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S. HRG. 107–922

OVERSIGHT OF THE DEPARTMENT OF JUSTICE–CIVIL RIGHTS DIVISION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

MAY 21, 2002

Serial No. J–107–81

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
86–453 PDF WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
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OVERSIGHT OF THE DEPARTMENT OF JUSTICE–CIVIL RIGHTS DIVISION

TUESDAY, MAY 21, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Present: Senators Kennedy, Feingold, Schumer, Durbin, Edwards, Kyl, and Sessions.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. We will come to order. We are just winding up a vote, Mr. Boyd, on the floor, so the other Members will be coming in and out.

I apologize to you for the delay.

It is a privilege to welcome Assistant Attorney General Ralph Boyd to the Senate Judiciary Committee. Today's hearing is part of the Committee's important responsibility for conducting oversight of the Civil Rights Division of the Justice Department.

Since the Division was established 45 years ago, it has been at the forefront of our Nation's continuing struggle to guarantee equal justice for all Americans. Last year, in an address to the Convention on the Elimination of Racial Discrimination, Assistant Attorney General Boyd eloquently discussed the significant progress made over the last half-century toward ending discrimination and fulfilling the promise of equality. That progress came largely from a genuine and sustained commitment by the Division and its leadership to vigorously enforce the Nation's civil rights laws, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act, the Americans with Disabilities Act, and the Civil Rights Act of 1991.

We are proud of the progress we have made, but civil rights is still the unfinished business of the Nation. In recent months, many of us have become increasingly concerned about whether the Civil Rights Division is living up to its important mission and whether its rhetoric can be reconciled with the realities of the record on enforcement.

In the past year, the Division has changed its substantive position on at least two significant employment discrimination cases, adversely affecting the interests of hundreds of women, African Americans, Hispanics, and Asians. In both cases, the Division's ac-

tions raise serious doubts about the strength of its commitment to end all forms of discriminatory employment practices. Equally troubling, at a time when referrals from the Equal Employment Opportunity Commission continue to rise, the Division has drastically cut back on filing new cases in this area. In the last 16 months, the Division has filed only two new Title VII Cases, compared to an average of 14 cases a year since 1980.

On another important civil rights issue, hate crimes, the Division has been reluctant to fully engage in the fight against these senseless acts of violence. Attorney General Ashcroft recently compared the fight against hate crimes to the fight against terrorism, describing hate crimes as criminal acts that run counter to what is best in America, our belief in equality and freedom. Yet, the Civil Rights Division has remained deafeningly silent on the bipartisan hate crimes bill in Congress that would provide it with greater tools to combat these senseless acts of violence.

As a matter of fact, we are trying to bring that legislation up on the floor of the U.S. Senate and the majority leader requested that we be able to at least proceed to it. There has been an objection filed. Soon we are going to have to vote on cloture on hate crimes, if not at the end of this week, the vote will take place right after the Memorial Day recess. It is enormously important legislation which has passed with bipartisan support, 56 to 44, a year ago and passed the Senate actually unanimously before that time.

Its position on hate crimes is in stark contrast to the Department's vigorous call for the new and expanded enforcement authority to fight terrorism after September 11.

These concerns are heightened by recent personnel moves and changes in longstanding hiring practices in the Division, changes that bear a disturbing resemblance to those called for in a recent *National Review* article, and that article states, and I quote: "Republicans should work to gain more control over the Civil Rights Division and its renegade lawyers. The forces of opposition have burrowed in and they are willing to wait out any GOP regime. Yet a few obvious steps would begin to address fundamental problems. Instead of putting a single section chief on what Boyd calls a temporary task force, the administration should permanently replace those it believes it cannot trust. Four or five new section chiefs would do a world of good. At the same time, Republican political appointees should seize control of the hiring process. They do not need to make sure that every new lawyer is a member of the Federalist Society. Simply hiring competent professionals who do not come from left-wing organizations would be an enormous improvement." I can only hope that the Civil Rights Division is not and will not make policy and personnel decisions based upon the wishes or recommendations of the *National Review*. Fulfilling the promise of equal justice is too important a goal and too difficult a challenge to allow ideological considerations to influence the importance of the Nation's civil rights laws.

The Committee looks forward to Assistant Attorney General Boyd's testimony today. We will continue to conduct regular oversight hearings on the Civil Rights Division in the future and I look forward to asking questions on a number of important issues.

Mr. Boyd, we welcome you if you want to proceed.

[The prepared statement of Senator Kennedy appears as a submissions for the record.]

STATEMENT OF RALPH F. BOYD, JR., ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. BOYD. Thank you, Senator. Senator, if I may, I would like to make a brief opening statement, if I might.

Senator KENNEDY. All right, please.

Mr. BOYD. Thank you, Senator Kennedy and Members of the Committee. I would like to thank the Committee for inviting me here today to discuss the important work of the Civil Rights Division of the Department of Justice. I appreciate this opportunity to let you know what the Division has accomplished, answer your questions about our work, and listen to your concerns about what I believe has been our thoughtful and vigorous enforcement of our Nation's civil rights laws. I also want to thank your respective staffs, that is the staffs of many of the Members of this Committee, for the courtesies that they have extended in meetings with me prior to this hearing.

Let me begin by saying that it is, indeed, a unique privilege to serve as the Assistant Attorney General for Civil Rights. The laws enforced by the Civil Rights Division reflect some of America's highest aspirations, that is, to become a society that provides for equal justice under law, a society that effectively protects the most vulnerable among us, and a society whose citizens not only protect their own individual freedom and liberty, but also champion the individual freedom and liberty of others who may be different from them.

As William Jennings Bryan once said: "Anglo-Saxon civilization has taught the individual to protect his own rights. American civilization will teach him to respect the rights of others." And while the continuing need to enforce our civil rights laws confirms that we have not yet achieved a society free of prejudice and the discrimination it brings, there is no doubt in my mind that America is better off for making the journey, and I am, therefore, honored and humbled to be charged with the heavy responsibility of enforcing our Nation's civil rights laws at the Department of Justice.

Senator when I agreed to serve as Assistant Attorney General and the Senate saw fit to confirm the President's confidence in me, I came to the job as a former prosecutor and a professional litigator by training and experience and it is from that perspective that I report to you on the work and the accomplishments of the Civil Rights Division.

Let me first speak generally and say that the work of the Division goes forward carefully, but aggressively. I recall during the confirmation process that many Senators sought assurances that I would continue to enforce certain statutes. I told you then that I was committed to vigorous enforcement of the law and I can confirm today that the Division is doing precisely that.

But I can also commit to something else, and that is not only are we aggressively using the tools at our disposal, but we are doing so with the professionalism and the care that Americans expect from their Federal law enforcement officials. As I am sure will become clear in this hearing today, there will no doubt be individual

issues, individual cases about which the distinguished Members of this Committee will have questions or concerns and I look forward to addressing those questions and concerns.

At the outset, however, let me say that, reviewed as a whole, the Division's commitment, my commitment to protecting the civil rights of all Americans is clear. Looking at our enforcement record in its entirety, I believe it is inarguable that the Civil Rights Division has been aggressive, productive, and fair in its civil rights enforcement efforts to date.

For example, last month, Attorney General Ashcroft presided over the signing ceremony for an unprecedented agreement between the Department of Justice and the city of Cincinnati that will effect major reform in the Cincinnati Police Department. A year ago, the city of Cincinnati, Ohio, was literally and figuratively smoldering in the wake of riots touched off by controversial police shootings of young African American men. One year later, after thorough investigation by the Civil Rights Division, led by the Special Litigation Section, and after intense negotiations, there is a positive outlook in Cincinnati. There is a framework for the healing that city thoroughly needs, a framework resulting from the coming together and the working together of many parties with differing views, parties like the ACLU, the Black United Front, and the Fraternal Order of Police, and Cincinnati is not an isolated case.

Since 1994, when Congress passed the statute that we use to investigate patterns of police misconduct, there have been seven settlements between the Department and various police departments allowing for real reform in those departments. Four of these settlements were accomplished in the 6 years between 1994 and January 20, 2001. Three were accomplished in the year and 4 months between that date and today.

Other areas of enforcement tell a similar story. We enforce the Civil Rights of Institutionalized Persons Act, the primary Federal law protecting those who are among society's most vulnerable, the elderly, the mentally ill, inmates, children, and others who reside in State-run institutions, and under this administration, the Civil Rights Division has authorized new investigations of 24 separate facilities under CRIPA. I have personally authorized 18 of those investigations since last July. By way of comparison, the Division initiated investigations of 15 facilities in fiscal years 1999 and 2000 combined.

I am also gratified to report that my Division's efforts to combat backlash crimes against Arab, Muslim, Sikh, South Asian, and other Americans who may appear to be of Middle Eastern origin since the attacks on our country on September 11 have proceeded aggressively. As I have said in the past, our Federal civil rights laws are meaningless unless those they are designed to protect first the fundamental right to physical safety.

The Civil Rights Division, working with the 56 FBI field offices and 94 U.S. Attorney Offices and State and local authorities across America has investigated approximately 350 incidents since September 11, ranging from the attempted firebombing of a mosque to outright murder. Through ongoing cooperation among Federal and State and local authorities, 80 criminal prosecutions have been initiated and they are bearing fruit.

For example, 2 weeks ago, a defendant in Federal court in Seattle pled guilty to a case we indicted in the days following September 11. He stood accused of setting fires to cars at a mosque and attempting to shoot worshippers when they exited the building. These prosecution efforts have proceeded in tandem with our outreach efforts to communities and individuals affected by these backlash crimes. Since September 13, I have spoken out repeatedly, indeed, between 20 and 30 times in closed door sessions and in town hall meetings across America against violence and threats aimed against vulnerable people and affected communities.

I could tell you, Senator Kennedy and Senator Feingold, about many other achievements, most of which are further detailed in the written testimony I have submitted for the record today. I could describe our continuing prosecution and our stepped-up prosecution of human trafficking cases or our continuing efforts to protect minority voting rights by scrutinizing, free of politics or other improper influence, almost 7,000 pre-clearance submissions under the Voting Rights Act since February of 2001, submissions containing over 21,000 voting changes for the Civil Rights Division to review. I am proud to say that the hardworking Section V staff has never missed a deadline in this endeavor.

I could also talk at length about the $500 million settlement we reached with the State of Mississippi to end segregation in its institutions of higher learning or the $300 million settlement we achieved with the city of Yonkers, New York, to close the education and achievement gap between minority and white students in that town.

I could also talk about the sexual harassment cases we have initiated in our Employment Section, targeting a county fire department or a school district in the American Southwest, or the redlining cases we have approved in the Housing Section of the Civil Rights Division. There is also our role in the President's New Freedom Initiative focusing on protecting the rights of the disabled.

Senator Kennedy, Senator Feingold, I have been litigating cases for the better part of two decades, both as a prosecutor serving the American people and the citizens of the Commonwealth of Massachusetts, where I come from, and as a private lawyer. As a result, I have a sound basis, I think, from which to say that both the quality and the quantity of civil rights enforcement work coming out of the Civil Rights Division during the 9 months I have had the privilege of leading that division is exceptional by any fair and reasonable measure.

But as you referred to in your opening remarks, Senator Kennedy, we can do more, we need to do more, and I am committed to doing more. I hope that today's hearing will help us do that. I hope that today's hearing will help in that effort.

So with that in mind, I look forward to your questions and your concerns and I, again, thank you for giving me the opportunity in a public forum to talk about these very important issues.

Senator KENNEDY. Thank you very much. We will include your entire statement in the record.

Mr. BOYD. Thank you, Senator.

Senator KENNEDY. Thank you very much.

[The prepared statement of Mr. Boyd appears as a submission for the record.]

Senator KENNEDY. If we could, I would like to draw your attention to the *Brennan* case, a rather notorious case involving discrimination in New York City. We have been joined by Senator Feingold and Senator Kyl. I ask if we might have 15-minute rounds to give us an opportunity to get into some detail. Then if we are joined by others, we can shorten that time so everyone gets a chance to speak.

Let me quote from the brief that the Civil Rights Division of the Justice Department filed in the Second Circuit in the *Brennan* case, a very important case in terms of discrimination: "The retroactive seniority provision is constitutional because it is narrowly tailored to serve the city's compelling government interest in remedying the adverse effects caused by its civil service examination and recruitment practice." Does the Department still hold the view that all of the relief that has been granted in the *Brennan* case, including the retroactive seniority provision, is constitutional?

Mr. BOYD. The answer to that, Senator Kennedy, is that we certainly do with respect to 27 of the beneficiaries of the settlement agreement entered into between the Department of Justice and the Board of Education of the city of New York, which the Second Circuit has vacated but is continuing to be litigated vigorously by the United States through the Civil Rights Division, and let me explain the position fully, if I may, Senator.

The *Brennan* case that you refer to is a case where the Board of Education of the city of New York used a screening test for applicants for permanent positions as custodial engineers in the New York City school system and that screening test had a disparate impact on minority applicants. That is to say, they did not do well under the terms of that screening test to the point at which the permanent hiring numbers were woefully deficient for the school board in those positions.

The Civil Rights Division brought a civil suit against the city of New York and the New York Board of Education under Title VII, the disparate impact provisions of Title VII, arguing that that screening examination was not sufficiently job-related nor was it consistent with business necessity. The Civil Rights Division and the Department of Justice entered into a settlement agreement with the city of New York, an agreement that provided retroactive seniority for almost 60 individuals who were given permanent employment status and retroactive seniority under the terms of that settlement agreement.

That settlement agreement was appealed by intervenors. That settlement agreement was vacated by the Second Circuit, which remanded the case to the District Court to allow the intervenors, who alleged that they had been harmed by the retroactive seniority given to the beneficiaries under the settlement agreement, to fully conduct discovery with respect to their claims and litigate their claims.

Since that time, we have vigorously defended the relief in that case with respect to the 27 beneficiaries who actually took the examination and failed the examination and, therefore, were harmed

by what we alleged were the discriminatory practices that the school board engaged in.

Senator KENNEDY. If I can, in your brief before the Second you intervened on behalf of *all* of the figures——

Mr. BOYD. We brought the suit originally——

Senator KENNEDY. I have the brief right here. I can read it to you. It was on behalf of all those covered in the initial settlement.

Mr. BOYD. The brief was on behalf of——

Senator KENNEDY. That has changed now. You changed your position with regards to the brief which covered all of those and now you are saying that you are only covering a part of them.

Mr. BOYD. What we have said, Senator, is that we are aggressively defending the settlement agreement with respect to the 27 individuals who actually took the exam and were harmed. With respect to the remaining 32, what we have told the court is because they did not take the examination and were not harmed, therefore, by the examination, that there has to be some other theory of entitlement in that at present, there is not a sufficient factual predicate in the record to demonstrate that they were actually harmed, and, therefore, there is not yet a sufficient factual basis to support a Title VII remedy of retroactive seniority, nor does the factual record at present support the constitutionality of that remedy with respect to the 32 who were not the test-takers and not harmed by the test.

But let me make very clear——

Senator KENNEDY. Five minutes are already up and I have asked one question, the answer to which we now know is that in the brief. You initially defended all, and now you draw a distinction. That is a change of position. You gave the reasons for that.

Mr. BOYD. Senator, if I may, just 20 seconds——

Senator KENNEDY. All right.

Mr. BOYD [continuing]. But to be very clear, we have not dropped the remaining 32 who did not take the test.

Senator KENNEDY. Who is defending them?

Mr. BOYD. What we are doing and what we have said to the court is during the course of discovery in this case, we will work diligently and vigorously to try to develop a factual record that will demonstrate or would demonstrate that the remaining 32 were actually harmed and, therefore, entitled to relief. But what we have said is the record does not presently demonstrate that, so we cannot claim it. We have an obligation——

Senator KENNEDY. It did demonstrate that according to the Justice Department in its brief. We will let the record——

Mr. BOYD. That is——

Senator KENNEDY. I want to move on, Mr. Boyd. I have asked one question and it has taken seven-and-a-half minutes and I would like to see if we can get to the facts on this. In the April 17 letter to the judge presiding over the case, the New York Corporation Counsel said, and I quote: "The Department has abruptly refused to be bound by the settlement that it proposed, signed, moved this court to approve, and defended on appeal before the Second Circuit." I have the letter right here.

It goes on to say that, "Until 3 months ago, your office was coordinating a defense with the city and then abruptly cut off com-

munication on the day the papers were due to be filed in court." Someone who is unknown to the corporation counsel contacted them and said the trial team was being removed from the case and you were no longer defending the relief granted to 32 of the 59 beneficiaries. That is what you were just saying.

I wonder, has the Department done anything to inform the 32 beneficiaries that it no longer supports the relief that they have been granted?

Mr. BOYD. Senator, we do not represent the 32.

Senator KENNEDY. Do you know who is representing them?

Mr. BOYD. I do not, Senator. Let me tell you this, and I want to be very clear about it. It may seem like a fine distinction, but it is an important one. We are defending that settlement agreement that the Second Circuit has vacated. It has been vacated by the Second Circuit, but we continue to defend it consistent with our obligations under the law as well as our obligations under the rules of professional responsibility and ethics that all lawyers, especially government lawyers, are bound by.

So what we are saying is, with respect to part of the relief to the 27 who took the test, we are flat out defending them. With respect to the 32 who the record does not currently demonstrate were harmed by any discriminatory practice, we are trying to develop that factual record so we can take the position that they are entitled to retroactive seniority. But the record does not yet reflect that. Now, a position——

Senator KENNEDY. Well, if I can, the Second Court did not vacate the joint defense agreement. It did not vacate that agreement. The Clinton Administration Justice Department found justification for coverage of all, which I have just illustrated here. The court did not vacate the joint agreement. You say that basically you have not changed the positions in the case. Then why did you remove the original trial team from the case, write a letter to the presiding judge telling him that a firewall has been erected to ensure that any information the city provided to the departmental attorneys previously assigned to these actions under any claim or privilege would not be compromised?

There has only been one other instance of the Civil Rights Division implementing a firewall, and that was years ago. For what possible reason would the Justice Department effectively set these 32 individuals who are being protected by the previous administration adrift?

Mr. BOYD. Senator——

Chairman KENNEDY [continuing]. I have the documents here, if I had the chance.

Let me ask you a specific question. Have you or anyone on your staff at any time had any contact with the Center for Individual Rights about the *Brennan* case?

Mr. BOYD. I do not recall that I have, Senator. I do not know the answer to that question. I can find that answer out and get back to you, but they are——

Senator KENNEDY. You would remember that——

Mr. BOYD. My understanding——

Senator KENNEDY. You have got a superb memory. This is the other intervening group. You would know whether——

Mr. BOYD. Senator, I——

Senator KENNEDY. OK. All right. Fair enough. Fair enough.

Mr. BOYD. Let me at least answer the question, if I may, respectfully, Senator. I would assume that we have, since they are a litigating party, so it would be hard for me to imagine that we would not have had some conversation with other litigants in the case.

But let me say something very quickly. I did not remove anyone from this case. The prior litigating team—the trial team in this case forwarded a request to the Office of Professional Responsibility within the Department of Justice to say that because the position that they had taken essentially with respect to the status of the 32 offerees who we are now saying there is not sufficient evidence in the record at this time to support relief with respect to them, but we are trying to develop that factual record, because of that modification in our position, and it clearly is a change in position. I have to look at the record as is presented to me and look at it in view of the facts and the law and make an independent, straight call on that, and we have taken a different position with respect to those 32 offerees and we expect and hope to be able to defend relief with respect to them.

But the Office of Professional Responsibility, having been petitioned by the trial team, the prior trial team in this case, gave the judgment that there should be a firewall between that trial team and the new trial team and that is the reason that counsel was changed. I did not remove them. I had nothing whatsoever to do with that, Senator, and it was perfectly proper for them, that is, the prior trial team, to raise the issue with the Office of Professional Responsibility. We do that when difficult ethical issues and responsibilities are raised and we follow their judgment.

Senator KENNEDY. Well, it is puzzling that they would be dismissed, considereing the success they have had, but that is not where my question is. My question was the contact you had with the Center for Individual Rights about the *Brennan* case. I understand your answer is that you may have.

Mr. BOYD. I suspect, Senator, that almost certainly we did. I just do not have firsthand knowledge of it, so I am not——

Senator KENNEDY. Will you provide for us when and where you had contact, and if the line attorneys on the case were aware or were involved?

Mr. BOYD. I would be happy to, Senator, and again, I am not trying to be coy at all. It is just that I have not been involved in the day-to-day-litigation——

Senator KENNEDY. Fair enough.

Mr. BOYD [continuing]. But the Center for Individual Rights is a litigant and I would imagine we would have talked to them.

Senator KENNEDY. OK, if you can get us that information. Before moving into another subject, the New York Corporation Counsel may have said it best: "The change of administration in Washington does not entitle the Department of Justice to walk away from legal positions it espoused and the obligation it entered into under a previous administration." I know that you do not agree with that. That was not my conclusion, that was theirs.

Let me go to the employment cases. I notice, according to the Employment Litigation Section's own website, which was last up-

dated on May 6, the Division had only filed two complaints, Title VII cases, one on March 20, 2002, the other May 31, 2001. Yet, in your opening statement, you note that you have authorized eight new lawsuits that are in pre-suit negotiations. Can you tell us, when were the complaints were actually filed on the six new cases?

