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CHANGING TIDES: EXPLORING THE CURRENT STATE OF CIVIL RIGHTS ENFORCEMENT WITHIN THE DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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CHANGING TIDES: EXPLORING THE CURRENT STATE OF CIVIL RIGHTS WITHIN THE DEPARTMENT OF JUSTICE

THURSDAY, MARCH 22, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:07 a.m., in Room 2237, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Davis, Ellison, Conyers, Scott, Franks, Pence, Issa, and Jordan.

Staff present: David Lachmann, Chief of Staff; LaShawn Warren, Majority Counsel; Crystal Jezierski, Minority Counsel; and Susana Gutierrez, Professional Staff Member.

Mr. NADLER. Good morning. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Today's hearing will examine the work of the Civil Rights Division of the Department of Justice.

The Chair recognizes myself for 5 minutes for an opening statement.

Today we begin the Subcommittee's oversight over the Civil Rights Division of the Department of Justice. The Division, established by Civil Rights Act of 1957, is charged with the enforcement of our Nation's civil rights laws, prohibiting discrimination on the basis of race, sex, disability, religion and national origin. The Constitution's promise of equal protection under the laws has, for many, remained unfulfilled. Our civil rights laws exist to make that promise a reality for all Americans.

The recently released report by the Citizens' Commission on Civil Rights, "The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration," documents a very troubling pattern of the politicization of the Division's work. The findings, by this bipartisan group of career civil rights professionals, are very troubling. They reflect concerns that have been raised for several years, and which, until now, have not been subject to the scrutiny of this Subcommittee.

Allegations of the politicization of law enforcement are certainly not new to the Members of this Committee. An extremely dis-

turbing pattern is emerging from this Administration of relentless political interference in the basic enforcement of our laws.

In areas such as the Voting Rights Act, which this Committee and the Congress just recently reauthorized last year, we have received allegations that political considerations have trumped the recommendations of career staff. In some of these cases, the courts have upheld the recommendations of the civil rights professionals in the Division and have struck down the political decisions imposed by what some have called the Shadow Civil Rights Division—that is, the political appointees who change the decisions or the recommendations of the professional staff and make different rulings on behalf of the Division, only to see those rulings upset by the courts because the rulings were held to be contrary to law.

If the rule of law is to have any meaning, if the civil rights laws this Committee produces are to have any value, then we must be assured that those laws will be enforced without fear or favor or political contamination.

I hope that we can get some answers to these very serious allegations, and I look forward in particular to Mr. Kim's testimony.

I will note that we did not get his testimony until yesterday evening. This has become a pattern with the Justice Department, one that I find unacceptable. I would be interested to know whether the Attorney General thinks he is accountable to anyone, because the contempt the department has shown toward this Committee, among other things, by not giving us that testimony until last night and to its Members and the American people is deplorable.

I realize that this Administration has gotten a free ride for the last 6 years, but that is over. This Committee will fulfill its constitutional duty, and I hope that, in the future, we can count on the department's cooperation.

And that means, among other things, answering our questions and giving us testimony before the night before the hearing.

I yield back the balance of my time.

I will now yield for an opening statement to the distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Today we begin the Subcommittee's oversight over the Civil Rights Division of the Department of Justice.

The Division, established by Civil Rights Act of 1957, is charged with the enforcement of our nation's civil rights laws, prohibiting discrimination on the basis of race, sex, disability, religion and national origin. The Constitution's promise of equal protection under the laws has, for many, remained unfulfilled. Our civil rights laws exist to make that promise a reality for all Americans.

The recently released report by the Citizens' Commission on Civil Rights, "The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration," documents a very troubling pattern of the politicization of the Division's work. The findings, by this bi-partisan group of career civil rights professionals, are very troubling. They reflect concerns that have been raised for several years, and which, until now, have not been subject to the scrutiny of this Subcommittee.

Allegations of the politicization of law enforcement are certainly not new to the members of this Committee. An extremely disturbing pattern is emerging from this

administration of relentless political interference in the basic enforcement of our laws.

In areas, such as the Voting Rights Act—which this Committee just reauthorized—we have received allegations that political considerations have trumped the recommendations of career staff. In these cases, the courts have upheld the recommendations of the civil rights professionals in the Division, and have struck down the political decisions imposed by what some have called the Shadow Civil Rights Division.

If the rule of law is to have any meaning, if the civil rights laws this Committee produces are to have any value, then we must be assured that those laws will be enforced without fear or favor.

