opposites when it comes to issues dealing with a woman's right to choose or issues dealing with immigration. But find the common ground when you can.

I can remember one time, it was an expunction bill—the first automatic expunction bill I got passed—where a guy up in Washington, D.C., came to me—African American gentleman—and he said, “Senator McKissick, let me tell you about a problem I encountered and see what you can do to help fix it.” And he explained to me how he had been living in Los Angeles, and he parked his car one day in a location, went into a store, and while he was exiting the store to go back to his car, a police officer saw him, handcuffed him, took him to jail, put him under like a six-figure bond, [and] charged him with some form of robbery. They later found out, looking at video, that it wasn't this particular gentleman, and ultimately, over some period of time, [the] charges got dismissed. But he had this record, whenever somebody would pull up his name, for being charged with this robbery offense. And he said, “What can you do to fix this kind of issue?”

So, I just gave it some thought, and I said,

The best thing I could do to come up with a fix is to make sure—[in] cases involving mistaken identity like yours—that somebody like you doesn't have to wait six months or a year or more or hire an attorney and go into court to seek an expunction. You get it automatically.

But I also knew there'd be a lot of people who wouldn't believe in mistaken identities, particularly when it came to African American people. So, I said, let me put a hook in there [that] they could understand. And I said, “We're going to put in there: identity fraud, because anybody can become a victim of identity fraud.”

Gene Nichol

So, that's what a smart lawmaker does. You don't just holler at them. You put something in there that would appeal to them.

Floyd B. McKissick, Jr.

Exactly. And you explain to them how identity fraud is rampant. It could happen to anybody—could be you, it could be your neighbor, could be a family member. And you want to be able to get these automatic expunctions.

Well, I wrote that bill up, I approached a couple of senators about it, and got them to buy in, as [the] primary co-sponsor to the bill, and got it through the Senate, got it through the House, and even Governor McCrory⁵¹ held a bill-signing ceremony.⁵² He gave me a ceremonial pin at the end. It was the first bill in the country that allowed for these automatic expunctions to begin.

So, you come up with something that people can live with. You find those middle grounds. You say, alright, rather than waiting fifteen years, you can now wait five years to be eligible for expunction, even if you have committed an offense but paid your debt to society—whether that is restitution, whether that is serving a short sentence. Whatever it may be, you're now entitled to get your records clean so you can go out there and you can get a job. You can go out there and get housing. You're not disqualified from certain student loans, potentially. And you talk to your Republican colleagues and say, "Now, look, you know, if we keep some of these people employed then we might not have recidivism."

Gene Nichol

If they can't get a house and they can't get a job and they can't get any benefits, the only option is doing something illegal.

Floyd B. McKissick, Jr.

That's exactly right. You build these bridges with alliances, and people who you might have thought there wasn't much common ground with because you find some common ground that they can understand. And if you have those

51. Pat McCrory, who was originally from Guilford County, North Carolina, served as the seventy-fourth governor of North Carolina from 2013 to 2016. *Gov. Pat McCrory*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governor/pat-mccrory/> [<https://perma.cc/KG42-VCLA>].

52. Act of Aug. 6, 2015, ch. 202, 2015 N.C. Sess. Laws 520 (codified as amended at N.C. GEN. STAT. § 15A-147); Office of Governor Pat McCrory, *Senate Bill 233*, YOUTUBE, at 00:22–6:09 (Aug. 6, 2015), https://www.youtube.com/watch?v=rTR_aRclGg [<https://perma.cc/8ZJX-VC8A>] (on file with the North Carolina Law Review).

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dialogues, and they're meaningful, and they're thoughtful, and you respect the confidentiality of what people say to you in the privacy of their offices, you get a whole lot done.

I found that was true of amendments to bills all the time. There was hardly a session of the General Assembly where I wasn't working on some amendment to a bill to make it a better bill to mitigate damages. And, once I worked up what I thought would be fair and reasonable and thoughtful, in committee meetings I would raise questions and get the professional staff of the General Assembly to validate my concerns and respects. But I'd go out and come up with a fix for it, and I'd take it back to the committee members and say, "Now this is what I think would work in terms of a fix. What are your thoughts?" And [I] would get their input and then say, "Alright, do you want to do this as proposed committee substitute at the next meeting, or do you want to run it as an amendment on the floor, or is it okay if I run this amendment?"

If you get selfless about your approach to getting it done and not looking for credit [for] every damn thing, you can get two-thirds of things done you want to get done. But don't worry about whether you get the credit or not, as long as you're fixing it.

Gene Nichol

Well, Senator, I've taken you longer than I was supposed to, so let me apologize for that. This has been so marvelous.

Floyd B. McKissick, Jr.

Kind of you to say so. My privilege to participate.

Gene Nichol

You're a great hero, Floyd, and it's nice to have the transcript of it.