Mr. BOYD. Not all of them have been filed, Senator. The way things work in several of our civil litigating sections, including the Employment Litigation Section, the Housing Section, is that lawsuits are authorized and then the trial teams engage in pre-filing negotiations. In most instances, what that results in is an agreed-upon consent agreement or settlement agreement that is entered at the same time the suit is filed. So a suit can be authorized and then there can be several months that transpire between the authorization to bring suit and the time the complaint is actually filed. I can give you examples of some of those cases.

Senator KENNEDY. As I understand from the website, there are only two filed complaints on Title VII. There is obviously an enormous number of increases. In your statement, you indicated: "I have authorized the eight new lawsuits that are in pre-suit that were not reflected on this." Is there any reason, without getting into the numbers game, that you would have the few numbers that you have as compared as to the average for the last 6 or 8 years, of some 14 cases?

Mr. BOYD. Senator, respectfully, I would take a different view of the numbers. I can only authorize suits. I do not control the timing of the filing of those lawsuits. I have been on duty for approximately 8 to 9 months and I have authorized the filing of eight new Title VII cases and I would say that that is consistent with the kind of numbers that were filed on an annual basis in the past.

Moreover, as the Senator knows, we have been more than a little busy in the Civil Rights Division dealing with the aftermath of September 11, the 350 hate crime investigations in which we have been involved, the outreach efforts that we have mounted nationwide. I have, as I said, done between 20 and 30 town meetings across America and even in Canada in the wake of September 11. So I actually think that the numbers of suits that I have authorized is not a departure from the past, but, in fact, consistent with the task, both in terms of quantity and quality.

Senator KENNEDY. Did you request any additional funding, if you are this hard pressed, to try and deal with these additional kinds of——

Mr. BOYD. Senator, we supported the budget that the President submitted to Congress.

Senator KENNEDY. Seventeen minutes to the Senator from——

Senator KYL. Mr. Chairman, I got here late. I am going to have to leave in about 3 minutes, and therefore, I would like to just yield to Senator Sessions.

Senator KENNEDY. That is fine. I apologize.

Senator KYL. Thank you very much.

STATEMENT OF HON. JEFF SESSIONS,
A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Mr. Chairman, thanks for calling this hearing. It is a very important subject, the oversight of the Civil Rights Di-

vision of the Department of Justice. The 13th, 14th, and 15th Amendments to our Constitution changed the Constitution to provide for freedom, civil rights, and voting rights for all persons, regardless of race. Congress's enactment of Civil Rights and Voting Rights Acts extended those protections. The judiciary's courageous decisions in the 1950s, 1960s, and 1970s played a crucial role in transforming those abstract guarantees into real changes that affected people's lives.

Yet, it was enforcement by the Department of Justice and the lawyers from civil rights organizations that enabled the courts to act that protected our citizens that made civil rights a reality for poor minorities in the South and around the country. Indeed, we have countries all over the world that have remarkably wonderful provisions protecting civil rights, but have no civil rights at all.

In America, discrimination on the basis of race, origin, religion, or gender has no legitimate place. Over the past several decades, the Civil Rights Division has played an important role in delivering on this promise by enforcing Congress's civil rights laws in housing, employment, and in the voting booth.

The men and women who work at the Department of Justice are outstanding professionals who can be proud of the role they played over the years in enforcing civil rights. That said, the role of the Civil Rights Division is different from that of Congress, who makes laws, and the judiciary, who interprets the laws. To be effective, the civil rights laws must be enforced vigorously, but there must be a consideration of balance.

Under the tenure of Bill Lann Lee and the Clinton Department of Justice, the Department, I believe, occasionally did lose that balance. Mr. Lee, by all accounts a very fine person, did take some steps that I considered out of the mainstream and not based on sound law.

For example, in 1999, the Civil Rights Division brought its tremendous resources to bear against a high school in North Carolina in order to force that school to drop its Indian mascot. In 1998, the Civil Rights Division targeted the city of Torrence, California, for allegedly discriminating against minorities in a written test for police and firefighting jobs. The city said the tests were fair and widely used around the country. The Civil Rights Division persisted, sued, and a Federal judge found the suit so unfounded and frivolous that she ordered the government to cover Torrence's legal fees of approximately $2 million.

Now, Mr. Boyd, you were talking with Senator Kennedy about having to have facts to back up the matters when you file a case in court, so I would suggest this decision in 1998 would indicate that the Clinton Department of Justice was not always right in its position. Do you feel a burden to make sure that when you sue a city or a business, that you have the facts and the law to justify it and that you are not, therefore, using the power or the authority or the august respect the Civil Rights Division has to in some way abuse that group?

Mr. BOYD. Thank you for that question, Senator. I think it is an important question, and let me say this. I think what you said is true in every case, not just a case that we bring against a municipality or another sovereign. We have an obligation as Federal pros-

ecutors, as government lawyers, to get it right and to do everything that we can to make sure that we put ourselves in as good a position as we can reasonably be in to get it right.

We not only have as prosecutors in the Civil Rights Division of the Department of Justice great statutory authority, but we also have great moral authority. So when we say something, courts and the American people ought to be able to rely on that as an unvarnished plain statement of truth, as best we can discern it.

So in every case, Senator, I insist on three things, regardless of the kind of case it is. The first is that every one of our legal claims be supported by well-settled legal principles. We are operating within a legal framework. We are law enforcers, so we should be seen not simply as just enforcing the law, but indeed following it ourselves and making sure that any claim that we bring is based on readily articulable legal principles. That is the first.

The second is to say that there should be a good-faith factual basis supporting each and every one of those legal claims. That does not mean that we have trial level or trial quality evidence, but that means we have a good-faith factual basis for claiming what we claim and that also means, and I insist that it mean in each case that we bring or consider seriously bringing, that we have done everything that we can reasonably to find out as many facts as we can so that we can get it right.

Now, that means different things for different litigating sections within the Civil Rights Division. Obviously, the criminal section has the opportunity to use a grand jury and compel witness testimony in the grand jury, so the criminal prosecutors have a better and more full opportunity to develop the facts. On the civil side, you do not have the grand jury, but we should still in civil cases do everything that we can reasonably do to make sure that we are getting the facts right and that we have a good-faith factual basis for everything we allege in a complaint.

Finally, with respect to the relief side, each aspect of the relief that we seek should again be well-grounded in established legal principles and also have a sufficient factual predicate. Now, that determination, because the relief comes at the end of the case after a finding of liability, that does not so much have to occur at the front end, but it sure better occur before the relief is arrived at, especially when it is relief that we are asking the court to embrace in the context of a court-sanctioned settlement agreement or consent agreement.

I insist or will insist on that in every case that we bring. I know some people have said there is a change in philosophy and ideology. That is not true. What there is a change in is the level of expectation and preparation that I expect with respect to everything we do as law enforcers. That is what the American people expect. That is what the courts expect.

I had the opportunity recently to have lunch with several other members of the Department of Justice and a Supreme Court Justice and this Supreme Court Justice reminded us that more is expected of us, that what we say in our pleadings and orally in open court is viewed differently. There is an expectation that we be right and that we do everything we can to get it right and I am absolutely determined that we do that.

We will be as aggressive as the law and facts allow us to be in every enforcement action we bring, but it is not rough justice by Boyd or rough justice by any member of the Department of Justice. It is justice according to the Constitution and the tools that Congress has given us.

Senator SESSIONS. Well said, Mr. Boyd. I thank you for saying that and I think that is important. You are speaking correctly.

The Civil Rights Division of the Department of Justice, when it takes on a city like Torrence, California, and accuses them of discriminating against police and firemen, that is a serious thing. That city, I am sure, had to wrestle very hard with whether or not to continue the litigation, whether or not just to give in and agree to changes because they did not want to continue to be accused by the United States Department of Justice as being discriminatory. They also had to ask whether they could afford the litigation.

So it is a power that ought not to be abused, and there are cases, particularly like under *Adarand* that we have some disagreement with. One columnist in the *Wall Street Journal* in 1998 reported that the acting head of the Civil Rights Division has supported unconstitutional racial or gender quotas in over 20 actions in 1 year. Probably, there would be a dispute and disagreement among honest people over that definition, but some of these questions are pretty close.

In 1997, the Circuit Court of Appeals rendered a stinging rebuke to the Civil Rights Division for its handling of an election dispute in Dallas County, Alabama. For 4 years, lawyers from the Civil Rights Division investigated and litigated in an attempt to prove racial discrimination in a local election. This was quite a challenge to the local county, but they resisted and defended and believed in their position and decided to see it through and take it to court.

After reviewing the record, this is what the Court of Appeals said: "A properly conducted investigation would have quickly revealed there was no basis for the claim of purposeful discrimination against black voters." The court pointed out that the actual placement of Dallas County voters within districts was made by the predominately black Board of Registrars. The court then ordered the Department of Justice to pay $63,000 in attorneys' fees to the Dallas County Commission because the Department had forced the County Commission to defend a suit that was not justified under the facts or the law.

I note that the opinion was written by a United States District Judge from California who was sitting by designation on the 11th Circuit panel. This judge said: "Unfortunately, we cannot restore the reputation of the persons wrongfully branded by the Department of Justice as public officials who had deliberately deprived their fellow citizens of their voting rights. We also lack the power to remedy the damage done to race relations in Dallas County by the unfounded accusations of purposeful discrimination made by the Department of Justice." The three-judge panel suggested to the Justice Department that it be "more sensitive" in the future to "the impact on racial harmony that can result from the filing of a claim of purposeful discrimination." The court said it found the Justice Department's actions were "without a proper investigation of the truth unconscionable." "Hopefully," the court goes on to say, "we

will not again be faced with reviewing a case as carelessly investigated as this one." Is that something that you will monitor and try to make sure does not occur, Mr. Boyd?

Mr. BOYD. Absolutely, Senator. I thank you for reminding us of kind of the obligations that I have been talking about that we have as Federal law enforcers. But as I listened to you, I also feel compelled to say a couple things about the Civil Rights Division and the lawyers in the Civil Rights Division.

The overwhelming preponderance of lawyers in the Department of Justice generally and the Civil Rights Division specifically are extraordinarily professional, talented, dedicated, committed folks who are doing tremendous good for our country and for the rule of law, and I have said several times that since coming to this position, I have had the honor to see some of the incredible high quality of work and commitment that those very professional and talented and gifted lawyers have done.

Last week, I had the opportunity to travel with the Attorney General to Albuquerque, New Mexico; Phoenix, Arizona, and Las Vegas, Nevada, and when we were meeting with the Federal judges in Albuquerque, one of the Federal judges right out of the box took about 5 minutes to talk about a case that Civil Rights Division lawyers had recently tried in front of him, a case that he described as a very difficult case, an uphill struggle, which they prevailed in, and he took great care to tell me how pleased and how remarkable he thought the professionalism of the Civil Rights Division lawyers was.

So I think it is careful for us as we go forward with all of the moral and legal authority that we have, and you are quite right to remind us that when we accuse, it carries great weight and has very often cascading consequences for the party that we accuse, it is certainly appropriate that you remind us of that, Senator. But I also want to be very clear to say that of the thousands of matters that the Civil Rights Division deals with every year, the overwhelming preponderance of those matters we are dealing with in an incredibly professional, capable way. We have some very committed, experienced, dedicated, talented people and I think the people of America ought to know that and feel confident about that.

Senator SESSIONS. I agree, and I know some of them and they do great work. It has changed the face of my area of the country, the whole legal landscape, and much of that was done by the Civil Rights Division of the Department of Justice. When I was a United States Attorney, it was said that I had blocked an investigation of the Civil Rights Division, but in truth, as I checked the record at that time, I signed and supported the pleadings at every pleading that was filed, and there were many, many cases pending at that time.

I believe in the work that you do, but just because someone says it is civil rights, maybe they have not done their homework. Maybe they have not studied the facts or researched the laws quite enough, and I am glad to see that you will give everyone a fair chance.

I am glad that you recognize the difficult position a business or a political institution or a governmental institution can be in when the Department of Justice says, we are going to file next month a

lawsuit accusing you of racial discrimination, but if you will agree to this consent settlement and agree to do A, B, C, and D, we will not file that suit. We can reach an agreement. That is the way it ought to be done. I am not criticizing that procedure, but do you recognize that gives an awful lot of power to the Civil Rights Division and you have to wield it responsibly?

Mr. BOYD. I do, Senator, very much, and let me say this, that the cause of victims of discrimination, which protecting victims of discrimination is our principal mission, and that mission is best served by us discharging our responsibilities, our law enforcement responsibilities in a highly professional way.

The idea of aggressive civil rights law enforcement and being careful, taking care in how we do that, are not necessarily contradictory concepts. In fact, they ought to be complementary concepts, and that essentially summarizes my approach. We will be aggressive in protecting victims. That is our mission, that is our job, and I will tell you, that mission in the aftermath of September 11 is as clear as it ever could be. But it also requires us, and that cause of protecting victims is best served if we do it right, and that is what we are going to try to do as best our skills and our experience will allow us to do, Senator.

Senator SESSIONS. Right. You should be aggressive. You should not allow and tolerate racial discrimination in America. But at the same time, you want to be professional and balanced. I like your remarks and thank you for them.

Senator FEINGOLD. [Presiding.] Thank you, Senator Sessions.

We have a vote on, so I am just going to simply recess the hearing for about 10 minutes and I will be back to resume questioning.

Mr. BOYD. I will look forward to it, Senator. Thank you.

Senator FEINGOLD. The hearing is in recess.

[Recess.]

Senator FEINGOLD. I call the hearing back to order. By the Senate's definition of 10 minutes, we are back.

Mr. Boyd, it is good to see you again. I would like to thank you, and I, of course, want to thank the Chairman, Senator Kennedy, and the Chairman of the Committee, Senator Leahy, for their leadership and for holding a hearing on this subject.

Mr. Boyd, you have already talked about this a bit, but we all have great respect for the hard work and the dedication of our Nation's police officers, but on occasion, some of those responsible for enforcing the law engage in conduct that itself violates Federal laws and constitutional rights. For example, racially biased policing, also sometimes known as racial profiling, is certainly, in my mind, an unacceptable practice that has tarnished relations between a number of police departments and the communities they serve.

As you well know, because I think I have at least discussed this in your presence last year, President Bush and Attorney General Ashcroft called for a ban on racial profiling and I and some of my colleagues have introduced legislation to implement and enforce such a ban. Just 2 weeks ago, Deputy Attorney General Thompson assured me that the Department still explicitly supports a ban on racial profiling and intends to work with us to get a bill to the President's desk.

Investigation of police departments conducted by the Civil Rights Division, such as the one recently settled in Cincinnati, play an important role in addressing this problem. I would like to first ask you, do you regard the settlement agreements in the Cincinnati case as a model for addressing this concern in other cities, and if so, can we expect to see Civil Rights Division investigations elsewhere lead to similar reform?

Mr. BOYD. Thank you for asking that question, Senator, and let me just say, before I answer your question directly, I appreciate and I know the Attorney General appreciates the leadership role that you and Representative Conyers have taken with respect to this issue. The issue of racial profiling is certainly one of—if not the most important—issue on my plate as the head of the Civil Rights Division, and as you correctly pointed out, Senator, during the Presidential campaign, then-Governor Bush made it very clear that he thought that racial profiling was wrong and ought to be eliminated.

The Attorney General has been very clear in saying, not only is it wrong, it is unconstitutional, and he has tasked the Deputy Attorney General, Deputy Attorney General Thompson, with the responsibility of reviewing and studying the issue in the context of Federal law enforcement with an eye toward us providing some useful guidance about the elimination, the ultimate elimination of racial profiling, and we in the Civil Rights Division have been in the boat rowing with the Deputy Attorney General to make sure that that is done and done as promptly as it can be.

I am also, obviously, aware of the bill that you have introduced that deals with this issue and it certainly is a good start with respect to dealing with this issue.

As to Cincinnati in particular, the Cincinnati settlement did have racial profiling issues that were present, but the principal issues in Cincinnati involved the use of force and the alleged excessive use of force as a matter of practice by Cincinnati police officers. So the gravamen, the overwhelming weight of that agreement was focused on issues regarding the use of force, use-of-force policies, training, and reporting with respect to the use of force. So that was the preponderant issue in Cincinnati.

But in Cincinnati and elsewhere, we have dealt with this racial profiling element or discriminatory police practices. The Pittsburgh agreement, the consent decree in Pittsburgh reflects issues with respect to racial profiling and others.

Senator FEINGOLD. Let me follow up on the Cincinnati situation a little bit. The Cincinnati settlement actually incorporates by reference a city ordinance, No. 88-2001, and requires enforcement of that ordinance. Now, Section 1 of the Cincinnati law bans racial profiling and defines it as "the detention, intradiction, or other disparate treatment of an individual using the racial or ethnic status of such individual as a factor, other than in the case of a physical description." Do you endorse that definition of racial profiling?

Mr. BOYD. Anything we ask of the Department is something—anything we ask to be part of an agreement in which we enter into, in that context, we do, and I do. Senator, I think what that is trying to get at, and certainly what your proposed legislation seeks to deal with and what I think concerns all of us is really racial stereo-

typing in law enforcement, that is to say, using race as a proxy for enhanced criminality, and I think that is what concerns us all and I think that is what we are trying to deal with effectively in a careful way that does not stop us from using race as a factor in circumstances where it is justified, and your legislation talks about suspect-specific situations.

Senator FEINGOLD. Let me comment on that. I think that is fine as far as it goes, but I think I did hear you explicitly agree that the language I read you is something the Department supports, and I want to make it clear that that is basically the definition of racial profiling that we have in our anti-profiling bill. So, I hope that your endorsement of that definition makes it as easy as possible for us to reach agreement on a bill to end the practice once and for all. That is similar to the type of response I received from the Deputy Attorney General, who certainly did not equivocate on the point, either.

Mr. BOYD. Senator, I would just say, as a law enforcement body, if we impose a requirement on a police department of one of our Nation's significant cities, that we obviously embrace it in that context. I think when Deputy Attorney General Thompson was in front of you, he said our mission continues to be to eliminate racial profiling and that is my position, as well, you should not be surprised to hear.

Senator FEINGOLD. Fair enough. Let me say on that point that I strongly believe that this is not an enforcement effort that should sort of wax or wane depending on who is running the Justice Department. I intend to work for enactment of a law that places a clear, workable definition of racial profiling in Federal law, that bans the practice, as both the Attorney General and, I might add, that the President not only said it during his campaign, but I was in the House chamber when he made one of his very first statements as President of the United States that racial profiling should be prohibited. The law should also create strong mechanisms to actually enforce that ban.

I mentioned earlier the striking similarity between the Cincinnati law and my bill with respect to a ban on racial profiling. For a number of reasons, and some we have already discussed, regardless of what the major point of that agreement was, the fact is that it had this ban on racial profiling, but there are other similarities, as well, with this agreement.

Both my bill and the Cincinnati settlement require the creation of citizen complaint procedures and data collection on stops and procedures. The ban on racial profiling, citizen complaint procedures, and data collection, in my view, are all good steps to address racial profiling and should be applied nationwide, so I am glad that you see this Cincinnati settlement as a success story, and again, I see it as a way in which we can come together to pass some important legislation.

Let me move on to one of the most important responsibilities of the Civil Rights Division: ensuring that law enforcement agents carry out their duties within the bounds of the law. One of the key tools for carrying out that responsibility is Section 14141 of Title 42 of the U.S. Code, which makes it unlawful for any law enforcement agent to engage in a pattern or practice of conduct that de-

prives persons of rights protected by the Constitution and the laws of the United States.

Mr. Boyd, during your time as head of the Civil Rights Division, how many new Section 14141 cases has the Department of Justice filed in court?

Mr. BOYD. I do not believe we have filed any new cases in court, Senator. There have been—we currently have opened a formal 141 investigation in a number of cities, including Portland, Maine, and Schenectady, New York. We have preliminary inquiries underway in several South Florida jurisdictions.

I should say, just to give you a sense of the order of magnitude of these cases and the volume of these cases, since the statute was enacted by Congress in 1994, there have been seven settlements. Three of those settlements have been achieved during the last year in the Civil Rights Division. We continue to have open investigations that are public in Cleveland, Ohio; Detroit, Michigan; East Point, Michigan; New Orleans, Louisiana; Prince George's County, Maryland; Riverside, California; Tulsa, Oklahoma; and Buffalo, New York.

Senator FEINGOLD. That is about settlements that have occurred under this administration?

Mr. BOYD. Those are open investigations.

Senator FEINGOLD. Those are open investigations. You mentioned the settlements before. But let me just make sure we agree on what has happened since the start of the Bush Administration in terms of initiating new complaints. My understanding is that there have been no new complaints filed against State or local police departments for police abuse or misconduct.

Mr. BOYD. There have not been lawsuits that have been filed. There have been formal investigations.

Senator FEINGOLD. And then the four formal investigations, Cincinnati, Tulsa, Schenectady, and Portland, Maine.

Mr. BOYD. Right, as well as a number of preliminary inquiries. Maybe it would be helpful if I briefly described how that 14141 process works.

Senator FEINGOLD. Let me just ask you one other thing first, and hopefully we will have time for that. In your opening statement, you said the following about the Cincinnati settlement: "This unique and historic arrangement achieved real reform without the need for protracted litigation or a consent decree." Now, how does your Department determine whether to initiate a pattern or practice lawsuit against a police department under Section 14141? What are the factors or standards that you use and how is this approach different from or similar to the standard utilized by the prior administration? You may well have been heading in that direction.

Mr. BOYD. Yes.

Senator FEINGOLD. I want to be sure that those different pieces are answered that I just listed.