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I realize that this administration has gotten a free ride for the last six years, but that's over. This Committee will fulfill its constitutional duty, and I hope that, in the future, we can count on the Department's cooperation.

I yield back the balance of my time.

Mr. FRANKS. Well, thank you, Mr. Chairman. I am very pleased to be here today to discuss the recent activities of the Civil Rights Division in the Department of Justice.

And, Mr. Kim, thank you for being here, sir.

The Division performs work that is important to the health of this Nation. And the evidence that we have in front of us here today indicates that it has been well led in recent years.

In 2006, the Voting Section filed 17 new lawsuits, which more than doubles the average number of lawsuits filed during the preceding 30 years.

This fall, the Division oversaw the largest election monitoring effort ever conducted by the Department of Justice for a midterm election.

Last year, the Employment Litigation Section filed as many lawsuits challenging a pattern or practice of discrimination as during the last 3 years of the previous Administration combined.

And in the last 6 years, the Division has tripled the number of agreements reached with police departments across the country and convicted 50 percent more law enforcement officials for misconduct, such as the use of excessive force, as compared to the previous 6 years.

In fiscal year 2006, the department obtained a record number of convictions in the prosecution of human trafficking crimes. Those victims were predominantly women and minorities.

I was also pleased to see the Division's recent report on its efforts to protect religious liberty. Religious freedom is the cornerstone from which all of our rights, including our civil rights, grow.

To reject the importance of our religious freedoms is to reject the very basis upon which the premise of the statutes the Division is charged with—of enforcing.

My colleagues in this majority have criticized the Division for its enforcement activities. They disagree with the chosen priorities of the President, the Attorney General and with Mr. Kim. While it is certainly their right to disagree with the Division's decisions, the evidence shows that the Division has vigorously pursued those

areas of the law that are most critical to civil rights and race relations in this country.

Under the current Administration, the department has increased the number of prosecutions and the number of convictions in key areas.

Similarly, the Division has had no rule 11—the rule under the Federal code of civil procedure, which seeks to ensure a certain level of good faith in all cases brought in Federal courts violations—no rule 11 violations. I mention this because the Division under the leadership of President Clinton and former Attorney General Janet Reno was ordered to pay or agreed to pay approximately $4 million for having brought frivolous lawsuits.

That means the lawsuits and the arguments made in those lawsuits were so lacking in merit that the lawyers of the Division and the Division were sanctioned for having even brought them.

The ultimate goal of the department's work in all areas should be to punish wrongdoing and to remove deserving wrongdoers from our communities.

And while I would hope that the Division is always asking how it can do its job better, it seems clear that the Division has been working to ensure that it furthers the important mandate it was given when formed 50 years ago.

Over the last few years, the Division has continued to ask itself how it can improve its performance while responding to what the public views as traditional civil rights violations and working hard to respond to emerging civil rights threats. This effort should be applauded and not criticized.

The job of the Division and, quite frankly, the Department of Justice as a whole is to provide national leadership on various legal issues and to address complex multijurisdictional cases and legal issues that promote the dignity of humanity.

I applaud the Division and the department's current leadership for making these strategic decisions and working to meet new challenges while continuing to address the longstanding issues that may sadly remain in some pockets of our Nation.

Thank you for joining us here today, Mr. Kim. And I look forward to discussing many of these issues with you and our other witnesses.

Thank you, Mr. Chairman.

[The prepared statemet of Mr. Franks follows.]

PREPARED STATEMENT OF THE HONORABLE TRENT FRANKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA, AND RANKING MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Thank you Mr. Chairman,

Mr. Chairman, our work to ensure the franchise to all citizens is not yet done. I'm delighted to see that we can all agree, that there must be law to ensure that all citizens have protection from false information about elections AND receive unencumbered access to the ballot. Voters must be confident that their vote is not diluted or cancelled out through voter fraud, by those who would make false statements to illegally participate in elections. As we know, the Supreme Court has held that (quote) "the right of suffrage can be denied by a debasement or dilution of the weight of the citizens' vote just as effectively as by wholly prohibiting the free exercise of the franchise." [1]

[1] *Reynolds v. Sims,* 377 U.S. 533, 555 (1964).

We must ensure that only citizens are participating in elections, and this bill brings us closer to that goal by penalizing those who would seek to dilute citizen votes. Eligible citizens are able to prove their eligibility and are not dissuaded from voting if required to do so. We know that states that have worked to strictly control the integrity of their voter rolls have experienced positive results. The issue hits close to home for me.