Mr. BOYD. And please follow up if I am not responsive to one of your questions. The factors and standards are the same. We review the record that is available to us through witness interviews from pleadings or depositions or testimony in other fora to determine whether there is a pattern or a policy and practice of a police de-

partment that consequently causes repetitive constitutional violations on the part of police officers, whether it is racial profiling, whether it is the repetitive use of excessive force.

If I could analogize for the lawyers, it would be kind of doing a 1983 assessment with respect to situation after situation to make some assessment as to whether there is some formal policy or some unspoken practice that is leading to some level of repetitive unconstitutional uses of authority by police officers.

Senator FEINGOLD. This has to do with whether to initiate a lawsuit, is what you are answering?

Mr. BOYD. That is with respect to whether to file a complaint in the setting of a lawsuit, but it also has to do, Senator, with whether to open a formal investigation, and this is what I was talking about before. In our pattern and practice, we have essentially three stages. One is the preliminary inquiry, where we hear concerns about unconstitutional patterns and practices by police departments. We do what we can in terms of factual development to see if there, if you will, is a "there" there. And then if there is sufficient evidence, then it moves to the level of a formal investigation, at which point it becomes public. And then, if necessary, it proceeds to a lawsuit.

But I should say, since 1994, the Civil Rights Division has never filed a pattern and practice lawsuit. The formal investigations that have been opened have always resulted, so far, anyway, in a settlement or a consent decree that is favorable in the view of the Department of Justice. That is, it takes care or remediates the problem that caused us to look at the police department.

Senator FEINGOLD. So, is it your belief that this administration uses the same approach with regard to both the filing of the lawsuit and the filing of the investigation?

Mr. BOYD. I think we are analyzing the law in the same way. I think that what we are trying to do is to go into a situation and early on gather all of the stakeholders, if you will, in the problem, from the community folk who are affected by police practices, government leaders, the command staff of the police department, as well as the rank-and-file police officers, with a view toward fixing the problem and not so much with a view toward fixing the blame.

If blame has to be assigned at some point, we will do that, but our view is that everybody has an interest in acknowledging issues where improvement or reform needs to take place, and the more people who have to be a part of that process for it to work in the long run, the more they are consulted in a part of that process early on, the less of a likelihood we will get bogged down in litigation.

Senator FEINGOLD. I appreciate that.

Mr. BOYD. Senator, if I——

Senator FEINGOLD. I only have 1 minute left, so I want to ask one more question. I understand what you are saying and I appreciate it, but I am taking your answer to mean this does not change the standard for initiating a lawsuit or commencing an investigation despite the desire to try to resolve matters in a consensual way.

Mr. BOYD. You are right, Senator.

Senator FEINGOLD. Mr. Boyd, I understand that in the Schenectady case, U.S. Attorney Daniel French forwarded descriptions of more than a dozen alleged incidents of police misconduct or abuse to the Civil Rights Division, but it took 1 year for the Division to authorize an investigation. I understand that earlier this year, you recused yourself from that case, but I am concerned about how long it took for the Department to decide whether to proceed to investigation.

Why does it take so long for the Department to authorize an investigation of a police department, and does the Civil Rights Division have deadlines for determining whether to proceed with investigation?

Mr. BOYD. Senator, as you correctly pointed out, I am recused in that case so I cannot talk about the details of the Schenectady case. But I can say that these investigations take a lot of careful effort by the trial team, by the investigative team and the Special Litigation Section of the Civil Rights Division. They go out, they conduct interviews, they review court pleadings, they talk to as many good sources, original sources of information as they can, and then they sit down and they do the evaluations and do the assessments.

The idea is that there is not a deadline at the front end and the more careful the work that is done at the front end, the more likelihood of success when something formal is submitted or filed. So I am not so much concerned about how long it takes. I am much more concerned about the quality of the ultimate product, the quality of our ultimate judgments.

Schenectady, during the pendency of the referral of the matter from the U.S. Attorney to the Civil Rights Division, during that time, there were a number of Federal criminal prosecutions of Schenectady police officers. So to the extent that there was allegedly unlawful conduct going on, it was being dealt with in the first instance by the criminal prosecutors outside the context of the 14141 investigation. But our key is to get it right and to do what is necessary in order to get it right at the front end so that we are more successful, ultimately, in fixing the problem.

Senator I also told you, to my knowledge, no formal 14141 lawsuits had been filed. I was incorrect. I had forgotten that a formal suit was filed in the Columbus action, in Columbus, Ohio. That is a pending case and I had just forgotten that it was pending.

Senator FEINGOLD. I am pleased to have that correction. My understanding is that the investigation of the Cincinnati case started pretty fast after the situation there, so I would just make note of that and my time is elapsed.

Senator Schumer.

Senator SCHUMER. Mr. Chairman, thank you and I appreciate it. First, I want to thank you for holding these important hearings. I want to thank Assistant Secretary Boyd for being here.

I have other pressing business, but I have some questions in writing. I wanted to submit those and ask that you, Mr. Boyd, answer those within, say, a week or so.

Mr. BOYD. I would be happy to, Senator.

Senator SCHUMER. They deal with predatory lending, fair housing, discrimination in housing, which is an area that has concerned

me, and I again thank you, Senator Kennedy, for running these hearings and thank my colleagues.

Senator KENNEDY. [Presiding.] Senator Durbin.

Senator DURBIN. Thank you very much, and Mr. Boyd, thank you for joining us today.

I suppose that there are two or three areas that I would like to explore with you very briefly, and one of them relates to the whole question of staffing at the Division. I suppose what I have been reading suggests that there has been an effort to move career employees out of the Civil Rights Division to other assignments, both permanent and temporary. I can understand in light of 9/11 that the Department of Justice is trying to allocate its resources most effectively to protect this Nation, but I am anxious to hear your explanation in reference to several specific transfers and to the policy in your Division.

First, I would like to ask you about the detailing of Katherine Baldwin, Section Chief of the Employment Litigation Section to the Civil Division. Was that a voluntary or involuntary detail?

Mr. BOYD. I asked Ms. Baldwin to take the laboring oar with respect to that very significant employment discrimination task force that we had recently created in response to really a decades-old expression of concern from lawyers handling employment discrimination cases, both within main Justice, and more importantly, out in the 94 U.S. Attorneys Offices across the country.

I asked her—but it was a directive, I am not being cute—because of her experience, her temperament, her expertise in this area of the law, the perspective that she brings as an experienced and aggressive civil rights enforcer, as well as her, what I had observed, what I would describe as excellent teaching skills, which is part of what this task force seeks to do. I thought that within the Division, the Civil Rights Division, that there was really no one else who was close in terms of all the qualifications we were looking for for the person that would really take the laboring oar on that task force.

Senator DURBIN. So did this leave a gap in terms of the talent pool in the Civil Rights Division because of your decision?

Mr. BOYD. It really did not, Senator. I am glad you asked the question because what it did, at least temporarily, was give me the opportunity to elevate to the Acting Chief position an experienced Hispanic American lawyer in the Civil Rights Division, David Palmer, and although I am delighted at the opportunity to be able to give that incredibly good and experienced and committed public servant an opportunity to serve as Acting Chief.

I am sorry to say that Mr. Palmer is the first Hispanic American to serve as a section chief of one of the litigating sections in the 45-year history of the Civil Rights Division, and so from my perspective, it was a win-win proposition. Ms. Baldwin was going to be taking the leading and the laboring oar with respect to a very important initiative of this Department.

Senator DURBIN. Is hers a temporary reassignment?

Mr. BOYD. It is, and I believe it is 120 days, or 240 days.

Senator DURBIN. Is she going to return to her previous position?

Mr. BOYD. My expectation is that she would, but I often get asked questions about future staffing decisions, Senator, and I try

not to be cute, but I say it depends on all the important circumstances that are then present. But when I assigned her to this task force, the expectation was that it would be temporary.

Senator DURBIN. Can you tell me, as of today, how many career Civil Rights Division attorneys have been detailed out of the Division?

Mr. BOYD. I do not know the answer as I sit here, but very few, and let me say this, if I may, Senator. I am told—I was not here and I certainly was not keeping score, but I offer it just as a matter of perspective—I am told that in the prior administration, there were five section chiefs, five out of 11 section chiefs, five out of nine litigating section chiefs in the prior administration that were permanently reassigned. As a matter of perspective, I have reassigned temporarily one section chief.

I would also say, Senator, that when I arrived in the Civil Rights Division, there were three front office personnel from the prior administration occupying senior front office positions—Deputy Assistant Attorney General, Counsel to the Assistant Attorney General—from the prior administration, including the prior administration's Chief of Staff. I kept all three of them on my front office staff either as Deputy Assistant Attorneys General or as Counsel to the Assistant Attorney General to me. So I cannot say that that is unprecedented, but I would be surprised if there were any prior administration that kept in the front office the previous administration's Chief of Staff.

Senator DURBIN. There are unconfirmed reports that about 20 or 30 Division attorneys have been assigned to terrorism investigation and prosecution and that you are seeking additional attorneys to leave your Division for terrorism work. Is that correct?

Mr. BOYD. I cannot verify the number, but there have been a number of attorneys who have volunteered to assist the Criminal Division in the really overwhelming burden they have of reviewing evidence and documents with respect to the terrorism investigation. So, yes, there have been not an insignificant——

Senator DURBIN. Do those numbers sound accurate?

Mr. BOYD. They sound like a correct ballpark figure.

Senator DURBIN. So has that had any impact on the quality of work in the Civil Rights Division?

Mr. BOYD. It has had no impact on the quality, and I do not think, candidly, Senator, that I have at least seen or am aware of it having remarkably an impact on the quantity. I mentioned, and you were not here for it, when Senator Sessions was asking questions about the remarkable commitment and productivity of the lawyers who work with me in the Civil Rights Division, and I think what it has meant is that—it is just like when the star player gets injured or a number of star players are injured, other people pick up the slack. I think in large measure——

Senator DURBIN. I would think that the departure of 20 or 30 of your better attorneys to an important assignment, no doubt, would have some measurable impact, but I will take that at face value.

Mr. BOYD. Senator, we have almost 400, and I am not sure that all those persons were attorneys. I think some may have been legal assistants.

Senator DURBIN. Let me ask you about this. There seems to be—I do not understand it and I am going to ask you to explain it—there seems to be an interesting contrast here. When you have been asked about speaking directly to defendants in cases involving civil rights, like *Adam's Mark*, you have argued that this kind of open dialog sometimes leads to progress being made and goals being achieved, and you do not think that that is necessarily in and of itself a bad idea. And yet we see reports, press reports, that career employees within your own Division are being cautioned not to speak to people on Capitol Hill or to the press or to organizations outside of the Department of Justice.

Explain to me the standard that you are applying here, where on one hand it is a reasonable and thoughtful thing to have this dialog, and yet on the other hand it is dangerous for your employees to speak out of school.

Mr. BOYD. Thank you for that question, Senator. I am glad you raised it, because it has come up in the media and I have not had a chance to address it, so I appreciate you giving me that opportunity.

There is a clear distinction and it is this. I have a complete open door policy both within the Division and outside the Division. That is to say, any responsible voice who wants to weigh in on the merits of an issue that is before us, I am happy to hear from. It helps us get it right.

It is why I have met probably on at least 20 to 30 occasions with representatives of the civil rights community with respect to a whole range of issues. I also repeatedly, in addressing the career attorneys in the Civil Rights Division, encouraged those attorneys to come talk to me about their cases, to come talk to me about pending issues that they feel strongly about, especially if they disagree with where they think an ultimate decision is going, and I should say that in the overwhelming preponderance of cases we have, over 99 percent of the cases, there is absolutely no dispute about what to do and there is consensus.

In the less than 1 percent of the instances in which there is a difference in how we should proceed, I encourage our staff attorneys to come see me. What I often say is—fortunately, I do not need a lot of sleep, Senator. I come in at somewhere around 6 a.m. and I leave around 8 to 8:30 p.m. and I say my door is open, either on formal scheduled invitation or if you just show up during those hours, I will see you.

Senator DURBIN. I accept that premise. Now let us go to the second part——

Mr. BOYD. Yes. The second part of the question is it is very simple in this respect, Senator. Internal deliberations, internal law enforcement deliberations that the Department engages in are deliberations about how to handle a pending law enforcement matter. These lawyers in the Department of Justice, by Justice Department rule and regulation, and also by rule and regulation of the sanctioning bodies of the bars of the several States, require that confidential information not be disclosed to outside parties. It is——

Senator DURBIN. So it is strictly limited to confidential information cannot be disclosed——

Mr. BOYD. It is attorney-client information, but it is the substance of our deliberations about pending law enforcement matters.

Senator DURBIN. So there is no prohibition against your career employees or other Civil Rights Division employees having conversations about the policy, for example, of how civil rights laws are being enforced in the most general way without reference to a specific case? I think what we have here, and reports out of the Washington Post, the most recent article, suggest that some employees within your Division do not see this as being such a clear line that you have drawn. They feel that you have discouraged even the most basic dialog about the policy and enforcement of civil rights laws under the Bush administration's Department of Justice, and that, of course, raises some troubling possibilities.

So can you clarify that in terms of a memo that you are going to present to your employees so that there is no doubt that you are talking about conversations relating to specific cases before the Civil Rights Division?

Mr. BOYD. Yes, Senator, and let me say this. If it were true, what you have suggested the Post has reported or some people have said, if it were true, it would be troubling. I am happy to be able to tell you it is not only not true, it is patently false.

We have career attorneys in the Civil Rights Division who every week, if not every day, are speaking to a wide range of organizations, groups, symposia, town meetings about the very things that you are talking about. It happens literally every day. We have done, for example, with respect to our response to backlash discrimination in the wake of September 11, we have literally conducted hundreds of outreach meetings——

Senator DURBIN. Let me use one specific example, because this article relates to your September 28 memo, issued after some lawyers in the Civil Rights Employment Litigation Section voiced dissent internally over the government's withdrawal from an employment discrimination case brought during the Clinton administration. Now, that clearly is not a pending case or would jeopardize attorney-client privilege, as I read it on its face, if this has been a decision by the Civil Rights Division under your leadership to withdraw from a case that was already being undertaken by the Department.

So, you are saying, from your point of view, that is all right. You do not have a problem with people speaking out if they disagree with the policy in the Civil Rights Division?

Mr. BOYD. No. People can offer whatever judgment they want about whether a particular decision is, on the merits, right or wrong. What they are not permitted to do is to disclose the internal deliberations in which they engaged as advising me. They are not allowed to—and this is well settled Department of Justice policy that dates back generations, it is also well settled lawyer professional responsibility ethics—you are just simply not allowed to discuss the details of client confidences or internal Department of Justice deliberations.

Now, anybody in the world is free to say, Boyd was right or wrong in a particular discussion with anyone. I mean, Senator, believe it or not, I value, I value dissent. I value dialog. I value difference because it helps us get it right.

Senator DURBIN. Let me just suggest, because my time is up, it might be, if that is your philosophy and your point of view, it might be worthwhile for you to consider another memo to the Division, because at least there is some uncertainty among the attorneys who serve with you.

Mr. BOYD. Thank you, Senator, and I will, and if I can respectfully just say very briefly, the memo to which you refer is not a memo that I prepared or had any role in. It was a memo that was drafted at the request of a career lawyer within the Department of Justice, David Margolis, who is one of the most respected and revered members of the Department of Justice, who served many administrations, both Democratic and Republican, and it was prepared by a member of the Office of Professional Responsibility. So it simply dealt with very clear-cut professional and ethical obligations of lawyers. It has nothing to do at all with appropriate dialog or dissent about general positions.

Senator DURBIN. Thank you very much. Thanks, Mr. Chairman.

Mr. BOYD. Thank you, Senator.

Senator KENNEDY. Senator Edwards.

Senator EDWARDS. Thank you very much, Mr. Chairman.

Mr. Assistant Attorney General, good afternoon.

Mr. BOYD. Good afternoon, Senator.

Senator EDWARDS. I want to talk with you about voting rights. As you know, there were a lot of problems in the 2000 election and none of us want to see those problems show themselves again in the upcoming election.

Mr. BOYD. Sure.

Senator EDWARDS. As you certainly know, the Justice Department has a lot of responsibility for stopping those problems, particularly since our election reform bill that has passed the Senate is in conference now and has not become law.

In December of this last year, I wrote to the Attorney General and asked several questions, including whether the Justice Department initiated any enforcement actions based upon the problems in the 2000 election. In February, I received a response from the Justice Department. The response did not identify any enforcement actions. It said, and I am quoting now, that several investigations were "open and pending" and that "we expect to make final decisions in the near future." It has now been over 18 months since the election of 2000. How many voting rights actions has the Civil Rights Division filed arising out of that election?

Mr. BOYD. Senator, thank you for the question. This is an area that I thought we would get to sooner or later and I am glad we got to it. I thank you for raising the issue.

We have not filed any lawsuits yet, and if I can perhaps, to answer your question more fully, just lay out as succinctly as I am able kind of the process and where things are.

In the aftermath of the 2000 Presidential election, the Civil Rights Division received almost 11,000 complaints, inquiries, expressions of dissatisfaction about various things, people offering opinions about the election, the outcome, the judicial proceedings in the wake of the election, a whole variety of things. We retained and hired contractors to help us deal with that volume of calls, almost 11,000 calls. We also coordinated with the NAACP and the

Florida Attorney General's Office, who were also collecting information or complaints about the election or the election processes.

By January of 2001, the career staff in the Voting Section of the Civil Rights Division had whittled all of that information down to 12 live investigations, 12 potential cases, if you would. Later, two cases were added, so 14 in total out of the mass of 11,000 contacts or communications, and I should underscore that most of those communications were not substantive complaints. They were expressions of dissatisfaction or offering opinions or points of view about what was transpiring. So most of that did not fall within our enforcement jurisdiction.

Since that time, those open investigations have been whittled down further, and I should tell you that kind of the range of issues that those 14 investigations dealt with were allegations of improper voter roll purges, registration problems, failures to provide accesses that the law requires for disabled voters, the failure to provide bilingual materials in covered jurisdictions, covered jurisdictions within the meaning of Section 203 of the Voting Rights Act, allegations that limited English proficient voters had been denied assistance which they are entitled to at the polls if they so seek it, and also some allegations of disparate treatment of some minority voters. So that is kind of the universe of what we were dealing with.

Since that time, we have made great progress and I have authorized the filing of several lawsuits, both in Florida and outside of Florida. Because those are ongoing investigations, because they are the present subject of pre-filing negotiations, which is a typical practice in this area, I cannot really comment on them further.

But it certainly was my hope that I would, by the time of this hearing, would be able to say more about it, but I simply will say that I have authorized the filing of some lawsuits, and the way it typically unfolds is that there are pre-filing negotiations, and very often, if the jurisdictions are cooperating, which I understand from our career Voting Section staff, the jurisdictions involved here, the subject jurisdictions are, in fact, working cooperatively with us to reach some enforceable agreements with respect to those identified problems. What will typically happen is the complaint will eventually be filed, but simultaneous with the filing of the complaint will be a settlement agreement or a consent decree that has the imprimatur of the court.

Senator EDWARDS. Let me make sure I followed all that. So you have done some investigating. You have filed no lawsuits so far, is that right?

Mr. BOYD. We have not filed any so far, that is correct, Senator.

Senator EDWARDS. You yourself have personally authorized the filing of a number of lawsuits. Can you tell me how many?

Mr. BOYD. That is correct. Senator, I would prefer to stay away from it at this point. We will, at the time the investigation and the negotiations are concluded, will certainly be prepared to make that as a matter of public record.

Senator EDWARDS. What problem would there be in telling me how many you have authorized——

Mr. BOYD. I do not want to——

Senator EDWARDS. I am just trying to get some sense——

Mr. BOYD. No, I do not want to be coy, Senator. It is five.

Senator EDWARDS. Five?

Mr. BOYD. Five.

Senator EDWARDS. OK. And out of those five lawsuits, in how many of those lawsuits are you engaged in what you would consider serious pre-filing negotiations?

Mr. BOYD. Every single one of them, Senator.

Senator EDWARDS. Do you have any expectation, based upon the present status of those negotiations, on the likelihood in each case of—I am not asking you to go one by one, but the likelihood in each case of actually reaching an enforceable settlement agreement prior to filing?

Mr. BOYD. My hope, my aspiration, and my expectation is that in each of those, we will reach an enforceable agreement prior to the filing of the lawsuit. My understanding is that the jurisdictions have been cooperating, that they have acknowledged certain deficiencies that we have identified and that—and so my expectation—of course, there are no guarantees, but my expectation is that at the time we file suit in each of those five instances, that we will have either agreed upon enforceable settlement agreements or consent decrees that have been assented to.

Senator EDWARDS. Of course, you know that my concern, our concern about this is reaching some conclusion that is in effect by the 2002 elections. Can you tell me what geographical areas are covered by these suits?

Mr. BOYD. They all involve, with two exceptions, the State of Florida. Can you hold on for a second?

Three of them are in Florida, Senator, and the others are in Missouri and Tennessee.

Senator EDWARDS. OK. So the five suits you have authorized, three are in the State of Florida, two are in Missouri——

Mr. BOYD. One is in Missouri and one is in Tennessee.

Senator EDWARDS. One is in Tennessee. The lawsuits in Florida, do they cover the entire State of Florida or are they isolated areas of the State?

Mr. BOYD. No, they cover particular counties in Florida.

Senator EDWARDS. OK. Are you able to tell me which counties are involved?

Mr. BOYD. I am not. I am not, Senator.

Senator EDWARDS. OK.

Mr. BOYD. Although I know that you are a trial lawyer and you are doing the progressive cross examination to get to what I said I could not give you. I appreciate that, but I cannot, Senator.

Senator EDWARDS. What about the States of Tennessee and Missouri? Are those also regional lawsuits?

Mr. BOYD. They are regional specific. They are district specific.

Senator EDWARDS. OK.

Mr. BOYD. Municipality specific.

Senator EDWARDS. Can you tell me what substantive issues are involved in the cases?

Mr. BOYD. The issues that I talked about, failure to provide bilingual assistance and bilingual materials in jurisdictions that are covered by Section 203 of the Voting Rights Act. In at least one instance, there are allegations of disparate treatment of minority voters. In another instance, there is a failure to provide for access to

disabled voters. And also, under Section 208 of the Voting Rights Act, the failure to allow limited English proficient voters to have assistance in voting at the polls.

There is widespread misunderstanding among poll workers a lot of places that a voter cannot be helped by someone else in the voting process and that is a misconception. That is a misunderstanding of voting rights laws. I understand Section 208 of the Voting Rights Act, for English proficient people, they have a right to be assisted at the polls if they so choose.

Senator EDWARDS. Can you tell me what the substantive issues are in the three Florida cases, not specific, one by one, but just in general, what issues are involved? Are they the ones you just mentioned?

Mr. BOYD. Yes, the ones I just mentioned.

Senator EDWARDS. OK, the same issues involving Florida?

Mr. BOYD. It is Florida.

Senator EDWARDS. OK.

Mr. BOYD. There are, in some——

Senator EDWARDS. Missouri and Tennessee, are they different?

Mr. BOYD. And some of the issues also involve, as I understand it, allegedly improper voting roll purges as well as NVRA—motor-voter—Act violations.

Senator EDWARDS. I am sorry, could you give me the last part one more time?

Mr. BOYD. Yes. The NVRA, which is the National Voter Registration Act, requires that voting jurisdictions make enrollment and registration materials available in certain public places and there are allegations of violations of that Act.

Senator EDWARDS. Well, of course, what we need to make sure is that we take steps quickly enough to ensure that the problems that occurred in the last election do not occur in the next election, and I assume that would be your goal in this process, is that correct?

Mr. BOYD. That is exactly right, Senator, and you missed my earlier dissertation. You were spared that dissertation. But one of the things I talked about is it is important for us to move promptly but it is more important that we proceed in a thorough and careful way to make sure that we get it right, and that is what we are really trying to do, and we are trying to get it right without regard to the political implications for anyone.

We are, as I said during my confirmation hearing, we are going to follow the investigative trail, the evidence, wherever it goes, without regard to politics, and without regard to who, if anyone's, ox is being gored, and that is precisely what we are doing in Florida and we are trying to take the time necessary to get it right.

Senator EDWARDS. When will the lawsuits be filed?

Mr. BOYD. I cannot give you a specific date. As I said——

Senator EDWARDS. Can you give me a timeframe?

Mr. BOYD. You can draw a reasonable inference from the fact that I was hopeful that I would be able to announce them prior to today, but it will be, I am very confident, well in advance of the primaries for the November 2002 elections.

Senator EDWARDS. Which means what, within the next 30 to 60 days?

Mr. BOYD. I would hope so. I would be surprised, disappointed, if we were not. But again, I do not want to be nailed down to a particular deadline, but I do not think that the date you have offered is unreasonable. I think that that is likely or probable.

Senator EDWARDS. OK. So you think it is likely or probable that the lawsuits we are talking about will be filed in the next 30 to 60 days, is that what you are saying?

Mr. BOYD. Right, and it would be my hope that they would be filed contemporaneously with settlement agreements or consent decrees that are enforceable.

Senator EDWARDS. Thank you very much.

Mr. BOYD. Thank you, Senator.

Senator EDWARDS. Thank you, Mr. Chairman.

Senator KENNEDY. Senator Sessions, I have just one area in conclusion. Thank you.

In the private meetings, you have indicated the Department is still studying the hate crimes bill. Has the Department finished its study of the bill and reached a conclusion about support for S. 625?

Mr. BOYD. We have not, Senator, but I will say, I do not think I am disclosing any of our ongoing deliberations to say that we are happy with your continued leadership on this issue, the leadership of Senator Hatch. I know Senator Specter continues to be concerned about this issue. Certainly, we are happy to see provisions in S. 625 that recognize the role that all of the sovereigns, if you will, have in combatting hate crimes, State and local government. I note that S. 625 has provisions that would provide Federal investigative and prosecutive assistance to State and local jurisdictions who are dealing with hate crimes, that it also would permit the Attorney General to give grants to those jurisdictions and also provides for funding over the course of the next 2 years and I think we are very happy with those aspects of the bill and we continue to deliberate the important issues that the remainder of S. 625 raise.

But I can tell you, and the Senator has heard me say this before, my background is as a Federal prosecutor, as you know, and I can just say that the tools that you give us, that the Congress gives us, will be arrows in our quiver that we will use without hesitation, Senator.

Senator KENNEDY. The leader has indicated that we will have this measure, S. 625, on the floor either at the end of this week or when we return, so I draw that to the attention of the Department for their consideration.

On the hate crimes, and I conclude from what you have said that you still have not taken a position on the specific legislation?

Mr. BOYD. That is correct, Senator.

Senator KENNEDY. On May 2, you wrote a letter to me on the questions about the hate crimes. Excuse me, Daniel Bryant, the Assistant Attorney General, wrote to me about the important work. "Thank you for meeting with Assistant Attorney General Boyd. This letter provides additional information your staff requested." Point one makes the summary of the Civil Rights Division and point two is hate crime prosecutions that are unrelated to the events of September 11. "The Division has prosecuted 25 cases under the hate crimes statute since January 20, 2001," and then

it, in addition, has initiated hate crimes investigations, 327 since that date.

Relating to the events of September 11, the Division has prosecuted ten cases and has investigated 350. Then you provide the list of the cases the Department has provided. In the list of the cases, of the ones that you have indicated of the civil rights enforcement outreach following September 11, only three of the ten are actually under the hate crimes statute. The rest of them are not. And of the 25 hate crimes, not including Attachment 2, the 25 cases, there are only three cases that use 245, U.S.C. Section 241 and 245.

As I understand it, we were told the Division had prosecuted 25 hate crimes in the last 16 months that are unrelated to September 11 and an additional ten hate crimes stemming from September 11. Of the 25 cases unrelated to September 11, only three were brought under 245 and only three of the ten post-September 11 prosecutions were brought up under 245. That means barely 17 percent of the cases listed by the Department as hate crime prosecutions were actually brought under the Federal hate crimes statute.

Mr. BOYD. Senator, I must confess, the numbers I am looking at are different. We had, and I think reported to you that we had in the wake of September 11 approximately 350 backlash hate crime investigations and the number of non-backlash hate crime investigations was, I believe at the time we spoke, 327, which I now understand is up to 343.

But as I sit here, I cannot say with any kind of certainty with respect to which particular statutes those cases are charged under. But as the Senator knows, we have got a wealth of statutory authority, 241, 242, 245, 247, and certainly some of these hate crimes, particularly the backlash hate crimes, are brought under 247, which is damage or destruction to a place of worship, and in the backlash context, that would certainly cover the mosques that have been attacked either by fire or some other means.

Senator KENNEDY. Well, there are two points that I want to mention. When asked about the prosecutions that are unrelated, the Division states it has prosecuted 25 cases under hate crimes statutes since, and ten cases of backlash discrimination as well as having investigated many others. Yet, only three used the statute. So at a time that Congress is trying to pass legislation, you are indicating to us that the numbers that you are able to use in terms of the hate crime statute are inflated. You are prosecuting them under other statutes. That is one of the points that we are getting to in terms of the hate crimes. It has to be under Federal activity under the existing statute, but under our bill, obviously, it is much broader.

Mr. BOYD. Senator, let me just offer this——

Senator KENNEDY. This is an area that we are enormously interested in. In fairness, I want to give you a chance to look through this. This is a letter not from you, but it is from the Justice Department and it is dealing with hate crimes and it lists the numbers here. Rather than asking you to go on though, I would be glad to have you answer.

Mr. BOYD. Senator, I am looking at the attachment that apparently accompanied what you are talking about and I am seeing—I am not going to sit here and add each one of them up, but a plethora of cases that are brought under hate crimes statutes. I see a number that are brought under 42 U.S.C. 36–31, which is hate crimes in a housing context——

Senator KENNEDY. That is housing discrimination.

Mr. BOYD [continuing]. Housing context, that is right. There are hate crime cases that are charged under 241, 245, and they go on and on.

So I certainly concur with your point, Senator, that the proposed legislation that you sponsored, S. 265, is broader than Section 245 of Title XVIII. That is inarguably true. I just simply want to make sure the record is clear that we are bringing and have brought a number of hate crime prosecutions. What I am looking at looks to be in excess of 30 cases laid out that are not related to September 11 that are brought under a wide range of statutes from 245 to 247 to 241 of Title XVIII and then Title 42, Section 36–31, as well. There are 27 since——

Senator KENNEDY. Let me ask, do you believe that the Federal Government and the Civil Rights Division has less of an interest in combatting hate-motivated violence against gays and lesbians than hate-motivated violence against individuals based on race or religion or national origin?

Mr. BOYD. Senator, I believe that as a Federal prosecutor and as the head of the Civil Rights Division, our mission and our interest is in protecting all people against any kind of violence, especially bias-motivated violence that is based on some impertinent or immutable characteristic of a person. So with respect to the positions we take about your legislation, the Department will speak with one voice and I would respectfully decline until——

Senator KENNEDY. I am trying to get that voice to be here this afternoon.

Mr. BOYD. No, I understand that, but I also know, Senator, that you understand that the Department speaks with one voice on a matter of policy and my positions are positions that I share and I can assure you I share with the Attorney General of the United States as we try to determine what our voice will be.

Senator KENNEDY. Just finally, on the *Brennan* case, was there a written opinion on the *Brennan* case? Could you provide that to us?

Mr. BOYD. I believe there was a written opinion, when the original trial team informed me that they had sought an opinion about their professional responsibilities and obligations in *Brennan*, that there was a written advisory from the Office of Professional Responsibility.

Senator KENNEDY. Would you provide that?

Mr. BOYD. Let me say this, Senator. If it is appropriate to provide it as a matter of policy, I would be happy to provide it. It would be helpful for your understanding fairly and accurately what went on here. I offer the following caution, though. As I think the Senator knows, it has been the longstanding policy of the Department not to——

Senator KENNEDY. It has been provided in the past, I would like to get that.

Mr. BOYD. Senator, let me offer this. The *Brennan* case, in the work that we do to protect victims of discrimination, is really important and I would be delighted at any time at your urging to continue our conversation about our position in *Brennan* or any other case that we are in the process of dealing with. I am happy to have your input. I am happy to have the dialog. The more committed minds that are looking at an important issue, the better opportunity we have of getting it right.

Senator KENNEDY. I will ask that Senator Leahy's statement be included in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator KENNEDY. I have no further questions. I want to thank you very much, General Boyd. You have great responsibility in this area of civil rights and we want to work with you to make sure that this is done in a way which represents the intent and the letter of the law. Our Committee is grateful for your presence here.

Senator SESSIONS. Mr. Chairman, may I offer for the record a statement of Senator Hatch, Ranking Member on the Committee, in which he praises Mr. Boyd's leadership since he has been in the Civil Rights Division.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Senator SESSIONS. Also, I would offer an article by John Leo referring to the lawsuit filed by the previous administration over the use of Indian nicknames by high schools, a case that I cited, *U.S.* v. *Williams*, in which the Civil Rights Division awarded, I believe, $63,000 in fees for improper actions during the time before Mr. Boyd took over, and another article I referred to from the *Wall Street Journal.*

Senator KENNEDY. Fine. They will be included as part of the record.

Senator SESSIONS. I would also ask that a statement from Senator Grassley be included in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator KENNEDY. The hearing will stand in recess.

[Whereupon, at 4:40 p.m., the hearing was adjourned.]

[Questions and anwers and submissions for the record follow.]

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

May 28, 2002

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-4502

Dear Mr. Chairman:

This letter responds to a post-hearing question that Senator Sessions submitted to me following a hearing before the Committee on May 21, 2002. The question relates to my testimony at the hearing regarding the Department of Justice's lawsuits arising out of voting issues in Florida.

I understand that some may have interpreted my comments as raising new questions in the now eighteen month-long inquiry by various newspapers, community groups, political activists and others attempting to determine with absolute precision how many voters in Florida were unable to vote or voted in error in the 2000 presidential election. Let me be clear, the Civil Rights Division's investigations identified only a limited number of Floridians who were unable to vote, a number that does not reasonably cast any doubt on President Bush's several hundred vote margin of victory in Florida.

The Civil Rights Division found no credible evidence in our investigations that Floridians were intentionally denied their right to vote during the November 2000 election. We did identify and speak with voters who told us they experienced difficulty while voting. We also found some localized, but significant, pockets of confusion and delay in certain counties, often resulting from lack of language assistance. I want to emphasize, however, that while these conditions may have been significant in some areas, the Civil Rights Division has identified very few voters who actually were prevented from voting or left the polls because of these conditions. Specifically, our investigations revealed problems in three counties:

County One is a jurisdiction subject to Section 203 of the Voting Rights Act, which requires: "Whenever any . . . [covered] political subdivision . . . provides any registration or

electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language." Although the County provided nearly all written materials in Spanish and English, as required by the Act, there were a few exceptions. For example, it appears the County disseminated some information about registration, eligibility, and candidate qualifying procedures in English but not in Spanish, and may have employed too few bilingual poll workers. In addition, in about eight precincts, our investigation indicated delays or failures to answer bilingual assistance phone lines or other delays in bilingual assistance. Evidence indicates that this may have resulted in at least 26 voters choosing to leave the polls. Finally, while poll watchers representing one of the major political parties alleged that many voters were turned away from the polls, we have been able to confirm only that 4 voters requested bilingual assistance from poll watchers, but those poll watchers were denied permission to provide assistance by the clerk. This denial is a violation of Section 208 of the Voting Rights Act, which provides that: "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write" may be given assistance by a person of the voter's choice, with the exception of agents of the voter's employer or union.

County Two is a jurisdiction not subject to Section 203 of the Voting Rights Act, but is subject to Section 208. Although the County appears to have had a pervasive lack of adequate poll worker training on Section 208 compliance, our investigation identified only two specific Haitian-American voters who were denied the right to have the person of their choice provide them creole-language assistance while voting. Poll watchers reported that, while they were able to assist many voters, some poll supervisors discouraged them from offering services to other voters. These poll watchers and others also alleged approximately 15 incidents where the poll watchers attempted to assist other voters who had actually requested bilingual assistance, but were denied permission. Apparently further complaints were received by local community groups, but despite thorough investigation the Civil Rights Division was unable to confirm any further incidents.

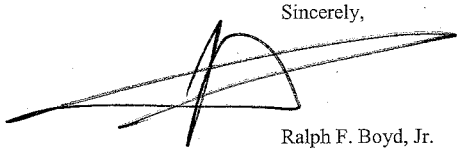
County Three is not a jurisdiction subject to Section 203 of the Voting Rights Act, but is subject to Section 208. The Civil Rights Division's investigation indicated that a lack of bilingual poll workers resulted in considerable confusion at the polls, and that some poll workers were hostile to Hispanic voters. Our investigation identified two specific Hispanic voters who encountered difficulty in voting, although they were ultimately able to vote. For example, one Hispanic voter was told she was not on the voter rolls, although the voter said that she had voted at the precinct in past elections. Unable to receive Spanish-language assistance at the precinct, she was referred to the Supervisor of Elections' office, where her name was found on the voting list and she was permitted to vote. Political party poll watchers allege that approximately 140 voters had difficulty voting, but it appears that in every instance the voter was referred to the Supervisor of Elections office. The Civil Rights Division has no evidence that any of these individuals was unable to cast a ballot. Many Hispanic voters also candidly admitted that they did not know to which precinct they should go and simply went to the one nearest their home. Political party poll watchers reported that at one precinct, a voter who needed assistance with English was not permitted help from the poll watcher and that at two other precincts the political

party poll watchers were permitted to help voters at the registration table, but were not permitted to accompany the voters into the voting booth, in violation of Section 208.

In sum, while the Civil Rights Division discovered evidence of significant confusion and delay, there were relatively few voters who actually did not vote because of these problems. Nevertheless, even one case in which a citizen's rights protected by the Voting Rights Act are unlawfully infringed is serious. I authorized law suits in these three counties to try to ensure that no one is denied the opportunity to vote. I am pleased to say that these three jurisdictions are cooperating in our efforts to address deficiencies in their voting procedures.

I hope you will find this information helpful.

Sincerely,



Ralph F. Boyd, Jr.
Assistant Attorney General

cc: The Honorable Orrin Hatch
Ranking Member

The Honorable Jeff Sessions

Response of Ralph F. Boyd, Jr. to
Written Questions from Senator Leahy

Please provide a copy of all correspondence -- including but not limited to any correspondence stating your intention to bring suit -- with local and/or State officials regarding each of the five planned lawsuits alleging violations of voters' rights that you discussed in your testimony before the Judiciary Committee.

The Department generally does not identify the recipients of the notice letters described above, and the letters themselves are not made public by the Department. The remaining correspondence relates to the substance of negotiations, and settlement negotiations are generally considered confidential. Copies of complaints and consent decrees in the cases that have settled are attached, since those documents are now public. See Attachment A.

What Federal or State elected officials, if any, did the Department inform of its intention to bring voting rights lawsuits in Florida, Missouri, or Tennessee before your announcement of those suits in your testimony before the Committee?

The Department generally does not identify the recipients of the notice letters described above, and the letters themselves are not made public by the Department. We notified Senator Schumer in the attached letter dated May 16, 2002, (Attachment B) that five lawsuits had been authorized resulting from the 2000 general election, though the Department did not identify the jurisdictions involved.

(A) From which of the Department's voting rights lawsuits, if any, did Attorney General Ashcroft recuse himself? (B) Has he viewed any of the correspondence between the Department and any local or State officeholders in Missouri? If so, which correspondence did he view?

The Attorney General is fully recused from any matter involving the November 2000 elections in Missouri.

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1. Please list all the Title VII cases that the Department has filed in court since January 20, 2001. For each case, please provide: (a) the named victims and/or plaintiffs and defendants in the case; (b) a brief description of the subject matter; (c) the date the case was filed in court; (d) the date the case was authorized by the AAG or the Deputy AAG for Civil Rights; (e) the date the "Justification Memorandum" in the case was sent to the AAG or the Deputy AAG from the Employment Section requesting approval of the case; (f) information regarding the Department's statutory authority for filing the case, and whether the case is an individual claim of discrimination or a "pattern and practice" case; and (g) the state or federal agency, if applicable, that referred the case.

We provide in Attachment C a list of the Title VII lawsuits that the Department has filed since January 20, 2001. The list describes the named victims and defendants, the subject matter, the date of filing, the statutory authority for filing the case, and the identity of the referring agency, where applicable. We appreciate your interest in the other information requested and hope that you appreciate the Department's substantial confidentiality interests in internal deliberations within the Civil Rights Division relative to these enforcement matters. Department decision-makers have long been concerned that disclosure of information about internal deliberations regarding particular matters would make it more difficult for them to obtain the candid advice and recommendations of their subordinates.

We note that the number of lawsuits filed does not present an accurate picture of the Division's efforts to enforce Title VII, because many authorized suits are settled prior to the filing of a complaint. Thus, the number lawsuits authorized is a better measure of performance. A comparison of the number of lawsuits authorized in 2002, 2001, and 2000 show that this Administration's enforcement efforts are at least comparable to, if not better than, the prior Administration's. In the first seven months of 2002 alone, seven lawsuits have been authorized. In each of the years 2001 and 2000, eight suits were authorized. It is the longstanding practice of the Department to attempt to resolve authorized cases in pre-suit negotiations before filing suit, and efforts are underway with respect to the authorized suits that have not been filed.

2. In written and oral testimony, you indicated that eight employment cases were in "pre-suit" negotiation. For each case, please provide: (a) brief description of the subject matter and the potential defendant; (b) a description of the status of the "pre-suit" negotiations; (c) the date the case was authorized by the AAG or the Deputy AAG for Civil Rights; (d) the date the "Justification Memorandum" in the case was sent to the AAG or the Deputy AAG from the Employment Section requesting approval of the case; (e) information regarding the Department's statutory authority for filing the case, and

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whether the case is an individual claim of discrimination or a "pattern and practice" case; and (f) the state or federal agency, if applicable, that referred the case.

Since the hearing before the Senate Judiciary Committee, the Division has filed a case that was previously in pre-suit negotiations, and two additional cases have been authorized but not yet filed. Accordingly, there are now nine cases in pre-suit negotiations, shown in Attachment C. It is the policy of the Department not to disclose information about pending investigations or settlement discussions. Unless and until these matters are settled or made the subject of a complaint filed in court, these matters are all pending investigations. In addition, it is unlawful to make public or otherwise release information regarding charges of discrimination that are pending before the Equal Employment Opportunity Commission (EEOC). See 42 U.S.C. § 2000e-5(b) (providing that charges of discrimination shall not be made public by the EEOC). The Department maintains that this prohibition applies equally to matters that have been referred to us by the EEOC and have not yet been the subject of a properly filed complaint. Accordingly, we are not at liberty to disclose the identity of the defendants or the status of pre-suit negotiations.