At the Committee's field briefing in Arizona, Secretary of State Jan Brewer discussed the effects of the newly enacted identification law known as Proposition 200. Under Proposition 200, all voters are required to present identification at the polls before casting a ballot, and all new voter registration applications must be accompanied by sufficient proof of citizenship. While identification is required in all Arizona jurisdictions, 15 jurisdictions have successfully implemented a proof of citizenship requirement. Secretary Brewer testified that Arizona has experienced a 15.4 percent INCREASE in voter registration since the requirements of Proposition 200 went into effect.

Currently, state and local governments do not have any effective way to prevent non-citizens from registering to vote and voting. Section 303(b)(4)(A) of HAVA requires inclusion of a citizenship box on the National Voter Registration Form. When applying to register to vote, individuals must check the box affirming their citizenship. The law provides that registration forms that do not have the box checked should be rejected and returned to the individual. However, some states are not enforcing this requirement. Even in states that do enforce the citizenship requirement, it is still done on an honor system that relies on the truthful response of the registrant. While the present state of the law leaves the system open to abuse, our work in this Committee will take us one step further to help to insure that only eligible citizens are voting.

While there may be disputes about the nature and extent of voter fraud, there can be no dispute that it occurs. People must be *protected* from false information about elections and *encouraged* that their vote will be counted and will not be cancelled out by an illegal vote.

With these aims in mind, I look forward to seeing our hard work on this issue come to fruition today.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you, Mr. Franks.

In the interest of proceeding to our witnesses, and we have two panels today, and mindful of our busy schedules, I would ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing at any time, which I will endeavor not to do unless there are votes on the floor.

As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her time arrives.

Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

And I will endeavor not to have to make this announcement at every subsequent hearing, but I thought I should do it at this time. That will be the policy we will follow in general.

[The prepared statement of Mr. Conyers follows.]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Since its establishment in 1957, the Civil rights Division has been the nation's bulwark against discrimination. Though I may have taken issue with the priorities of various administrations over the years, I must state that the policies adopted by this administration are truly stunning and without precedent. Just as in the case of the U.S. Attorney firings more generally, we have seen an unprecedented politicization of the Civil Rights Division. As the report submitted by the Citizens' Commission on Civil Rights details, this administration has seldom missed the opportunity to reduce or redirect the resources of the Division.

Our concerns date back to the 2002 Mississippi Congressional redistricting plan's preclearance under Section 5 of the Voting Rights Act. In that case, the Division ran out the clock on the review process and allowed a Republican dominated three-judge court to take jurisdiction over the case. This situation resulted in a plan that favored the Republican candidate and the loss of African-American voter influence in the process. That was the first of a series of incidents where the Department used the Voting Rights Act as a shield to block the interests of minorities.

In former Rep. Tom Delay's drive to redistrict Texas, the Division again succumbed to intense partisan pressure. My colleagues will recall that both the DOJ and Homeland Security Offices of Inspector General reported numerous high level contacts made in an attempt to pressure their Departments into tracking down Democratic legislators who were protesting the process in Austin.

The stakes involved in the Texas preclearance were immense and should have been devoid of the barest hint of partisanship. We later discovered, however, that political appointees overruled the career staff at the expense of minority voters, who objected to the Delay plan. It was not until this session, after a long legal and political battle, that Latino voters in Texas were finally able to elect their candidate of choice to Congress.

Again, in the case of the Section 5 review of the Georgia photo ID requirement, we were to discover that career staff were overruled by the political appointees. This time, however, a court stepped in with an injunction to protect the interests of Georgia minorities, calling the plan that you precleared a "poll tax." Apparently learning your lesson, the press reported that the Division hereafter barred staff attorneys from offering recommendations in major Voting Rights Act cases, marking a significant change in the procedures meant to insulate such decisions from politics.

Despite the bright sounding statistics cited in your testimony, these kinds of practices have clearly taken a toll on the Division. The Commission's report details an alarming level of attorney and professional turnover throughout the Division, with the Voting, Employment and Special Litigation Sections being especially hard hit.

Since April 2005, the voting Section has experienced over 54% attorney turnover. During the same period, only one of the five persons in section leadership—a single litigation deputy—remains in the section today. The Employment Section is even worse, with over 65% attorney turnover.