We appreciate your interest in the other information requested and hope that you appreciate the Department's substantial confidentiality interests in internal deliberations within the Civil Rights Division relative to these enforcement matters. Department decision-makers have long been concerned that disclosure of information about internal deliberations regarding particular matters would make it more difficult for them to obtain the candid advice and recommendations of their subordinates. We are, however, providing you with the following information in Attachment C about these pre-suit matters: (1) whether the defendant is a state, county or municipal government; (2) the subject matter of the allegations; (3) the statutory authority for filing the case; and (4) the identity of the referring agency, where applicable.

3. Rarely do we confront situations where employers, lenders or businesses post signs saying: "Women need not apply." More typically, those who would discriminate erect more subtle -- though not less damaging -- barriers to achieve their ends. These barriers may operate in the form of stereotypes that women for instance are not suited for particular jobs, or the use of selection criteria that exclude certain groups but that bear no relation to success in the job. The 1991 Civil Rights Act passed by Congress and signed into law by President Bush ensures that the Department of Justice has the tools necessary to address actions with an unjustified disparate impact and all forms of discrimination.

Despite the important role the disparate impact standard plays in assuring equal opportunity, the Department seems to be backing away from its use. Last December, you gave a speech to the ABA in which you stated that disparate impact cases would be less of

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a priority and that "in most instances" the Division would bring impact cases only if there was additional evidence of "intentional discrimination."

A few months before your speech, the Department had taken the rarely used step of changing positions in a case involving selection criteria for Philadelphia transit police that operated to exclude women. The transit police subjected job applicants to a running test that was more demanding than the one used by the FBI, the DEA, Secret Service or the New York City police or firefighters, and exempted overwhelmingly male incumbents from having to pass the test. The Department's expert, by a former head of New York City Transit, submitted a report making clear that the test excluded people who could perform well in the job. The Department joined with five women in 1997 to challenge the use of the test, but in October of last year, the new Administration changed position when the case was on appeal.

(A) Has the Department made a decision to de-prioritize disparate impact cases as you expressed in your ABA speech? On what basis, can the Department justify a decision not to combat practices that Congress clearly prohibited in 1991?

As an initial matter, the Department respectfully disagrees with your characterization of (1) the facts of the SEPTA case; (2) the Department's position in that case; and (3) the Department's position regarding disparate impact cases.

In answer to your specific question about disparate impact cases, the Department has made no decision to de-prioritize disparate impact cases. The Division takes seriously its obligation to conduct employment discrimination prohibited by the statutes the Division enforces.

The facts of the SEPTA case are set forth in 250 pages of findings by the District Court and provide ample support for the conclusion that the running test at issue was job-related and consistent with business necessity. Those findings included the following:

- SEPTA officers are part of a unique, foot-based patrol unlike any other transit force; typical law enforcement officers simply do not engage in the type of physical activities with the same frequency as SEPTA officers.
- Aerobic encounters are a routine part of the job generally as part of an emergency assist or running backup.
- Officers are deployed alone and on foot, and have only two ways to respond to officer backup and officer assist calls: 1) ride a train to the location where help is needed, if one is available; or 2) run to the location where assistance is needed.

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- Expert testimony showed that running was a critical task, and that officers who could not pass the running requirement may not arrive in a timely fashion to an assist or backup.

- The Chief of SEPTA testified that officers who are not passing their incumbent fitness exams are not capable of performing all of their policing duties and that a lack of fitness and inability to meet the standards has resulted in on-the-job injuries.

(B) If you are not de-prioritizing disparate impact cases, what did you mean by your ABA speech? In particular, what did you mean when you stated that you would require an additional showing of intent in order to pursue a disparate impact case when the purpose of disparate impact cases do not require intent?

Assistant Attorney General Boyd did not state that he would require an additional showing of intent in order to pursue a disparate impact case. Instead, he stated:

> Our focus on disparate treatment cases will not be to the exclusion of disparate impact matters. We will scrutinize and look very carefully at these cases as well. However, in exercising discretion, we recognize that statistical disparities resulting from a particular practice alone may not necessarily reflect racial, or ethnic, or religious, or gender bias. This recognition, this acknowledgment militates against the Division bringing cases based solely on numerical disparities. In most instances we are going to want to see additional evidence that is indicative of -- or that reflects disparate treatment, that to say: intentional discrimination. However, I will say this -- to the extent that really bad numbers may be probative of discriminatory intent, bad numbers will buy companies, employers, lenders and the like a very close look from us.

(C) Have you filed any Title VII cases that include disparate impact claims in the last year? Have you filed any Title VII cases that include solely disparate impact claims (and no intentional discrimination claims) in the last year? If you have, please provide a list of each case, a description of the subject matter and the date on which the case was filed. Do you anticipate position changes in additional Title VII disparate impact cases?

The Department has not filed any Title VII disparate impact cases in the last year. However, we continue to litigate 4 disparate impact cases and are monitoring compliance (which often involves active litigation) in 14 other disparate impact cases.

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The phrase "position changes" is ambiguous but, assuming that it means a decision not to pursue a lawsuit already filed, we anticipate no changes at this time. In addition, to the extent your question suggests that there have been "position changes" in the past, we disagree with that assertion.

(D) Are you currently investigating any Title VII disparate impact cases? If you are, please describe each matter that you are currently investigating, when each investigation commenced, and the status of the investigation. Do you envision the number of Title VII disparate impact cases that the DOJ will pursue decreasing, increasing, or staying the same?

The Employment Law Section is investigating matters which may give rise to disparate impact claims under Title VII. Among those matters are cases involving testing or selection procedures that have a disparate impact on protected classes under Title VII. Again, as mentioned above, it is the policy of the Department of Justice not to disclose information about pending investigations, of which there are more than a hundred. Unless and until these matters are settled or made the subject of a complaint filed in court, these matters are all pending investigations. Accordingly, it is difficult to identify cases by the theory of proof or the theory of prosecution. We can say, however, that our investigations arise under both Section 707 and 706 of Title VII, that is, referrals from the EEOC as well as "pattern and practice" cases. At this time, we do not know whether the number of disparate impact cases brought by the Department in the future will increase, decrease, or remain the same. That will depend upon the evidentiary facts revealed in our investigations.

4. Please list all matters that the Employment Section is currently investigating. For each case, please provide: (a) a brief description of the subject matter and the claims of each case, and whether the case is an individual or "pattern and practice" case; (b) the date the formal investigation by the Department commenced; (c) whether a justification memorandum has been submitted to the AAG or the Deputy AAG in each matter and, if applicable, the date of the "Justification Memorandum."

The Employment Litigation Section is currently investigating over one hundred matters, including referrals from the EEOC as well as pattern and practice investigations initiated by the Department. These matters may give rise to disparate impact and/or disparate treatment claims. We appreciate your interest in these matters and hope that you appreciate that it would be inappropriate to provide additional information while they remain under investigation, consistent with the Department's long-standing policy about pending matters.

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Affirmative Action

1. As you know, the Sixth Circuit recently decided, in a 5-4 en banc decision, that the University of Michigan Law School could consider race and ethnicity as one factor in admissions for purposes of increasing diversity in the student body. The Sixth Circuit is expected to soon issue a ruling on a companion case concerning the constitutionality of the affirmative action program at the University of Michigan undergraduate institute.

When these cases were before the district court, the Civil Rights Division participated as amicus -- supporting the admissions policy at both the University of Michigan Law School case and the Michigan undergraduate case, and the constitutionality of considering race as one factor in admissions. The Division also submitted amicus briefs in the Ninth and Eleventh Circuits supporting race-conscious university admission policies.

(A) Does the Department intend to maintain the position that it is constitutional to consider race and ethnicity as one factor to further a diverse student body?

The Department considers its litigation position on a case-by-case basis.

(B) Will the Department write an *amicus* brief in the University of Michigan cases on the question of whether certiorari should be granted? Please discuss the position that you plan to take. If certiorari is granted, will the Department write an *amicus* brief in the case. Please discuss the position that you plan to take. If the Department has not made a decision on this matter, please explain why, given the position that was taken in the lower court, the Department might be revisiting its position on the constitutionality of race-conscious affirmative action in higher education.

The Department is currently not a participant in this case and has made no decision about whether to file an amicus brief.

2. During the past administration, the Civil Rights Division defended in litigation the constitutionality of the Section 8(a) program, under which the Small Business Administration awards procurement contracts to "socially and economically disadvantaged small business concerns" and allows a rebuttal presumption that certain racial groups are socially disadvantaged.

Will the Department continue the prior Administration's policy of defending the Section 8(a) program in against constitutional challenge?

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The Department considers its litigation position on a case-by-case basis. Currently, the Department is defending the constitutionality of the Section 8(a) program in *DynaLantic Corp. v. United States Department of Defense, et al.*, C.A. No. 95CV02301 (EGS) (D.D.C.).

Education

1. Lower courts have been divided on the question of when *non-remedial* affirmative action programs are constitutional, and specifically on the constitutionality of non-remedial integration programs. For instance, in *Brewer v. West Irondequoit Central School District*, the Second Circuit held that a race-based voluntary integration program may further a compelling interest even in the absence of past discrimination by the school district. The Civil Rights Division submitted an *amicus* brief in support of this view, and submitted *amicus* briefs in cases raising the constitutionality of race-based integration programs in Montgomery County, Maryland and Arlington, Virginia.

Will the Department continue to support the constitutionality of <u>voluntary</u> integration programs in primary and secondary education? Does the Department have plans to submit any *amicus* briefs in support of the constitutionality of such programs before district courts or appellate courts? If so, please list the cases in which you expect to participate.

Since the Department considers its litigation position on a case-by-case basis, it is difficult to determine in advance of such consideration whether we will submit *amicus* briefs. In accordance with our long-standing policy on pending matters, we do not generally disclose, prior to filing such briefs, the cases in which we have decided to participate.

Personnel

1. Do you have plans to relocate or remove additional Section attorneys? If yes, please provide a list of which attorneys you plan to relocate or remove.

As you are aware, I have temporarily reassigned a Civil Rights Division section chief to an interdivisional task force on employment discrimination. These types of reassignments are not unusual. At the outset of Attorney General Reno's tenure, three of the nine (33%) career section chiefs in the Civil Rights Division were *permanently* reassigned.

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As has been the case with prior Assistant Attorneys General, I reserve the right to reassign personnel to where their skills are put to the best use.

2. What are your plans regarding the assignment of the Employment Section Chief who was transferred to the Civil Division? You testified that the transfer of this Section Chief though involuntary, was temporary, and that you anticipated that she would be returned. Please detail the factors that will influence the decision to return this Section Chief to her position.

This attorney was asked to take the laboring oar on a very significant employment discrimination task force that was recently created in response to a decades-old concern from Justice Department attorneys litigating employment discrimination cases. This attorney was asked to take a large role on the task force because of her experience, her temperament, her expertise in the area of law, the perspective she brings as an aggressive enforcer of federal civil rights laws, and her teaching skills. When this attorney's temporary reassignment to the task force is over, we will examine all of the circumstances to determine her next assignment, taking into account where we believe she can best serve the interests of the Department of Justice in enforcing the Nation's civil rights laws.

3. Do you expect to alter hiring practices of line attorneys so that the front office will screen all applicants? Please explain the process that you currently use for hiring attorneys and whether you have changed any practices or procedures employed by the prior Administration.

The Office of the Assistant Attorney General (OAAG) is currently screening all applicants. In February 2002, the Division changed the practice and procedures associated with the hiring of experienced attorney positions in order to create a centralized system of recruitment and selection. The new process includes the following steps:

When a Section's staffing pattern management report indicates an attorney vacancy does or will exist, the Chief obtains approval of the respective Deputy Assistant Attorney General (DAAG) to announce the position.

The Human Resource Office (HR), in consultation with the Chief, announces the position. All attorney vacancy announcements will be open a minimum of two weeks, contain specific opening and closing dates, and be distributed for the purpose of outreach to minority bar associations. It is the policy of the Division to post all supervisory and/or management positions for a minimum of three weeks.

HR receives, logs, and determines which applicants meet minimum qualifications.

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HR forwards applicants who meet minimum qualifications to the appropriate DAAG in the OAAG.

The DAAG reviews applications and identifies a list of individuals for the Section Chief to interview and forwards all applications to the Section.

The Section follows established practice for identifying and interviewing other applicants.

The Section Chief provides a hire list to the DAAG with recommendation for hires. This list should include individual written recommendations, addressed to the Assistant Attorney General (AAG), for each hire which discusses the applicant's background, qualifications, credentials, and references and includes a line for the AAG to indicate approval.

The DAAG sends the Section Chief's hire recommendation and DAAG's recommendation (if different from Chief) to the AAG for review and approval.

Upon approval by the DAAG and the AAG, the Section Chief provides a copy of the selectee's hire memo and resume to the HR in order to determine appropriate salary information.

The Section Chief (or designee) contacts applicant to make a tentative offer of employment.

All resumes are returned to the Human Resource Office.

Prior to this change, all attorney applications were sent directly to the Section where the position was located, rather than the HR Office. Each Section had established practices for screening, identifying, and interviewing applicants. The Section Chief would then make a recommendation for hire, via memorandum, to his respective DAAG and the AAG seeking approval.

With respect to new lawyers hired under the Attorney General's Honor Program, the OAAG is not currently involved in reviewing the more than 600 applications we receive. However, beginning last year, a member of the OAAG serves as an active member on the Division's hiring committee, which is directly involved in the process of establishing the criteria to be used when screening applications.

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Voting

The Division is charged with enforcing the 1965 Voting Rights Act, most importantly Section 2, which prohibits voting practices and procedures that discriminate on the basis of race, color or membership in a language minority group, and Section 5 which requires certain jurisdictions with a history of severe discrimination to submit for preclearance any voting-related changes before adopting them.

States have, of course, been redistricting in the wake of the 2000 Census, which has caused a tremendous increase in the number of Section 5 submissions that the Department will be required to review.

1. How are you allocating resources in the Voting Rights Section given the need to meet increased Section 5 obligations? Specifically, how will you ensure that your proactive Section 2 litigation challenging discriminatory districts continues despite your increased Section 5 workload?

Starting in 1999, the Division's Voting Section began planning how to handle the increase in Section 5 submissions which occurs as a result of new redistricting plans adopted after the decennial census. By way of comparison, in the years before the 2000 census the Section received approximately 50-75 redistricting submissions a year, whereas between October 1, 2001, and June 1, 2002, it received 1,326 such submissions. In preparation for this, the Department sought and received significant new resources to prepare for this increase.

Enforcement of Section 2 of the Voting Rights Act is one of the Voting Section's priorities, along with enforcement of Section 5 and Section 203 of the Act. As part of the Section's planning for the increase in work expected because of redistricting, special attention was paid to maintaining the amount of resources devoted to Section 2 enforcement. While there has been some shift in resources to handle the tremendous increase in Section 5 work, we have continued to devote resources to Section 2 work.

A review of our case management system indicates the following estimates of the percentage of Voting Section resources from attorney and professional staff allocated to Section 5 and to all other case related matters (Section 2 and other statutes):

	10/1/00 through 10/1/01	10/1/01 through 6/4/02
Section 5	50%	58%
Case Related and Matter Development	31%	26%

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2. Has the Department filed any new Section 2 litigation since the new Administration has been in place? Have you authorized any Section 2 litigation? If you have, please provide the date that such litigation was authorized, and a description of the litigation.

Three new Section 2 vote dilution suits have been filed since the new Administration has been in place: (1) *United States v. City of Lawrence, MA* (D. Mass.) (amended complaint filed on August 6, 2001; suit was settled by consent decree entered on Feb. 21, 2002); (2) *United States v. Alamosa County, CO* (D. CO) (complaint filed on November 27, 2001) (presently pending); and *United States v. Osceola County, FL* (M.D.FL) (complaint and consent decree filed on June 28, 2002).

In addition, there has been extensive litigation in a Section 2 vote dilution case -- *United States v. Blaine Co. MT* (D. MT) -- which was filed prior to January 20, 2001, but which was tried since then. The Voting Section prevailed at trial, and two important litigated judgments have been entered in the case: (1) a July 23, 2001, order denying the defendants' summary judgment motion, which upholds the constitutionality of Section 2 on its face, and as applied to cases involving Native Americans as the victim class; and (2) an extensive written decision on the merits entered on March 21, 2002, finding for the United States on its Section 2 claim and ordering Blaine County to draw single-member districts.

There has also been extensive litigation since January 20, 2001, in another important Section 2 vote dilution case -- *United States v. Charleston County, SC* (D. SC, filed January 17, 2001). Trial was completed in this case in August of 2002. Post-trial briefs are due in September 2002.

In addition to the Section 2 actions noted above, one of the matters arising from the 2000 election and authorized for suit by Assistant Attorney General Boyd includes a Section 2 claim.

Mountain States Legal Foundation Fee Award

1. When we met in my office in late-March of this year, you said you were unaware that Mountain States Legal Foundation had received over $300,000 in attorneys' fee for being the "prevailing party" in the *Adarand* litigation. Was that statement true and correct?

While Assistant Attorney General Boyd had approved the settlement, he had no recollection of it when he responded to your question during the March meeting. He regrets any confusion his answer might have caused.

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2. On what date did the Department of Justice officially decide to pay Mountain States Legal Foundation attorneys' fees? Why were you not made aware of the decision at that time? Do you believe you should have been made aware at that time?

The Department and the plaintiff reached a settlement regarding the fees in February 2002. As stated in response to the prior question, Assistant Attorney General Boyd had approved the settlement.

3. Did you or anyone in the Civil Rights Division front office or the Employment Litigation Section participate in any way in the decision-making process regarding the Mountain State Legal Foundation attorneys' fee award? If no, then who within the Department of Justice gave formal approval to pay Mountain States?

The litigating section, the front office, and the client agency (where applicable) are involved in virtually every significant settlement decision in the Division. The Adarand fee settlement was no exception.

4. In its Application for Attorneys' Fees -- filed with the United States District Court for the District of Colorado on January 18, 2002 -- Mountain States Legal Foundation argued that it was entitled to a 20% enhancement in fees because "it took *Adarand* ten years, and two trips to the Supreme Court, to secure the relief it sought . . . [and because of the government's] bad faith." (Fee Application, Pg. 19). Do you believe that the Justice Department acted in "bad faith" in defending a Congressionally enacted affirmative action plan? If yes, why? In no, then why did the Justice Department include the 20% "bad faith" enhancement in the $424,000 baseline figure ($327,100 (Attorney Fees on the Merits)) + ($65,420 (Bad Faith" Enhancement)) + ($25,775 (Expenses)) + ($6,050 (Preparation of Application)) from which it negotiated a final settlement amount? (See DOJ OLA Letter (May 2, 2002) to Senator Kennedy).

We refer you to our attached letter of May 2, 2002, in which we discuss the basis for the settlement. Attachment D.

Adams Mark

1. Earlier this year, in response to a document request by Chairman Leahy, the Justice Department produced two letters (March 13, 2001 and August 6, 2001) from Fred Kummer to Attorney General Ashcroft regarding the Adams Mark settlement agreement. In transmitting these letters to the Committee, the Department asserted that they implicated "personal privacy interests" that ostensibly would be violated if the letters were released publicly. Could you explain in detail what "personal privacy interests" are

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implicated or violated by the public release of letters from the owner of a company directly to the Attorney General in his official capacity regarding an ongoing settlement agreement to which the company and the Justice Department are both parties?

The Department of Justice's May 3, 2002 transmittal letter to Chairman Patrick J. Leahy indicated that some letters included in the enclosed exhibits might "contain information that implicates individual privacy interests." This notice did not apply to every document submitted by the Department. Neither of the two letters from Fred Kummer described above contain privacy sensitive material. Both of those letters may be released to the public without harming individual privacy interests.

Brennan Case

1. Please provide this Committee with the dates of any and all meetings or conversations (i.e., face-to-face, conference calls, or e-mails) between you or anyone in the Civil Rights Division and representatives of the Center for Individual Rights ("CIR") regarding the Brennan case. Please provide the Committee with a list of who attended these meetings - from both CIR and the Justice Department -- and designate who in attendance from the Department is a career employee and who is a political appointee.

U.S. v. New York City Board of Education and *Brennan v. Ashcroft* are ongoing cases. As with all pending cases, the Department attorneys handling the case have had countless communications with other attorneys involved with the case, including those attorneys from the Center for Individual Rights (CIR) who represent some of the parties. It would be impossible to determine the dates of every meeting or conversation that has ever taken place in these cases between Department attorneys and attorneys from CIR. We note, however, that neither Assistant Attorney General Boyd nor anyone on his staff has to date spoken to a representative of CIR about these matters.

2. According to the Justice Department's brief in the 2nd Circuit:

"the magistrate judge held that the relief afforded the 54 offerees is `narrowly tailored' since only `persons who are qualified for the position of [c]ustodian and [c]ustodian [e]ngineer will receive remedial relief, and no current permanent employee will be displaced.' The magistrate judge also held that the number of victims entitled to relief is quite small in comparison with the number of individuals who may have been afforded relief had this matter proceeded to final adjudication.'" DOJ Brief Pg. 15.

In an April 17, 2002, letter to Assistant Corporation Counsel Norma Cote, however, the Department wrote: "I am sure you will agree -- no court would demand of a party that it defend something that is unlawful or that it mount a defense that does not comply

with professional ethical standards." The Justice Department argued, and a magistrate judge agreed, that the relief originally granted to all 54 offerees was lawful. Since this issue was not reached on the merits by the 2nd Circuit, on what basis does the Department now contend that the relief granted to 32 of these offerees is "unlawful" and that defending it is inconsistent with "professional ethical standards"? Do you believe that the original trial team on the case or their supervisors failed to comply with "professional ethical standards" based upon the relief they sought and were granted by the magistrate judge?

Our letter of April 17, 2002 fully sets forth the Department's views on this subject. A copy of this letter is attached, Attachment E.

Special Litigation

1. In your answers to questions posed by the Committee on the Elimination of Racial Discrimination, you stated that "the federal government takes an active role in preventing police misconduct by bringing lawsuits against law enforcement agencies that engage in a pattern or practice of police misconduct." Please list:

(a) all "pattern and practice" actions under 42 U.S.C. § 14141 that the Department has filed in court since January 20, 2001;

We are attempting in the first instance to take a cooperative approach to resolving 14141 cases. This has generally been successful, and has led to genuine reform in police practices far more quickly than would be possible via litigation.

(b) all investigations involving alleged or suspected police misconduct that the Department has commenced since January 20, 2001;

The following investigations under 42 U.S.C. § 14141 have been opened since January 20, 2001 and are public knowledge:

1. Cincinnati, OH
2. Schenectady Police Department, NY
3. Portland Police Department, ME
4. Miami Police Department, FL

(c) in actions or investigations initiated by the Department that involve alleged or suspected police misconduct, all settlements reached and/or judgments entered since January 20, 2001.

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The following settlements have been reached or judgments have been entered since January 20, 2001, in actions or investigations under 42 U.S.C. § 14141:

1. Los Angeles Police Department, CA
   Consent Decree entered June 2001
2. Washington Metropolitan Police Department, DC
   Settlement agreement effective June 2001
3. Highland Park Police Department, IL
   Settlement agreement effective July 2001
4. Cincinnati Police Department, OH
   Settlement agreement effective April 2002
5. Columbus Police Department, OH
   Letter agreement effective and case dismissed September 2002
6. Pittsburgh Police Department, PA
   Order terminating portions of Consent Decree and providing further relief entered September 2002
7. Buffalo Police Department, NY
   Memorandum of Agreement effective September 2002

2. In cases involving alleged or suspected police misconduct, you have repeatedly expressed a preference for informal negotiation and out-of-court settlements over litigation and consent decrees. In your written statement to the Committee, for example, you described the Department's recent agreement with the City of Cincinnati as a "collaborative negotiation process" that "achieved real reform without the need for protracted litigation or a consent decree. . . . It reflected our desire to help fix the problems in Cincinnati, not fix the blame."

(a) Does the Department approach "pattern and practice" cases differently from how it approaches other alleged civil rights violations? In other contexts, the Department has routinely concluded its "collaborative negotiations" with state and local governments, businesses, and other institutions with the entry of consent decrees in federal court. Consent decrees, of course, can be enforced through civil and criminal contempt proceedings; they do not require the Department to file a lawsuit in the event of a defendant's non-compliance. Do you believe that the need to obtain enforceable relief through a consent decree or other court judgment is any less compelling in "pattern and practice" cases?

The Department approaches all cases involving alleged civil rights violations seriously, and allegations of a "pattern or practice" of police misconduct certainly are no exception. Civil Rights Division personnel do thorough, resource-intensive investigations of allegations of "patterns or practices" of police misconduct, as exemplified by our recent

investigations involving the Washington, DC, and Cincinnati, Ohio, police departments. Where we find pattern or practice problems covered by the statute, we recognize the importance of obtaining enforceable relief.

In recent pattern or practice matters, such as our investigations of the Washington, DC, and Cincinnati police departments, the jurisdictions have been willing to work cooperatively with us. During the investigations, we have notified city and police officials as soon as we identified concerns, and have provided technical assistance to enable the jurisdiction to immediately begin making change. Because these jurisdictions had undertaken reforms and made real progress even before the end of the investigation process, it was not necessary to insist on the entry of court orders.

(b) In future "pattern and practice" cases, in what circumstances will the Department (i) seek settlements that are enforceable in court (*i.e.*, consent decrees), and (ii) seek final judgments through litigation?

The Department considers its position in pattern and practice cases on a case-by-case basis. The Department will never yield its prerogative under the law to do what is necessary for effective enforcement, either by consent decrees or final judgments through litigation. These means may be necessary where the jurisdiction and law enforcement agency have not demonstrated a willingness or capacity to make reforms, or where we are not able to make the requisite progress through a settlement agreement that is not a court order. But to the extent we can achieve compliance with the law with contractual settlement agreements that are enforceable in court, like the ones in Cincinnati and the District of Columbia, and do so on an expedited basis, we hope to reach such agreements at the earliest possible date.

3. Please list all actions under the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, that the Department has filed in court since January 20, 2001, and describe the underlying subject matter.

1. *U.S. v. State of Wyoming* No. 02 CV 068 (D. WY). Complaint, settlement agreement and joint motion under Rule 41(a), F.R.Civ. P., for conditional dismissal filed 4/15/02. Settlement addresses deficient conditions at the Wyoming State Penitentiary including: medical and mental health care; safety and security; classification; fire safety; and food services.

2. *U.S. v. Nassau County* No. CV 00-0148 (NGG) (ARL)(E.D. NY). Complaint, settlement agreement and joint motion under Rule 41(a), for conditional dismissal filed 4/22/02. Settlement agreement addresses deficient conditions at the Nassau County

Response of Ralph F. Boyd, Jr. to
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Correctional Center, East Meadow, NY, including use of force, and medical and mental care.

3. *U.S. v. Shelby County* No. 02-2633 D V (W.D. TN). Complaint, settlement agreement and joint motion under Rule 41(a), for conditional dismissal filed 8/12/02. Settlement agreement addresses deficient conditions at the Shelby County Jail, Memphis, TN, including use of force, security, safety of inmates, medical and mental health care, and environmental conditions.

4. Please list all investigations involving conditions at jails, prisons, juvenile facilities, and other detention facilities that the Department has commenced since January 20, 2001.

The following investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, or 42 U.S.C. § 14141 (regarding juvenile correctional facilities) since January 20, 2001 and are public knowledge:

1. Patrick County Jail, VA
2. Nevada Youth Training Center, NV
3. Santa Fe County Correctional Center, NM
4. Alexander Youth Services Center, AK
5. Arkansas Prisons
   - McPherson Correctional Facility
   - Grimes Correctional Facility
6. Garfield County Jail, OK
7. W.J. Maxey Training School, MI
8. Arizona Juvenile Facilities
   - Adobe Mountain School
   - Black Canyon School
   - Catalina Mountain School
9. Mississippi Juvenile Facilities
   - Oakley Training School
   - Columbia Training School
10. Maryland Juvenile Facilities
    - Charles H. Hickey, Jr. School
    - Cheltenham Youth Facility

5. Please list and provide copies of all findings letters involving conditions at jails, prisons, juvenile facilities, and other detention facilities that the Department has issued since January 20, 2001.

1. Shelby County Jail, Memphis, TN (see attached findings letter, Attachment F).

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2. Woodward State Resource Center and Glenwood State Resource Center, Iowa (see attached findings letter, Attachment F).
3. Baltimore City Detention Center, Baltimore, MD (see attached findings letter, Attachment F).
4. Wicomico County Detention Center, MD (see attached findings letter, Attachment F).

6. In November 1999, Human Rights Watch reported that hundreds of children are being held in appalling conditions in the Baltimore City Detention Center. It stated:

Juveniles are confined to dimly-lit, squalid cells crawling with cockroaches and rodents and subject to extreme temperatures. Violence between inmates is rampant and may include "shanks," or weapons fashioned from pieces of metal from air vents or old light fixtures. Some jail guards have condoned and even organized fights between youth, known as "square dances," which have resulted in serious injuries. Furthermore, Human Rights Watch reported, children are confined to disciplinary segregation cells for as long as six months at a time; educational services are denied for months; and mental health services are "minimal to nonexistent." In October 2000, the Justice Department opened an investigation of the Baltimore City Detention Center to examine possible violations of inmates' constitutional rights. Is this investigation still open, or has it been closed? If the investigation is open, what has the Department done in the last 19 months? Has it issued any findings? What actions has the Department taken to remedy the allegedly inhumane conditions of confinement at this facility?

The Civil Rights Division's investigation of the Baltimore City Detention Center, which began in October 16, 2000, is open and ongoing and a matter of public knowledge. The investigation focuses on environmental conditions and safety, medical and mental health care, protection from harm, and the use of isolation of juveniles. The Division has reviewed records and documents, and conducted on site tours with expert consultants in the fields of corrections, medical and mental health care, environmental and fire safety and education. As is typical of our Civil Rights of Institutionalized Persons Act (CRIPA) investigations, we provided preliminary feedback to the jurisdiction during our on site tours and sent a findings letter on August 13, 2002. The scope of the investigation and the size of the facilities are factors affecting the time it has taken to complete the investigation.

Federalism

In your written testimony, you noted that a part of your job is to defend the civil rights laws against constitutional challenges. You mentioned a range of challenges under the Eleventh Amendment to some very basic civil right laws - for instance Title VI, Title VII, Title IX. You then went on to make statement that I agree with 100%.

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Written Questions from Senator Kennedy

> **Although these types of cases do not generate a great deal of publicity ... their impact is ... significant. Individual cases may be won or lost, but litigation over the constitutionality of federal civil rights statutes goes to the fundamental question of whether victims of discrimination will be able to seek relief in court. I am gratified to report that the tools Congress has provided remain largely intact.**

As I read that passage, I couldn't help wondering if you have spoken with the President about his nominations for the federal bench. Because many of these nominees, as you know, have supported controversial Eleventh Amendment challenges to civil rights laws, either as judges or as advocates. Have you discussed with the President or White House Counsel Judge Gonzalez the importance of protecting our civil rights laws against constitutional challenges? Have you discussed with either of them the importance of nominating judges who support Congress's power to enact civil rights laws and to make these laws enforceable against states?

> Assistant Attorney General Boyd wholeheartedly supports all of the President's outstanding nominees for federal judgeships.

Response of Ralph F. Boyd, Jr. to
Written Questions from Senator Durbin

In an article which appeared in the *Washington Post* on March 17, 2002, the Civil Rights Division apparently issued an e-mail to its staff attorneys stating that lawyers who talked to "outside entities" about "internal legal deliberations" would face discipline. The article also references a September 28 memo, which was also issued by the Division to its staff. Please provide the Judiciary Committee with a copy of both the e-mail and the memo that were referenced in this article.

The Department generally does not disclose internal documents, but notes that all lawyers, especially government lawyers, are bound by a strict code of ethics, including an obligation to protect client confidences.

Response of Ralph F. Boyd, Jr. to
Written Questions from Senator Edwards

Following the 2000 election, Florida voters made allegations concerning (1) improper statewide purges of eligible voters and (2) poor voting equipment that disproportionately impacted minority communities. As you know, the Voting Rights Act prohibits certain voting practices even in the absence of discriminatory intent.

Please describe in detail the Justice Department's investigations, if any, of each of these two allegations.

Does the Justice Department plan to take legal action regarding these allegations? If not, why not?

The issues presented in these two investigations and our rationale for closing them are detailed in the June 7, 2002 letter from Assistant Attorney General Ralph F. Boyd, Jr., to you, another copy of which is attached (Attachment G).

The Advancement Project has stated that in some heavily minority inner city precincts in Chicago, almost four out of ten votes cast for President were discarded. Did the Justice Department investigate this allegation or any similar allegation? If so, what were the results of the investigation? If the Justice Department is taking no legal action, please explain why.

After the November 2000 election, news accounts suggested a large number of ballots (upwards of 120,000) in Chicago and Cook County cast using the punch-card balloting method did not have a recordable vote for President. These accounts also suggested that there was a racially disparate pattern with higher spoilage rates in predominantly black city precincts than in predominantly white outer suburban precincts. These accounts were similar to those published regarding spoiled ballots in several Florida counties which used punch-card ballots. We, however, have not received any specific complaints regarding the Chicago matter.

Several lawsuits were brought challenging Chicago's punch-card balloting method. We understand that a state court in *Illinois Democratic Party v. Orr* issued an order requiring Cook County to use new voting technology in conjunction with the existing punch-card method. The new technology would detect spoiled ballots by feeding the ballots into a scanning device that can detect overvoting and undervoting and then give voters a second chance to correct balloting errors. News reports indicate that this new technology is now being used in Cook County, and that it cut the number of ballot errors in the March 2002

primary election. We also understand that two lawsuits brought by minority voters challenging the punch-card balloting method under the Voting Rights Act and the Fourteenth Amendment are likely to go to trial this year in federal court, *Black v. McGuffrage* and *Del Valle v. McGuffrage*.

Response of Ralph F. Boyd, Jr. to
Written Questions from Senator Hatch

Mr. Boyd, many on both sides of the aisle of this Committee have been supporters, if not champions, of the goals of the Americans with Disabilities Act ("ADA"). But in recent years, there has been a notable increase in litigation between the Department of Justice and private industry that are attempting to comply with regulations in furtherance of the Act. Some of the cases brought by the previous administration appeared to directly contradict appellate rulings defining such regulations. We are aware that in the past year, at least one industry -- the National Association of Theater Owners (NATO) -- has been in discussions and negotiations with the Civil Rights Division about resolving some ADA issues in a generic way so as to avoid continuing conflict and litigation in the courts, and to provide for important and needed accommodations to our nations elderly and disabled communities. Indeed, the settlement terms some have proposed reportedly go further than the requirements of recent appellate decisions on the litigations of this issue.

Under your leadership, has the Civil Rights Division encouraged, or does it intend to encourage, these and other negotiations with responsible industries seeking to clarify the requirements of the Act, where the disabled community could obtain accommodations and compliance with the ADA more expeditiously?

In February 2001, President Bush announced his New Freedom Initiative to fulfill America's promise to people with disabilities. He hailed the ADA as one of the most significant civil rights laws since the Civil Rights Act of 1964 and committed his Administration to effective enforcement of the ADA. Our approach to implementation of the ADA is to promote the highest possible degree of voluntary compliance through a comprehensive program of technical assistance. Experience has shown that many businesses will comply with the ADA if they are just given the information they need to comply. Our toll-free ADA Information Line handles over 100,000 calls annually for information about the requirements of the ADA. We have produced over 30 technical assistance publications that are available through our Information Line and over the Internet, including many that are tailored to the specific needs of particular sectors of the business community.

The Civil Rights Division values its ongoing dialogue with the business community. These discussions help us to provide better information about the ADA's requirements and give us greater insight into the implications of these requirements in business decision making. Under our recently launched "ADA Business Connection," we created a new web destination and materials for businesses in need of ADA information and initiated a series of meetings between the business community and people with disabilities to promote collaborative compliance efforts. We look forward to continuing and deepening this dialogue in the coming years.

Response of Ralph F. Boyd, Jr. to
Written Questions from Senator Hatch

In our enforcement activities, we strongly favor negotiated solutions to compliance problems over the protracted and costly process of litigation. Our record emphatically shows that the vast majority of enforcement matters are resolved through settlement agreements. Only a handful proceed to litigation and throughout that process we are always open to a negotiated resolution. Our current litigation involving the accessibility of newly constructed stadium-style movie theaters was initiated only after an exhaustive effort to resolve the conflict through negotiations, including mediation. We are pursuing this litigation despite an adverse ruling from a panel in the Fifth Circuit and two district court holdings because we believe that those courts are mistaken in their interpretation of the regulations promulgated under the ADA. We still hope for a voluntary resolution of these cases. In fact, we are in formal mediation in one case and stand ready to resume negotiations, either in specific, additional cases or generally with the industry.

SUBMISSIONS FOR THE RECORD

1-13

Department of Justice

STATEMENT

OF

RALPH F. BOYD, JR.
ASSISTANT ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

OVERSIGHT OF THE DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

PRESENTED ON

MAY 21, 2002

**TESTIMONY OF ASSISTANT ATTORNEY GENERAL RALPH F. BOYD, JR.
ON "OVERSIGHT OF THE DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION"**

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

MAY 21, 2002

Mr. Chairman, Ranking Republican member Hatch, and members of the Committee:

I would like to thank the Committee for inviting me to discuss the important work of the Civil Rights Division. I appreciate this opportunity to let you know what the Division has accomplished, answer your questions about our work, and listen to your concerns and thoughts about what I believe has been our thoughtful and vigorous enforcement of the civil rights laws. I also want to thank your respective staffs for the courtesies they have extended me in our meetings prior to this hearing.

Let me begin by expressing what a privilege it is to serve as the Assistant Attorney General for the Civil Rights Division. The statutes enforced by the Civil Rights Division reflect some of America's highest aspirations: to become a society that provides equal justice under law; to become a society that effectively protects the most vulnerable among us; and to become a society whose citizens not only protect their own individual freedom and liberty – but champion the individual freedom and liberty of their neighbors who may be different from them. As William Jennings Bryan once said, "Anglo-Saxon civilization has taught the individual to protect his own rights; American civilization will teach him to respect the rights of others." And while the very need to enforce the civil rights statutes confirms that we have not yet achieved a society that is free from the conduct these statutes prohibit, there is no doubt in my mind that America is

better off for making the journey, and I am therefore privileged, honored, and indeed humbled to be charged with the awesome responsibility of civil rights enforcement at the Department of Justice.

When I agreed to serve as Assistant Attorney General, I came to the job as a professional prosecutor and litigator by training and experience, and it is from that perspective that I report to you on the work and accomplishments of the Civil Rights Division. Before I comment on the substantive enforcement of the civil rights statutes, I note that one of the jobs of the Department of Justice, and therefore the Civil Rights Division, is to defend Acts of Congress from constitutional challenge wherever a reasonable defense can be made. With this in mind, the Civil Rights Division, mainly through the efforts of our Appellate Section, has been vigorously defending anti-discrimination statutes by repeatedly intervening in cases where constitutional questions are raised, and this effort has been largely successful. For example, the Division has defended 11th Amendment challenges to Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Individuals with Disabilities Education Act, the Equal Pay Act, and Section 504 of the Rehabilitation Act of 1973, and has been, with limited exceptions, very successful in this important endeavor. Although these types of cases do not generate a great deal of publicity, I mention them first because their impact is so significant. Individual cases may be won or lost, but litigation over the constitutionality of federal civil rights statutes goes to the fundamental question of whether victims of discrimination will be able to seek relief in court. I am gratified to report that the tools Congress has provided remain largely intact.

As for substantive enforcement, let me first speak generally and say that the work of the Division goes forward carefully, but aggressively. I recall during the confirmation process that many Senators' written questions sought assurances that certain statutes would continue to be enforced. I told you then that I was committed to vigorous enforcement of the law, and I feel very comfortable telling you today that the Division is doing just that.

TAKING A COOPERATIVE APPROACH TOWARD POLICE DEPARTMENT REFORM

I think that the Civil Rights Division's enforcement of Section 14141 of Title 42 of the United States Code, the statute that grants the Department of Justice the authority to investigate State and local law enforcement agencies that are alleged to have engaged in a pattern or practice of unconstitutional conduct, provides a particular success story in this regard. Last April, the City of Cincinnati, Ohio was literally and figuratively smoldering in the wake of riots touched off by community reaction to a number of controversial police shootings. One year later, Attorney General Ashcroft presided over the signing ceremony for an agreement between the Department of Justice and the City of Cincinnati that implemented significant reforms with respect to uses of force by the Cincinnati Police Department. Moreover, by engaging in a collaborative negotiation process with the City, the police, and community groups, the Department of Justice agreement will be jointly monitored and enforced along with a separate agreement among the community groups and the City. This unique and historic arrangement achieved real reform without the need for protracted litigation or a consent decree. It reflected our desire to help fix the problems in Cincinnati, not fix the blame. It was supported by groups as diverse as the Cincinnati Black

United Front, the ACLU of Ohio, the Fraternal Order of Police, the Cincinnati branch of the NAACP, and the Urban League of Greater Cincinnati.

Cincinnati is not an isolated case. Since the statute was passed in 1994, there have been seven settlement agreements or decrees entered pursuant to Section 14141. Three of those settlements have been achieved during this Administration. Moreover, the Division has commenced active investigations in Portland, Maine and Schenectady, New York, and preliminary inquires are underway in several South Florida jurisdictions. In sum, the Division's enforcement efforts with respect to this statute – led by its Special Litigation Section – have been thoughtful, focused, and vigorous, and the overwhelmingly favorable results we have achieved bear this out.

COMBATING CRIMINAL DEPRIVATIONS OF CIVIL RIGHTS

As a former federal criminal prosecutor, I really enjoy being able to convey the successes of our Civil Rights Division's Criminal Section. The Criminal Section of the Civil Rights Division prosecutes criminal civil rights violations, including bias-motivated crimes, police and other official misconduct, and human trafficking and involuntary servitude, among other things. From October 2000 to February 2002, the Division filed cases against 218 defendants for criminal civil rights violations. Of those, nearly 200 defendants were either convicted at trial or pleaded guilty. During that period the Division secured convictions in every prosecution involving non-law enforcement personnel, and in 80% of the cases involving police or other official misconduct. Prosecution of State and local officials who abuse their positions of authority continues to be a priority for the Division. Since October 2000, 114 law enforcement officials have been charged for using their positions to deprive local citizens of constitutional

rights. The number of officers charged in fiscal 2001 is the most ever in a single year – and a 50% increase over the previous fiscal year.