This brain drain will soon come back to haunt the Division. In your testimony, you attempt to explain the small number of Title VII pattern and practice cases by describing them as "factually and legally complex, as well as time-consuming and resource-intensive."

I suspect that the problem is that the Section lacks attorneys with enough tenure or experience to bring the cases. The Voting Section is similarly vulnerable. With the turnover of Section 5 analyst in particular, you must ask yourself whether, at the end of your term, your management has resulted in a stronger or weaker commitment to the protection of civil rights.

Even after the Division's illustrious 50 year history, civil rights are still the unfinished business of America. As Assistant Attorney General, you carry the burden of ensuring that we continue our progress in civil rights. Unfortunately, that progress has been uneven in this Administration. It's very important that this Committee know you are committed to maintaining and resuming progress across the Division' particularly the Employment, Voting and Special Litigation Sections. As we move forward today and in the coming year, I hope we can work in a cooperative spirit to fulfill our nation's promise of equal opportunity.

Mr. NADLER. Our first witness is Wan J. Kim, assistant attorney general for the Civil Rights Division of the United States Depart-

ment of Justice. Mr. Kim previously served as a deputy assistant attorney general in the Civil Rights Division.

He has spent most of his career at the Department of Justice, having entered through the Attorney General's honors program as a trial attorney in the Criminal Division and later serving as an assistant United States attorney for the District of Columbia.

Mr. Kim also has worked on the staff of the Senate Judiciary Committee for former Chairman Orrin G. Hatch and as a law clerk to Judge James L. Buckley of the U.S. Court of Appeals for the District of Columbia circuit.

He was born in Seoul, South Korea, and is a graduate of the Johns Hopkins University and the University of Chicago Law School.

Mr. Kim, your written statement will be made part of the record in its entirety. I would ask that you now summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow and then to red when the 5 minutes are up.

Thank you, and you may proceed when you wish.

TESTIMONY OF WAN J. KIM, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. KIM. Thank you, Mr. Chairman.

Mr. Chairman, Ranking Member Franks, distinguished Members of the Subcommittee, it is a pleasure to appear before you today to represent the President, the Attorney General and the dedicated professional public servants in the Civil Rights Division.

I am honored to serve the people of the United States as assistant attorney general for the Civil Rights Division, and I am pleased to report that the past year was full of outstanding accomplishments in the Civil Rights Division and a year in which we obtained many record levels of enforcement.

I am proud of the professional attorneys and staff in the Division whose talents, dedication and hard work made these accomplishments possible.

My prepared written statement details the accomplishments of each section of the Division, and I will address portions of it here.

Mr. Chairman, Members of the Subcommittee, I am sorry the statement was submitted late. I will assure the Committee that I will endeavor to work and make sure that it is submitted more timely in the future.

I would also state, however, that the Department of Justice does take seriously its obligation. It was submitted to the interagency clearance process in time. It just was returned too late. And I take responsibility for that.

I would just like to take a few minutes to highlight some of the accomplishments of the Division recently, beginning with two recent initiatives and the creation of a new unit recently within the Criminal Section of the Civil Rights Division.

Just a few weeks ago, on February 20, 2007, the Attorney General announced a new initiative entitled "The First Freedom Project" and released a report on the enforcement of laws protecting religious freedom to highlight and build upon the Division's

role in enforcing the longstanding Federal laws that prohibit discrimination based on religion.

This initiative is particularly important to combat religious and cultural intolerance in the aftermath of the terrorist attacks of September 11.

Just 2 months ago, the Attorney General announced a Federal indictment charging James Seale for his role in the abduction and murders of two African-American teenagers, Henry Dee and Charles Moore, in Mississippi in 1964. This case is being prosecuted by the Civil Rights Division and the U.S. Attorney's Office.

Shortly thereafter, the Attorney General announced an FBI initiative to identify other unresolved civil rights-era murders for possible prosecution, to the extent permitted by the available evidence and the limits of Federal law, an effort in which the Civil Rights Division will play a key role.

On January 31, 2007, the Attorney General announced the creation of a new human trafficking prosecution unit within the Criminal Section.

This new unit is staffed by the C Section's most seasoned human trafficking prosecutors, who work with our partners in Federal and State law enforcement and NGOs to investigate and prosecute the most significant human trafficking crimes, such as multijurisdictional sex trafficking cases.

In addition to these recent advances, the Division has done much to further the enforcement of our Federal civil rights laws. In the past year, the Voting Section has filed 18 new lawsuits in calendar year 2006, more than doubling the average number of lawsuits filed during the preceding 30 years.

We successfully mounted the largest election monitoring effort ever conducted by the Justice Department for a midterm election. The Administration strongly supported passage of the voting rights reauthorization legislation which Congress did last year.

The Criminal Section obtained a record number of convictions in the prosecution of human trafficking cases, deplorable offenses of fear, force and violence that disproportionately affect women and minority immigrants.

The Housing and Civil Enforcement Section filed more cases alleging discrimination based on sex than in any year in the Division's history.

The Housing and Civil Enforcement Section conducted significantly more tests to proactively ensure compliance with the Fair Housing Act pursuant to the Attorney General's Operation Home Sweet Home Initiative. And we are working to achieve an all-time high number of such tests this year.

The Disability Rights Section obtained the highest success rate to date in mediating complaints brought under the Americans with Disabilities Act, 82 percent.

In the past 6 years, the Disability Rights Section has reached more than 80 percent of all the agreements obtained with State and local governments under Project Civic Access, a program that has made cities across the country more accessible and lives better for more than three million Americans with disabilities.

And in the past 6 years, we have ensured the integrity of law enforcement by more than tripling the number of agreements reached

with police departments and convicting 50 percent more law enforcement officials for willful misconduct such as the use of excessive force, as compared to the previous 6 years.

Before I close, I would like to note that this year the Division is celebrating its 50th anniversary. Consequently, I reflected upon the work of the Division not only during my time in service but also over the past half century.

Since our inception in 1957, the Division has accomplished a great deal, and we have much of which to be proud. But while much has been accomplished, the Division's daily work demonstrates that discrimination still exists, and our work still continues.

Thank you, Mr. Chairman and Ranking Member Franks, for the opportunity to appear before you today. I look forward to answering any questions that you may have.

[The prepared statement of Mr. Kim follows:]

PREPARED STATEMENT OF WAN J. KIM

Statement of
Wan J. Kim
Assistant Attorney General
Civil Rights Division
Department of Justice

Before the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives

Concerning
Activities of the Civil Rights Division

March 22, 2007

Thank you. Mr. Chairman, Ranking Member Franks, Members of the Committee, it is a pleasure to appear before you to represent President Bush, Attorney General Gonzales, and the dedicated professionals of the Civil Rights Division.

I am honored to serve the people of the United States as Assistant Attorney General for the Civil Rights Division. I am pleased to report that the past year has been full of outstanding accomplishments in the Civil Rights Division, where we obtained many record levels of enforcement. I am proud of the professional attorneys and staff in the Division – men and women whose talents, dedication, and hard work made these accomplishments possible.

This year, the Division celebrates its 50th Anniversary. Consequently, I have reflected upon the work of the Division not only during my own time of service but also over the past half-century. Since our inception in 1957, the Division has achieved a great deal, and we have much of which to be proud. While citizens of all colors, from every background, living in all pockets of the country – rural, urban, north, and south – have seen gains made on the civil rights front, one need not look back very far to recall a very different landscape.

This point was made more vivid for me when I traveled with Attorney General Gonzales to Birmingham, Alabama, last year. We attended the dedication of the 16th Street Baptist Church as a National Historic Landmark. In 1963, racists threw a bomb in this historically black church, killing four little girls who were attending Sunday School. Horrific incidents like this sparked the passage of the Civil Rights Act of 1964 – the most comprehensive piece of civil rights legislation passed by Congress since Reconstruction. While much has been achieved under that piece of legislation and other civil rights laws, the Division's daily work demonstrates that discrimination still exists. There is still much work to be done, but we are working toward the goal famously described by Dr. Martin Luther King of a society rid of discrimination, where people are to be judged on the content of their character and not the color of their skin.

NEW INITIATIVE: THE FIRST FREEDOM PROJECT

On February 20, 2007, the Attorney General announced a new initiative, entitled *The First Freedom Project*, and released a *Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001 to 2006. The First Freedom Project* includes creation of a Department-wide Religious Liberty Task force, a series of regional seminars on Federal Laws Protecting Religious Liberty to educate community, religious, and civil rights leaders on these rights and how to file complaints with the Department of Justice, and a public education campaign that includes a new website, www.FirstFreedom.gov, speeches and other public appearances, and distribution of literature about the Department's jurisdiction in this area.