The investigation and prosecution of bias-motivated crimes is also a top priority. Over the last year we have made clear that the Department will not tolerate violence or other crimes driven by racism or religious discrimination. Since October 2000, the Division has filed 34 cases charging 49 defendants with racial violence ranging from shootings and assaults to cross-burnings and arson. Moreover, in the wake of the tragic events of September 11, 2001, the Division immediately responded to the upsurge in backlash violence and threats.

PROSECUTING ACTS OF DISCRIMINATORY BACKLASH AND ENGAGING IN COMMUNITY OUTREACH FOLLOWING SEPTEMBER 11 ATTACKS

Since September 11, the Civil Rights Division has been involved in the investigation and prosecution of alleged incidents involving violence or threats against individuals perceived to be of Middle-Eastern origin, including Arab Americans, Muslim Americans, Sikh Americans, and South-Asian Americans. The Division has also been involved in outreach efforts to provide individuals and organizations information about government services.

With respect to the investigation and prosecution of alleged incidents involving violence or threats, the Civil Rights Division, the Federal Bureau of Investigation, and United States Attorneys' offices have investigated approximately 350 such incidents since September 11. The incidents have consisted of telephone, internet, mail, and face-to-face threats; minor assaults as well as assaults with dangerous weapons and assaults resulting in serious injury and death; and vandalism, shootings, and bombings directed at homes, businesses, and places of worship.

Several experienced attorneys in the Civil Rights Division's Criminal Section have been tasked to review all new allegations and to monitor those investigations that are opened to ensure uniform decision-making in the initiation of federal investigations and prosecutions and to optimize resource allocation. Approximately 70 State and local criminal prosecutions have been initiated against approximately 80 subjects, many after coordination between federal and local prosecutors and investigators. Federal charges have been brought in ten cases, and the Civil Rights Division and United States Attorneys' offices are working together on those cases. A few examples are as follows:

(1) On February 14, 2002, the United States Attorney's Office for the District of Massachusetts filed a criminal information against a suspect under 18 U.S.C. 245 for placing a telephone call to an Arab-American man and threatening to kill him and his children.

(2) On December 12, 2001, the United States Attorney's Office for the Central District of California filed a criminal complaint against Irving David Rubin and Earl Leslie Krugel under 18 U.S.C. 371, 844, and 924 for conspiring to damage and destroy, by means of an explosive, the King Fahd mosque and for possessing an explosive bomb to carry out the conspiracy. On January 10, 2002, Rubin and Krugel were indicted under 18 U.S.C. 371, 2332, 844, 924, 373, 922, and 5861, which additionally included charges related to the defendants' alleged attempt to damage and destroy, by means of an explosive, the office of the Muslim Public Affairs Council and the district office of United States Representative Darrell Issa.

(3) On September 26, 2001, the United States Attorney's Office for the Western District of Washington indicted Patrick Cunningham under 18 U.S.C. 844, 247, and 924 for shooting at two Islamic worshipers and for dousing two cars with gasoline in an attempt to ignite them and cause an explosion that would damage or destroy the Islamic Idriss Mosque. Cunningham pled guilty to two counts on May 9, 2002, and faces a mandatory minimum of 5 years in prison and a maximum of life in prison.

In addition, the Civil Rights Division and the United States Attorney's offices continue to coordinate with local prosecutors in instances where cases are being prosecuted locally – and where there are also potential federal crimes that have not been charged – to consider whether plea bargains can resolve both local and federal criminal liability.

We are pleased to note that cooperation between federal agents and local law enforcement officers and between Justice Department prosecutors and local prosecutors has been outstanding. This is a testament to local law enforcement nationwide, which has shown the willingness to, and which has largely been given the legal and financial resources to, investigate and prosecute vigorously alleged bias-motivated crimes against individuals perceived to be of Middle-Eastern origin, including Arab Americans, Muslim Americans, Sikh Americans, and South-Asian Americans. The Department is aware that, in rare instances, local authorities may not have the tools or the will to prosecute a particular bias-motivated crime fully. In those rare instances, the Department will be prepared to initiate federal proceedings, if appropriate.

America is well-served by our partners in State and local law enforcement. If the post-September 11 alleged incidents of backlash violence were a test of local efforts to prosecute bias-motivated crimes, local law enforcement passed with flying colors.

With respect to community outreach, I have directed the Civil Rights Division's National Origin Working Group (NOWG) to help combat the post-September 11 discriminatory backlash by referring allegations of discrimination to the appropriate authorities and by conducting outreach to vulnerable communities to provide information about government services. The NOWG, which existed before the September 11 terrorist attacks, was created to combat discrimination: (1) by receiving reports of violations based on national origin, citizenship status, and religion, including those related to housing, education, employment, access to government services, and law enforcement, and referring them to the appropriate federal authorities; (2) by conducting outreach to vulnerable communities; and (3) by working with other components within the Department of Justice and with other federal agencies to ensure accurate referrals, productive outreach, and the effective provision of services to victims of civil-rights violations and by coordinating efforts to combat the discriminatory backlash with other Department of Justice components and other federal agencies.

Since September 11, I have spoken out against violence and threats against individuals perceived to be of a certain race, religion, or national origin and have met frequently with leaders of Arab-American, Muslim-American, Sikh-American, and South-Asian American organizations. My first such meeting occurred on September 13, 2001, the same day I issued a statement that "[a]ny threats of violence or discrimination against Arab or Muslim Americans or Americans of South Asian descents are not just wrong and un-American, but also are unlawful and will be treated as such." Among the attendees at this meeting were James Zogby, President, Arab American Institute; George Salem, Chairman, Arab American Institute; and Dr. Ziad Asali, President, Arab-American Anti-Discrimination Committee. Since that time, I have met with and

spoken to various groups on numerous occasions to listen to the concerns of minority communities and to explain the Department's efforts in combating crimes of discriminatory backlash.

AGGRESSIVELY PROSECUTING ACTS OF HUMAN TRAFFICKING

Another criminal enforcement priority of the Civil Rights Division is to establish appropriate mechanisms to enhance our ability to prosecute those who engage in the despicable act of trafficking in persons. Even while these mechanisms are being developed, our attorneys are aggressively prosecuting these cases. Using the additional tools provided by the Trafficking Victims Protection Act passed by Congress in 2000, the Civil Rights Division and United States Attorneys' offices have jointly prosecuted dozens of traffickers and helped hundreds of trafficking victims over the past year.

To provide one example, a Maryland couple lured a fourteen-year old girl from Cameroon with promises of an American education, only to enslave her as a domestic servant in their home for three years. They kept her under their power through physical violence and threats of deportation, and she was sexually assaulted. Ultimately, she ran away with the help of a good Samaritan. A call to our human trafficking complaint line led to a federal involuntary servitude prosecution. About eight weeks ago, the couple was sentenced to nine years in prison and ordered to pay the girl over $100,000 in restitution.

Using the new prosecutorial tools provided by the Act, we prosecuted 34 defendants for human trafficking in 2001 -- roughly quadrupling the number prosecuted in 2000. The Division currently has approximately 100 pending trafficking investigations, which represent nearly a 50% increase from a year before.

IMPLEMENTING THE PRESIDENT'S NEW FREEDOM INITIATIVE AND EXECUTIVE ORDER 13217

The Civil Rights Division is especially focused on initiatives of the President and the Attorney General. On February 1, 2001, the President announced the New Freedom Initiative to assist Americans with disabilities by increasing access to assistive technologies, expanding educational opportunities, increasing the ability of Americans with disabilities to integrate into the workforce, and promoting increased access to daily community life. The Civil Rights Division has been an active participant in this Initiative, led by the Disability Rights Section, the Division's largest section and one of its most active. These dedicated attorneys have accomplished a great deal recently and many of their victories are not just for individuals, but for the disabled community that is afforded greater access through the relief the Section obtains. For example, through "Project Civic Access," the Section reached agreements, which were announced in January 2002, with 21 jurisdictions requiring them to ensure that their public facilities (*e.g.*, courthouses, libraries, polling places, and parks) are accessible to people with disabilities, as required by the Americans with Disabilities Act ("ADA"). The Section has also negotiated: (1) a comprehensive settlement agreement with New York-New York Hotel and Casino to provide accessibility throughout its Las Vegas facility; (2) an agreement with one of the nation's largest theater chains to modify its design for newly-constructed stadium-style theaters to provide people with disabilities meaningful access; and (3) an agreement with a large resort and campground owner and operator that will require policy changes allowing persons with service animals to use the facilities, the nationwide training of all employees, and compensatory damages for prior discrimination.

In addition to these notable achievements, the Disability Rights Section has also initiated a broader initiative called the "ADA Business Connection Project." This business initiative seeks to facilitate increased compliance with the ADA by fostering a better understanding of ADA requirements among the business community and by increasing dialogue, understanding, and cooperation between the business community and the disability community. The project features a new ADA Business Connection web destination on the Section's ADA Website providing easy access to information of interest to businesses and a new series of ADA Business Briefs that are designed to be easily printed from the website for direct distribution to a company's employees or contractors.

An essential part of this initiative is a series of meetings between the disability and business communities, which represent collaborative efforts to discuss how the disability community and business leaders can work together to make the promise of the ADA a reality. The kick-off meeting in January 2002 raised many issues that can be addressed through collaboration and dialogue. For example, one hotel company has approached a graduate business school about including an instructional module on serving guests with disabilities in the school's hotel curriculum. At our upcoming meeting, which is scheduled for June 26, we expect to explore ways of ensuring adequate staff training about the ADA and people with disabilities in service industries that typically suffer from high staff turnover. We are also planning a series of meetings at several cities around the country to foster dialogue between businesses and disability groups in those cities regarding ADA compliance and market development opportunities for business.

Both Project Civic Access and the ADA Business Connection program are integral parts of the President's New Freedom Initiative. In addition to these two projects, we are working with State and local governments to implement Executive Order 13217 and the 1999 *Olmstead v. L.C.* United States Supreme Court decision, which requires States to place individuals with disabilities in community settings rather than institutions, where placement is appropriate and reasonable, in order to provide them with greater access to community life. Thus, we are developing a technical assistance document designed to assist States in implementing their responsibilities under Title II of the ADA, including those addressed in the *Olmstead* decision.

In addition, we hope to increase our outreach and education efforts to parents and other family members of people currently residing in institutions, those on the verge of institutionalization, and professionals treating those persons. By doing so, we hope to assist family members in understanding the benefits of community placement and to address some treating professionals' unfamiliarity with community placement alternatives, thereby reducing the likelihood that persons with disabilities who can be placed in community settings will be unnecessarily institutionalized.

ENFORCING THE VOTING RIGHTS ACT OF 1965 AND IMPLEMENTING THE ATTORNEY GENERAL'S VOTING RIGHTS INITIATIVE

In March 2001, the Attorney General announced the Voting Rights Initiative to ensure that American voters are neither disenfranchised nor defrauded. The initiative focuses on two main areas of concern: preventing abuses of voting rights and prosecuting abuses of voting rights.

The Voting Section enforces the Voting Rights Act of 1965 and has been incredibly busy, as is traditional following a census. In the past year, the majority of the Section's enforcement of the Voting Rights Act has been in the areas of Section 5 enforcement, Section 2 enforcement, and the use of Federal observers in covered jurisdictions to ensure compliance with the Act. Since last February, the Section has received 6,683 Section 5 submissions containing 21,163 changes, of which 1,771 were redistricting plans. The Division has precleared 1,222 of the redistricting plans. We have interposed objections to six redistricting plans, six changes in the form of government, and one cancellation of an election.

In addition, the Section has represented the Attorney General in two suits for a declaratory judgment under Section 5 of the Voting Rights Act (filed by Georgia and Louisiana). The Department recently prevailed in the Georgia litigation: on April 5, 2002, the United States District Court for the District of Columbia issued its decision, adopting the Department's position and invalidating Georgia's State Senate plan. The Louisiana case is still at the pretrial stage. The Section is also pursuing several suits under Section 2 of the Voting Rights Act, which prohibits dilution of minority voting strength. Litigation is pending, at various stages, against Charleston County, South Carolina; the San Gabriel Water District in California; and Alamosa County, Colorado. Another accomplishment is a settlement in *United States v. Lawrence*, a Section 2 lawsuit brought to protect the voting rights of Hispanic voters. The agreement was approved by a federal court on February 27, 2002.

The Attorney General has allocated additional attorney slots to the Voting Section of the Civil Rights Division and has announced the creation of a position devoted to addressing issues of election reform. The Attorney General has now appointed a Senior Counsel for Election

Reform, Mark Metcalf, who is assisted by two career attorneys. These attorneys monitor and review State and federal election reform proposals. Investigations are also continuing in several matters related to the 2000 Presidential election.

PROTECTING THE RIGHTS OF INSTITUTIONALIZED PERSONS

Another example of vigorous enforcement by the Division is our enforcement of the Civil Rights of Institutionalized Persons Act or "CRIPA." This statute authorizes the Civil Rights Division to investigate State-run nursing homes, prisons, and juvenile facilities when credible allegations of systematic serious or flagrant violations of constitutional standards or, in some cases, federal law, arise. Although CRIPA work is very rarely high profile, it is among the most important work that we do. The Senate Special Committee on Aging's hearings on March 4, 2002 made clear the importance of safeguarding the safety and health of senior citizens in nursing homes. CRIPA investigations can literally address life and death issues in nursing homes and juvenile facilities, and the population protected by the statute are among society's most vulnerable – the elderly, the mentally disabled, victims of abuse, and children. This Administration has authorized investigations of 24 facilities under CRIPA, and I have personally authorized 18 such investigations since I arrived at the Department late last July. In the past seven months alone, the Division has conducted 57 tours of nursing homes, juvenile facilities, mental health facilities, and correctional institutions. By way of comparison, the Division initiated CRIPA investigations of only 15 facilities in fiscal years 1999 and 2000 combined. Moreover, the Special Litigation Section, which is charged with enforcing this statute, is hiring to fill attorney positions that have been added to pursue these cases, so I expect to continue to be able devote the resources necessary to continue to enforce this important statute.

CLOSING THE EDUCATION GAP

The work of the Division's Educational Opportunities Section is notable for several recent major accomplishments. First, the Section helped to resolve the longstanding Yonkers, New York elementary and secondary education desegregation case. The settlement resolves outstanding issues concerning State liability, restores control of the district to the local school board, and provides $300 million to the school district to use for educational and remedial programs over the next five years. These programs are intended to help narrow the "achievement gap" between disadvantaged and other students.

The Section also achieved another major victory through the settlement of the Mississippi higher education desegregation case, which was approved by the court and will be of significant enduring benefit to many disadvantaged and other students in Mississippi. Under the agreement, the State will provide approximately $500 million to improve education at the State's historically-black public four-year colleges and increase access for minority students to the State's other colleges. As part of the relief, the historically-black colleges will implement new programs, be provided funds to enhance facilities, and will receive funds to create and enhance existing endowments.

Other notable achievements in safeguarding educational opportunities for all students include: (1) successfully litigating a Title IX case against the Michigan High School Athletic Association ("MHSAA") and obtaining a court order that requires MHSAA to develop a plan to ensure equal opportunity for girls in high school sports; (2) obtaining a favorable settlement in ten cases regarding the desegregation of several of Alabama's junior colleges and trade schools;

(3) working with parties in longstanding desegregation cases to ensure that requests for unitary status were properly evaluated, and agreeing to unitary status in several cases where our efforts helped achieve unitary school systems; and (4) opening preliminary inquiries into school districts to determine whether legally appropriate services are being provided to limited English proficient students, disabled students, and whether peer harassment is being adequately addressed by school officials.

PROTECTING HOUSING, CREDIT, AND PUBLIC ACCOMMODATION RIGHTS

The Housing and Civil Enforcement Section enforces the Equal Credit Opportunity Act, the Fair Housing Act (FHA), Title II of the Civil Rights Act of 1964 (public accommodations), and Section 2 of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Under the first three statutes, the Department of Justice may bring suit where there is a "pattern or practice" of discrimination. RLUIPA enforcement may involve a single incident of discrimination. In addition, upon referral from the Department of Housing and Urban Development (HUD) under the FHA, after HUD has investigated and issued a charge of discrimination, the United States may bring suit on behalf of individual victims of discrimination.

This Section has been extremely busy during this Administration and has achieved a number of notable successes. The Section has brought 47 new lawsuits, negotiated 49 consent decrees, and litigated one case to judgment in a successful jury trial. I have also authorized 20 additional lawsuits that are in pre-suit negotiations. Examples of significant victories include a $451,208 verdict against a landlord who sexually harassed a number of his female tenants, and

two consent decrees against nightclub owners in Kansas and Alabama who denied black patrons access to the clubs on the same basis as whites.

The Section's pending matters run the full gamut of the statutes under its jurisdiction. For example, since January 20, 2001, the Section has filed 12 cases against developers and builders of multifamily housing that fail to meet the FHA's requirement that they be accessible by persons with disabilities. I also have approved (1) two lending discrimination cases, one involving redlining practices by a major Chicago bank; (2) several cases involving sexual harassment of tenants by landlords; (3) several cases of discrimination based on familial status or race; and (4) several cases involving discriminatory zoning decisions which were based on the race, national origin, or disabled status of the affected individuals.

WORKING TO ENSURE EQUAL EMPLOYMENT OPPORTUNITIES

The Employment Litigation Section has had nine successful resolutions of cases involving discrimination based on race, sex, and religion since the beginning of the new Administration. They include: (1) a 2001 supplemental consent order in the *Milwaukee Fire Department* case where we secured $1.8 million in back pay and 40 jobs for African-American victims of hiring discrimination; (2) a settlement with the City of Newark based on religious discrimination directed at Muslim police officers; and (3) three consent decrees resolving allegations of sexual harassment.

With respect to the settlement with the City of Newark, the Civil Rights Division alleged that the City had discriminated against current and former police officers on the basis of their religion by failing or refusing reasonably to accommodate their religious observance, practice, and belief as Muslims of wearing a beard. The suit also alleged that the City threatened the

Muslim officers with termination, transferred them to undesirable assignments, and denied them opportunities to work special overtime events. The consent decree provides for back pay and compensatory damages to 10 current and former Newark police officers. In addition, the agreement provides for two years of court supervision to allow the Department to ensure that the City implements non-discriminatory employment policies designed to reasonably accommodate the religious observance, practice, and belief of police department employees.

As with the other sections in the Division, the Employment Litigation Section continues to be very productive. During this Administration, the Section commenced 59 supplemental investigations of charges referred to the Civil Rights Division by the Equal Employment Opportunity Commission, filed eight new cases, litigated 34 active cases, and monitored 69 consent decrees. One of the new and precedent-setting cases filed by this Administration involves the application of Title VII to participants in workfare programs under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. In this case, the Division took the position that Title VII applied to women who were participants in workfare programs and who were allegedly subjected to sexual harassment. Although the district court disagreed with our position, I have authorized an appeal of this case to the United States Court of Appeals for the Second Circuit.

I have authorized eight new lawsuits that are in pre-suit negotiations. One case involves the sexual harassment of a female firefighter by her male colleagues. Another involves the sexual harassment of a school teacher by a female supervisor of the same sex. In another case, a black employee was denied a promotion because of his race.

PROTECTING CITIZENS AND LEGAL IMMIGRANTS FROM EMPLOYMENT DISCRIMINATION

One particularly important component of the Civil Rights Division that I also wanted to mention is the Office of Special Counsel for Immigration Related Unfair Employment Practices or "OSC." OSC protects United States citizens and work-authorized aliens from employment discrimination based on citizenship status or national origin. The OSC fulfills this mission through investigation and litigation, a vigorous outreach program directed towards employers and potential victims of discrimination, and a unique early intervention program. The OSC also advises the Department on a wide range of policy matters relating to immigration and the treatment of immigrants.

The Office's accomplishments include: (1) acceptance of 315 charges alleging unfair immigration-related practices, completion of 265 investigations of charges, and settlement of over 30 charges and complaints; (2) favorable results in, and the ongoing litigation of, cases and matters against major employers in several industries that employ large numbers of immigrants, including the hospitality, gaming, agriculture, meatpacking, and retail industries; (3) initiation of a major investigation of internet-based job-referral agencies that may be engaging in acts of illegal citizenship status discrimination; (4) an expanded and improved program, including increased outreach to the employer community, use of ethnic media to communicate OSC's mission to under-served communities, and increased emphasis on establishing partnerships with State and local governments; and (5) timely and ongoing responses to both employer and worker concerns about the employment of non-citizens in the aftermath of the September 11th attacks.

CONCLUSION

Today I have talked about the highlights of the Division's accomplishments and initiatives, but there is obviously more that could be said. I must say in closing that none of what I have discussed could have been accomplished without the dedicated career staff of the Civil Rights Division, and in fact, it is because of their, experience, talent , and dedication that we have been able to achieve the successes we have – both in terms of quality and quantity – during my brief tenure as Assistant Attorney General. I look forward to answering your questions.

For the Record

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March 1, 1999, Monday

SECTION: OPINION; Pg. B7

LENGTH: 864 words

HEADLINE: Feds Make "P.C.' Legally "Correct'

BYLINE: By JOHN LEO

BODY:

Asheville, N.C., is the site of a brand-new legal question, never raised before in the annals of political correctness: Should the federal government be involved in determining the mascot or nickname of your local high school sports teams?