Most of the civil rights statutes the Division enforces protect against discrimination on the basis of religion along with race, national origin, sex, and other protected classifications. Yet prior to this Administration, no individual at the Department coordinated the protection of religious liberties. In 2002, we established, within the Civil Rights Division, a Special Counsel for Religious Discrimination to coordinate the protection of religious liberties. We have won virtually every religious discrimination case in which we have been involved and have increased the enforcement of religious liberties throughout the areas of our jurisdiction.

The Civil Rights Division reviewed 82 cases of alleged religious discrimination in education from Fiscal Year 2001 to Fiscal Year 2006, resulting in 40 investigations. This is compared to one review and one investigation in the prior six-year period. In Fiscal Year 2006, the Division reviewed 22 cases and investigated 13. The largest category of cases involved harassment of students based on religion. Of the 13 investigations in Fiscal Year 2006, eight involved harassment claims. Seven of these involved Muslim students.

Similarly, we have been active in a broad range of cases involving religious discrimination in employment. We currently have a pattern or practice suit under Title VII against the New York Metropolitan Transit Authority alleging that it failed to accommodate Muslim and Sikh bus and train operators who wear religious headcoverings and has selectively enforced its uniform policies. In *United States v. Los Angeles County Metropolitan Transportation Authority*, the Division sued the Los Angeles MTA alleging that it had engaged in a pattern or practice of religious discrimination by failing to reasonably accommodate Sabbath-observant employees and applicants who were unable to comply with MTA's requirement that they be available to work seven days a week. The Division reached a consent decree in October 2005 requiring Sabbath accommodations.

While many of these cases involved straightforward religious discrimination, the Division also has sought to prevent harassment based on religion. For example, in January 2006, we reached a consent decree in a Fair Housing Act case against a Chicago man for harassing his next-door neighbors because of their Jewish religion and their national origin. The Division also has been active in preventing discrimination based on religion in access to public accommodations and public facilities under Titles II and III of the Civil Rights Act of 1964. Investigations under these two statutes increased from one in 1995-2000 to ten in 2001-2006.

For example, in the area of public accommodations, we reached a settlement with a restaurant in Virginia that had denied service to two Sikh men because of their turbans. In the area of access to public facilities, we investigated the city of Balch Springs, Texas, after officials told seniors at a city senior center that they could no longer pray before meals, sing gospel music, or hold Bible studies, all of which were initiated by the seniors themselves without the involvement of any city employees. The city settled and agreed to permit seniors to engage in religious expression to the same extent that they can engage in other forms of expression at the center.

The Civil Rights Division also has been active in enforcing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The Division has reviewed more than 120 complaints and has opened 30 formal investigations under RLUIPA. The majority of these investigations have been resolved favorably without filing suit. These cases have involved Muslims, Sikhs, Buddhists, Jews, Hindus, and Christians of various denominations.

We also have filed four RLUIPA lawsuits. The most recent, filed in September 2006, involves Suffern, New York's refusal to permit an Orthodox Jewish group to operate a "Shabbos House" next to a hospital where Sabbath-observant Jews who cannot drive on the Sabbath can stay the night if they are discharged from the hospital on the Sabbath or if they are visiting patients on the Sabbath. In July 2006, the Division also reached a consent decree in *United States v. Hollywood, Florida*, which involved allegations of discrimination in denial of a permit to a synagogue to operate in a residential neighborhood.

The Division also has been active in filing amicus briefs in RLUIPA cases and defending RLUIPA's constitutionality. In August 2006, the U.S. Court of Appeals for the Ninth Circuit ruled in favor of the United States in *Guru Nanak Sikh Society v. County of Sutter*. In that case, the Division had intervened to defend the constitutionality of RLUIPA and filed an amicus brief on the merits in a case involving a Sikh congregation that was denied permits to build a Gurdwara in both residential and agricultural neighborhoods.

Of particular note are the Division's efforts to combat "backlash" crimes following the September 11, 2001, terrorist attacks. Under this initiative, the Division investigates and prosecutes backlash crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some involving dangerous weapons and resulting in serious injury or death, as well as threats made over the telephone, on the internet, through the mail, and in person. We also have prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship. The Department has investigated more than 750 bias-motivated incidents since September 11, 2001, and we have obtained 32 Federal convictions in such cases. We have also assisted local law enforcement in bringing more than 150 such criminal prosecutions.

Two recent examples of our backlash prosecutions are *United States v. Oakley*, in which the defendant pled guilty to emailing a bomb threat to the Council on American Islamic Relations, and *United States v. Nix*, in which the defendant detonated an explosive device in a Pakistani family's van which was parked outside their home. The defendant set off the explosive

with intent to interfere with the family's housing rights. These backlash crimes, and others we have prosecuted since September 11, 2001, are an unfortunate reality of American life today. As President Bush has stated, "those who feel like they can intimidate our fellow citizens to take out their anger don't represent the best of America, they represent the worst of humankind, and they should be ashamed of that kind of behavior."

In recent years, the Division has continued its investigations and prosecution of church-burning cases. In addition, anti-Semitic attacks remain a persistent problem in the United States. We recently prosecuted several individuals in Oregon for conspiring to intimidate Jews at the Temple Beth Israel in Eugene, Oregon. Defendants threw swastika-etched rocks at the synagogue, breaking two stained glass windows, while 80 members of the synagogue were inside attending a religious service. One defendant was sentenced to 15 months in prison. Three other defendants are scheduled to be sentenced at the end of this month.

We are proud of the First Freedom Project, as well as other Attorney General initiatives involving the work of the Civil Rights Division. These include the Department's Cold Case Initiative, Operation Home Sweet Home, and Human Trafficking prosecutions, as discussed in greater detail discussed.

PROTECTING VOTING RIGHTS

The right to vote is the foundation of our democratic system of government. The President and the Attorney General strongly supported the Voting Rights Act Reauthorization and Amendments Act of 2006, named for three heroines of the Civil Rights movement, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. During the signing ceremony at the White House, President Bush said, "My administration will vigorously enforce the provisions of this law, and we will defend it in court." The Civil Rights Division is committed to carrying out the President's promise. In fact, the Division is already defending the Act against a constitutional challenge in Federal court here in the District of Columbia.

The Civil Rights Division is responsible for enforcing several laws that protect voting rights, and I will discuss the Division's work under each of those laws. First, however, it is worth noting that under our nation's Federal system of government, the primary responsibility for the method and manner of elections lies with the States. Article I, Section 4 of the Constitution states, "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." Thus, each State holds responsibility for conducting its own elections. However, Article I, Section 4 goes on to provide: "[B]ut the Congress may at any time by Law make or alter such Regulations" with respect to Federal elections. The Fourteenth and Fifteenth Amendments likewise authorize congressional action in the elections sphere. Therefore, except where Congress has expressly decided to legislate otherwise, States maintain responsibility for the conduct of elections.

Congress has passed legislation in certain distinct areas related to voting and elections. These laws include, among others, the Voting Rights Act of 1965 and subsequent amendments

thereto, the Uniformed and Overseas Citizen Absentee Voting Act of 1986 (UOCAVA), the National Voter Registration Act of 1993 (Motor Voter or NVRA), and the Help America Vote Act of 2002 (HAVA). The Civil Rights Division enforces the civil provisions of these laws. The vast majority of criminal matters involving possible Federal election offenses are assigned to and supervised by the Criminal Division and are prosecuted by the United States Attorneys' Offices. However, a small percentage of voting related offenses are principally assigned to the Civil Rights Division to handle or supervise.

During my tenure as the Assistant Attorney General, the Voting Section has brought lawsuits under each of these statutes. In fact, the 18 new lawsuits we filed in Calendar Year 2006 is double the average number of lawsuits filed in the preceding 30 years. Additionally, because 2006 was a Federal election year, the Division worked overtime to meet its responsibilities to protect the voting rights of our citizens.

In 2006, the President signed the Voting Rights Act Reauthorization and Amendments Act of 2006, which renewed for another 25 years certain provisions of the Act that had been set to expire. The Voting Rights Act has proven to be one of the most successful pieces of civil rights legislation ever enacted. However, as long as all citizens do not have equal access to the polls, our work is not finished. As President Bush said, "In four decades since the Voting Rights Act was first passed, we've made progress toward equality, yet the work for a more perfect union is never ending."

The Civil Rights Division is committed to ensuring that all citizens have equal access to the democratic process. During Fiscal Year 2006, the Division's Voting Section continued to aggressively enforce all provisions of the Voting Rights Act, filing eight lawsuits to enforce various provisions of the Act. These cases include a lawsuit that we filed and resolved under Section 2 against Long County, Georgia, for improper challenges to Hispanic-American voters – including at least three United States citizens on active duty with the United States Army – based entirely on their perceived race and ethnicity. We also filed a Section 2 lawsuit in 2006 on behalf of African-American voters that challenges the method of election in Euclid, Ohio. This case is currently in litigation.