Erwin High School in Asheville is being investigated by the Justice Department's Civil Rights Division for using the nicknames "Warriors" and "Squaws" and for having students dressed as Indians at games and pep rallies. The investigation will center on whether the Indian theme creates a racially hostile environment that violates the civil rights of Indian students, according to a letter sent to the school system by Bill Lann Lee, acting head of the Civil Rights Division, and Lawrence Baca, a department trial attorney. The letter was a response to a complaint from an Asheville nurse, Pat Merzlak, a Lakota Sioux Indian.

Some Indian activists and their allies have campaigned against Indian nicknames for years. Some 600 schools have dropped these names. More than 2,500 have not. But so far, the Justice Department has never tried to intervene. This is a first. It is also a fresh example of how broad concepts like "hostile environment" and "racial harassment" are constantly being extended from serious issues to minor and symbolic ones.

On the nickname issue, a reasonable case can be made on either side. Indian activists say that it's wrong to use living people as mascots. But on the college level alone, teams are named for Gaels, Scots, Norsemen, Dutch and the Fighting Irish, as well as Seminoles, Chippewa, Aztecs and the Fighting Sioux. Some nicknames certainly sound like slurs -- Redskins and Redmen -- but most Americans don't think that Braves, Chiefs, Warriors or famous tribal names fit into this category.

Most Indian names were adopted to indicate that the teams using them have a

fierce fighting spirit. This may help promote a stereotype of Indians as savage or hopelessly primitive, particularly when war whoops and tomahawk chops are part of the act at sports events. But many nicknames seem harmless or positive. Some were clearly intended to honor Indian nations or heroes -- the Chicago Blackhawks celebrate the Sauk chief Blackhawk, and the Cleveland Indians were named, by a vote of fans, to honor the first Native American Major-League star, Lou Sockalexis. And if Indian nicknames are inherently oppressive, why do many Indian and Indian-dominated schools use them?

Debatable issues like this are the proper concern of schools and local communities. When the feds intervened, Asheville had already spent two years and a good deal of money to prepare students at Erwin to make their own decision on a possible change of nicknames and mascots. Students had many discussions and met with the chief of the large Cherokee community in western North Carolina.

Student support for a name change, which had reached 44 percent, dropped to 24 percent after the federal intervention.

The Civil Rights Division says it was bound to act after receiving the Merzlak letter, but Asheville was an odd choice for its first nickname intervention. The local community was already addressing the issue. The school usually has only one or two Indian students at a time, and local Indian opinion at the Cherokee community seemed indifferent. The damage claimed in the case was allegedly inflicted on a single Indian student, Rayne Merzlak -- Pat's son -- who never filed a complaint with the school district and had long since graduated when the feds moved in.

A letter such as the one sent by the Justice Department carries the implied threat of spending the school board into submission. The board chairman says it might cost $500,000 in legal fees to fight back. About $8 million in federal school funding is also at risk, but the Justice Department lacks jurisdiction and would have to go to the Department of Education to cut funds. Or it could go to civil court, seeking damages and an injunction against the school board.

The Civil Rights Division has a reputation of using the threat of costly litigation to get what it wants. In 1993 the division targeted the city of Torrance, Calif., for allegedly discriminating against minorities in written tests for police and firefighting jobs. The city said the tests were fair and widely used, so it dared the division to sue. It did, and last year federal judge Mariana Pfaelzer found the suit so unfounded and frivolous that she ordered the government to cover Torrance's legal costs, about $2 million.

In the Asheville case, the Justice Department asked for so much paperwork that the school district says it will take staff 12 full working days to provide

it. One of the requests is for the names and racial identifications of all students who have performed as Indian mascots. This wretched excess seems to ask the board to violate the federal Family Educational Rights and Privacy Act. Lawyers for the board say they will refuse to comply.

The division has short-circuited normal democratic debate, intervened clumsily, and attempted to manufacture a grave civil rights violation out of a nickname. Apart from that, it's behaved professionally.

LOAD-DATE: March 5, 1999

FOR THE RECORD

SENATOR CHUCK GRASSLEY'S STATEMENT
COMMITTEE ON THE JUDICIARY

HEARING ON THE OVERSIGHT OF THE
DEPARTMENT OF JUSTICE – CIVIL RIGHTS DIVISION

MAY 21, 2002

Mr. Chairman, thank you for holding this oversight hearing on the Civil Rights Division of the Department of Justice. I want to also thank Mr. Boyd for his attendance here today. We know that you have an extremely busy schedule at the Justice Department, as you manage over 500 lawyers and oversee the prosecution and defense of thousands of criminal and civil cases.

This nation has long struggled with the issue of civil rights, and has made tremendous strides in the last several decades. Since the Civil Rights Division was created, the Federal Government has paved the way for these advances. The Division's mission is to enforce the letter and spirit of civil rights laws enacted by the Congress,

and to educate, enhance and promote enforcement activities to improve the lives of all Americans.

Under your leadership, Mr. Boyd, the Civil Rights Division has become an even greater force. You were able to bring about some measure of closure in the Cincinnati Police Department case. Instead of a protracted investigation and prosecution that could have cost millions of dollars without ever producing long-term change and protections, you swiftly negotiated an agreement, lauded by the local NAACP, the ACLU, the Fraternal Order of Police, the Urban League, civil rights activists, local leaders, and the national community.

The Civil Rights Division has increased investigations under the Civil Rights of Institutionalized Person's Act – – a little used statute that protects people institutionalized in nursing homes, mental institutions, and other facilities. In many cases, these investigations have uncovered unlawful conditions and have produced

voluntary corrections. Last year, you authorized 24 investigations, and the Division toured almost 60 facilities to watchdog conditions. Such an aggressive approach demonstrates your commitment to serving the community of people living in institutions. As the former Chairman of the Senate Aging Committee, I believe that this is particularly important as baby-boomers reach their older years, and more and more Americans find themselves in need of nursing care.

The Civil Rights Division has also been swift to respond to incidents of hate crimes after the 9/11 attacks. You've initiated over 350 hate crime investigations, and have worked with state and local officials to prevent the hostile treatment of this Nation's Arab-American and Muslim citizens and guests.

So, Mr. Boyd, I commend you on your leadership of the Civil Rights Division. I look forward to your testimony.

For the Record

Statement of Senator Orrin G. Hatch
Ranking Republican Member
Hearing on "Oversight of the Department of Justice- Civil Rights Division"
before the Senate Judiciary Committee
May 21, 2002, 2:15 p.m.

Mr. Chairman, thank you for holding this hearing on the important work being done by the Civil Rights Division. I have long considered the Civil Rights Division to be one of the most important components of the Department of Justice. The fair and even-handed enforcement of our nation's civil rights laws is critically important to me and to all

Americans. I am therefore pleased to welcome Ralph Boyd, the nation's chief enforcer of these laws, here today. I am eager to hear about the important work that he and the Civil Rights Division are doing today.

It is no secret that I was disappointed with the activist course that the Civil Rights Division steered under Bill Lann Lee, President Clinton's choice to head that division.

While I have always held the highest personal regard for Mr. Lee, I was unable to support his nomination for that important position because of his aggressive, life-long pursuit of promoting race-based policies. And Mr. Lee's three-year tenure as "*acting*" chief of the Civil Rights Division – a post that he occupied for so long without the advice or consent of the Senate – bore out the validity of my concerns. He used the Civil Rights Division, time and time

again, to pursue race-based policies. That is not a record we should be proud of. Indeed, in May 2000, the Ninth Circuit Court of Appeals affirmed an award of nearly $2 million in attorneys fees against Mr. Lee's Civil Rights Division for bringing a "frivolous and unreasonable" lawsuit against the fire and police departments of the City of Torrance, California. That litigation was brought – and pursued for years – simply because of the low

number of minority workers in those departments.

The message of the Civil Rights Division under Ralph Boyd has been resoundingly positive. Even though Mr. Boyd's time there has been short, the Division's accomplishments are many. All Americans should join with me in applauding the Civil Rights Division's active role in aggressively investigating and prosecuting hundreds of

incidents of discrimination – especially against those of Middle-Eastern origin – in the aftermath of the terrorist attacks on September 11th. I was also very pleased to learn of the Civil Rights Division's central role in reaching an agreement with the City of Cincinnati and its police department, and I look forward to hearing about that landmark process today. Finally, I applaud the Division's newfound aggressiveness in prosecuting human trafficking

crimes. There is nothing more repulsive to our free society then those who would trade, deal and sell human lives.

There is much good news to report from the Civil Rights Division. Mr. Chairman, I look forward to hearing some of it today.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
May 21, 2002

CONTACT: Stephanie Cutter
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STATEMENT OF SENATOR EDWARD M. KENNEDY AT THE JUDICIARY COMMITTEE OVERSIGHT HEARING OF THE DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION

It's a privilege to welcome Assistant Attorney General Ralph Boyd to the Senate Judiciary Committee. Today's hearing is part of the Committee's important responsibility for conducting oversight of the Civil Rights Division of the Justice Department.

Since the Division was established 45 years ago, it has been at the forefront of our nation's continuing struggle to guarantee equal justice for all Americans. Last year, in an address to the Convention on the Elimination of Racial Discrimination, Assistant Attorney General Boyd eloquently discussed the significant progress made over the last half century toward ending discrimination and fulfilling the promise of equality. That progress came largely from a genuine and sustained commitment by the Division and its leadership to vigorously enforce the nation's civil rights laws, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act, the Americans with Disabilities Act, and the Civil Rights Act of 1991.

We are proud of the progress we've made, but civil rights is still the unfinished business of the nation. In recent months, many of us have become increasingly concerned about whether the Civil Rights Division is living up to its important mission, and whether its rhetoric can be reconciled with the realities of its record on enforcement.

In the past year, the Division has changed its substantive position in at least two significant employment discrimination cases, adversely affecting the interests of hundreds of women, African Americans, Hispanics, and Asians. In both cases, the Division's actions raise serious doubts about the strength of its commitment to end all forms of discriminatory employment practices. Equally troubling, at a time when referrals from the Equal Employment Opportunity Commission continue to rise, the Division has drastically cut back on filing new cases in this area. In the last 16 months, the Division has filed only one new Title VII case, compared to an average of 14 cases a year since 1980.

On another important civil rights issue – hate crimes – the Division has been reluctant to fully engage in the fight against these senseless acts of violence. Attorney General Ashcroft recently compared the fight against hate crimes to the fight against terrorism, describing hate

-more-

crimes as "criminal acts that run counter to what is best in America – our belief in equality and freedom". Yet the Civil Rights Division has remained deafeningly silent on the bi-partisan hate crimes bill in Congress that would provide it with greater tools to combat these senseless acts of violence. Its position on hate crimes is in stark contrast to the Department's vigorous calls for new and expanded enforcement authority to fight terrorism after September 11th.

These concerns are heightened by recent personnel moves and changes in longstanding hiring practices in the Division – changes that bear a disturbing resemblance to those called for in a recent National Review article. That article states, and I quote:

Republicans should work to gain more control over the civil rights division and its renegade lawyers. The forces of opposition have burrowed in and they're willing to wait out any GOP regime. Yet a few obvious steps would begin to address fundamental problems. Instead of putting a single section chief on what Boyd calls a "temporary" task force, the administration should permanently replace those it believes it can't trust. Four or five new section chiefs would do a world of good, . . . At the same time, Republican political appointees should seize control of the hiring process. They don't need to make sure every new lawyer is a member of the Federalist Society; simply hiring competent professionals who don't come from left-wing organizations would be an enormous improvement.

I can only hope that the Civil Rights Division has not and will not make policy and personnel decisions based upon the wishes or recommendations of the National Review.

Fulfilling the promise of equal justice is too important a goal and too difficult a challenge to allow ideological considerations to influence the enforcement of the nation's civil rights laws.

The Committee looks forward to Assistant Attorney General Boyd's testimony today, and we will continue to conduct regular oversight hearings on the Civil Rights Division in the future.

I look forward to asking you questions on a number of important issues.

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Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
"Oversight of the Department of Justice – Civil Rights Division"
May 21, 2002

The Judiciary Committee convenes today to exercise its oversight of the Civil Rights Division at the Department of Justice. The Civil Rights Division is entrusted with the protection of rights that so many sacrificed so much to obtain – the right to vote, the right to buy a home or stay in a hotel without facing discrimination, the right to receive equal educational opportunity without regard to race or gender. This committee is entrusted with the duty to ensure that those rights are in fact being vigorously defended, and we all take that responsibility seriously. Senator Kennedy's leadership on civil rights issues is unquestioned, and I appreciate his chairing this hearing.

I would like to welcome Ralph Boyd back to the Committee for the first time since his confirmation. As Mr. Boyd knows, at both his confirmation hearing and the Attorney General's confirmation hearings, this Committee was reassured repeatedly that the Justice Department would enforce all the laws of this country, whether or not the political leaders of the Department personally agreed with them. In the arena of civil rights, living up to those assurances is particularly important, because the nation's civil rights laws ensure that the system works for all Americans – no matter the color of their skin, their gender, their religious affiliation or their sexual orientation. The civil rights laws are the foundation of our nation's aspiration toward a just and fair society. That is why so many people have been so concerned with recent reports that the Department is going backwards, not forwards, in civil rights enforcement.

For example, the Division has been criticized for its response to Mississippi's request for approval of its redistricting plan, and questioned about whether the Voting Rights Act was being used to reach a particular partisan result. Mr. Boyd has said that the Division's decision to reject Mississippi's court-drawn plan – which was strongly supported by civil rights organizations in the state – was reached without regard to its political consequences, which in this case clearly benefit the Republican Party. This hearing will provide an opportunity for further discussion of that issue.

The Division's apparently serious consideration of the Adam's Mark hotel chain's 2001 request to relax the conditions of a settlement reached with the Justice Department just one year earlier in an anti-discrimination lawsuit also caused great public interest and concern. That lawsuit was brought against Adam's Mark after African-American guests at its Daytona Beach hotel complained of being charged more than white guests, and of being forced to wear orange wristbands to gain entry to the hotel and having to pay cash in full to reserve rooms – both conditions not placed on white guests. Although Adam's Mark has withdrawn its request for relief, questions have been raised about why the Division ever invited these negotiations in the first place. These questions are especially understandable considering that the settlement had been reached only one year earlier, and that officials and representatives of the chain have

consistently characterized the Clinton Justice Department's litigation against it as improper and vociferously denied any wrongdoing. Moreover, this matter is of special concern because it appears that personal requests were made to the Attorney General, the Assistant Attorney General, and other political officials to overrule the actions of the career trial attorneys who had brought the case and won hardfought concessions.

I also have been quite concerned about an apparent gap between the expansive rhetoric of the President and Attorney General about hate crimes in the wake of September 11, and the small number of such cases that the Justice Department has actually prosecuted. According to the Department's latest numbers, although the FBI investigated well over 300 hate crimes cases, the Department has only brought charges in 10. Even among the 10, only some of the cases involved hate crimes charges. In other words, the Department has declined to prosecute in more than 97 percent of hate crimes investigations. The reason for this high declination rate is a matter that Mr. Boyd should have the opportunity to explain since we all agree with the President that hate crimes are important matters of national concern.

In addition to hearing Mr. Boyd's thoughts on the Division's handling of those issues, I look forward to learning what his priorities are for the future. In particular, I am interested in whether and how he plans to use disparate impact litigation to enforce our civil rights laws and whether he foresees any changes in the Division's prosecution of hate crimes. I am also interested in whether Mr. Boyd believes there are any morale problems among the career attorneys in the Division, and if so, how he might solve them.

For the Record

12/14/98 WSJ A19
12/14/98 Wall St. J. A19
1998 WL-WSJ 18995463

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Monday, December 14, 1998

Rule of Law

Lee Loves Quotas, Just as the Senate Feared

By Roger **Clegg**

One year ago tomorrow, President Clinton made Bill Lann Lee "acting" head of the Justice Department's Civil Rights Division when Mr. Lee's nomination failed to clear the Senate Judiciary Committee. Mr. Lee failed to make it through Judiciary because of concerns that he favors the use of classifications based on race, ethnicity and sex. Set out below is a chronology of some actions taken by Mr. Lee (or by the division without him if he was disqualified from a case) during his 365 days in office.

Jan. 7: Files motion to affirm with the Supreme Court in King v. State Board of Elections, citing an expert's testimony that the aim of the litigation is to create a "Hispanic-majority district that would not violate the integrity of three existing African-American majority districts."

Feb. 6: Files complaint against the police and fire departments of Garland, Texas, challenging their application tests because they have a "disparate impact" on blacks and Hispanics.

Feb. 9: Division files reply brief, seeking to intervene on Colorado's behalf in the Adarand litigation challenging the state's role in a contracting-preference program. (The Supreme Court's 1995 decision in Adarand held all government racial classifications to be presumptively unconstitutional; Mr. Lee said at his hearings that he disagreed with the decision.)

Feb. 25: Testifies before the House Judiciary Subcommittee on the Constitution. Defends federal racial preferences as necessary "to have a country we can all be proud of" and says they shouldn't end "anytime soon." Asserts that the Justice Department "acted appropriately" in backing an unsuccessful challenge to the constitutionality of Proposition 209, California's ballot initiative banning state preferences based on race, ethnicity or sex.

May 11: Files brief with the Sixth Circuit, defending an Environmental Protection Agency regulation that requires its prime contractors, when awarding subcontracts, to "assure that small, minority, and women's businesses are used when possible as sources of supplies, construction and services."

May 29: Division files brief with the 11th Circuit, asking for continued judicial supervision in a Georgia school desegregation case, first filed in 1969.

June 4: Files brief with the Eighth Circuit, asking for continued judicial supervision in the decades-old St. Louis school desegregation case.

July 6: Files brief with the Fifth Circuit, defending a Louisiana redistricting plan from a claim that it is illegal racial gerrymandering, in violation of the Supreme Court's decision in Shaw v. Reno.

July 8: Files brief with the Fifth Circuit, supporting the constitutionality of Houston contracting preferences based on race and sex.

July 14: Files brief with the Fourth Circuit, asking it to order the district court to enter a consent decree ensuring that the North Carolina Department of Corrections will "seek to hire and promote women roughly in proportion to their representation in the pool of applicants qualified for hire or promotion."

July 17: Testifies again before the Subcommittee on the Constitution. Supports extension of "disparate impact" theory to housing discrimination. Under this approach, liability can be proved based on racially disproportionate results alone, even if discriminatory intent is neither alleged nor proved. Defends Justice lawsuits challenging tests by police and fire departments that have a disparate impact on women and minorities.

July 21: Files brief with the Fourth Circuit, defending a Virginia school district's use of racial and ethnic preferences in admissions to ensure "diversity"

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in a student body. The brief argues that there are reasons, other than remedying past discrimination, that are constitutionally sufficient to justify racial and ethnic classifications by the government. In its recent cases, the Supreme Court has acknowledged only the remedial justification.

July 21: Files amicus brief in the Fifth Circuit, defending the creation of a new Mississippi voting district from the challenge that it violated the Supreme Court's prohibition against racial gerrymandering in Shaw v. Reno.

Aug. 12: Files brief in the Second Circuit, arguing that it is not a violation of Title VII of the Civil Rights Act or the Equal Protection Clause of the 14th Amendment for a New York county to redesign a police application test deliberately so that fewer whites and more blacks will pass it.

Aug. 14: Writes the Florida attorney general, rejecting new state antifraud procedures for absentee ballots on the grounds that they will have a disparate impact on minority voters.

Sept. 29: Writes a letter to the Texas secretary of state, blocking a new procedure of filling judicial vacancies by gubernatorial appointment instead of special election, since this will result in fewer minority-supported judges in majority-minority districts.

Oct. 9: Writes a letter threatening to sue Tennessee's transportation department, based principally on its allegedly low percentage of female employees.

Oct. 19: Writes letter threatening to sue a county unless it creates a majority-Indian voting district.

Oct. 21: The division joins a consent decree -- superseding a 1969 one -- requiring that the school board of Evangeline Parish, La., "substantially increase the desegregation" of its faculty, using an affirmative action plan and reassigning employees so that each school's racial makeup is "substantially" the same. This is just one of many race-conscious consent decrees the division has entered with school districts this year.

Nov. 5: Files suit against Lawrence, Mass., asking for, among other things, a higher percentage of Hispanic pollworkers and the reconfiguration of City Council and school districts to increase the number of majority Hispanic districts.

Nov. 6: Division refuses to allow charter schools for a South Carolina district in desegregation litigation since 1969.

Nov. 9: Division files a Supreme Court amicus brief in Hunt v. Cromartie, opposing a claim of racial gerrymandering.

Nov. 10: Gives speech endorsing a recent book defending race-based college admission policies.

As the record shows, the concerns of the Senators one year ago were justified.

Mr. Clegg, general counsel of the Center for Equal Opportunity in Washington, D.C., was a deputy in the Civil Rights Division, 1987-91.

(See related letter: "Letters to the Editor: A Brazen Disregard of Senate, Constitution" -- WSJ Dec. 24, 1998)

---- INDEX REFERENCES ----

NEWS SUBJECT: Editorial & Columns; Public-Policy and Regulatory Issues; Politics; Wall Street Journal (EDC PBP PLT WSJ)

PRODUCT: Washington News and Views; Wall Street Journal Graphics (DWV PIC)

GOVERNMENT: Congress; Executive; Justice Department (CNG EXE JUS)

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