Among our recent successes under Section 2 is the Division's lawsuit against Osceola County, Florida, where we brought a challenge to the county's at-large election system. In October 2006, we prevailed at trial. The court held the at-large election system violated the rights of Hispanic voters under Section 2, and the court ordered the county to abandon it. In December, the court adopted the remedial election system proposed by the United States and ordered a special election under that election plan to take place this spring. Our most recent Section 2 accomplishment is the preliminary injunction obtained in our Section 2 challenge to Port Chester, New York's at-large election system. On March 2, 2007, after an evidentiary hearing, the court enjoined the March 20 elections, holding that the United States was likely to succeed on its claim. Trial is set for May 21. Also, this January, in Fremont County, Wyoming, the Division successfully defended the constitutionality of Section 2 of the Voting Rights Act, for the third time in this Administration.

The Section also continues to litigate a case in Mississippi under Sections 2 and 11(b) of the Voting Rights Act. This case is unusual for several reasons: it is the most extreme case of racial exclusion seen by the Voting Section in decades; the racial discrimination is directed against white citizens; and we are not aware of any other case in which the Voting Section has had to move for a protective order to prevent intimidation of witnesses.

We will continue to closely investigate claims of voter discrimination and vigorously pursue actions on behalf of all Americans wherever violations of Federal law are found.

The Division also had a record-breaking year with regard to enforcement of Section 208 of the Voting Rights Act in 2006. In Fiscal Year 2006, the Division's Voting Section brought four out of the nine lawsuits ever filed under Section 208 since it was enacted twenty-five years ago. As the Committee knows, Section 208 assures all voters who need assistance in marking their ballots the right to choose a person they trust to provide that assistance. Voters may choose any person other than an agent of their employer or union to assist them in the voting booth. During the past six years, we have brought seven of the nine cases ever filed under Section 208 in the history of the Act, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

In 2006, the Voting Section processed the largest number of Section 5 submissions in its history. The Division made two objections to submissions pursuant to Section 5, in Georgia and Texas, and filed its first Section 5 enforcement action since 1998. The Division also made an objection pursuant to Section 5 in Alabama in January 2007. Additionally, the Division is vigorously defending the constitutionality of Section 5 of the Voting Rights Act in an action brought by a Texas jurisdiction and recently filed an amicus brief in a Mississippi Section 5 case. We also consented to several actions in Fiscal Year 2006 in jurisdictions that satisfied the statutory requirements for obtaining a release, or "bailout," from Section 5 coverage. The Voting Section has begun a major enhancement of the Section 5 review process to minimize unnecessary paperwork involved with submissions, make improvements in training, and expand its outreach.

Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress last summer, remains strong, with four lawsuits filed in 2006. During the past 6 years, the Civil Rights Division has litigated more cases on behalf of minority language voters than in all other years combined since 1965. Specifically, we have successfully litigated approximately 60 percent of all language minority cases in the history of the Voting Rights Act.

Our cases on behalf of language minority voters have made a remarkable difference in the accessibility of the election process to those voters. As a result of our lawsuit, Boston now employs five times more bilingual poll workers than before. As a result of our lawsuit, San Diego added over 1,000 bilingual poll workers, and Hispanic voter registration increased by over 20 percent between our settlement in July 2004 and the November 2004 general election. There was a similar increase among Filipino voters, and Vietnamese voter registration rose 37 percent. Our lawsuits also spur voluntary compliance: after the San Diego lawsuit, Los Angeles County

added over 2,200 bilingual poll workers, an increase of over 62 percent. In many cases, violations of Section 203 are accompanied by such overt discrimination by poll workers that Section 2 claims could have been brought as well. However, we have been able to obtain complete and comprehensive relief through our litigation and remedies under Section 203 without the added expense and delay of a Section 2 claim.

During Fiscal Year 2006, the Division continued to work diligently to protect the voting rights of our nation's military and overseas citizens. The Division has enforcement responsibility for the UOCAVA, which ensures that overseas citizens and members of the military, and their household dependents, are able to request, receive, and cast a ballot for Federal offices in a timely manner for Federal elections. As a result of our efforts, in Fiscal Year 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. In Calendar Year 2006, we filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina and reached a voluntary legislative solution without the need for litigation in South Carolina. In Alabama and North Carolina, we obtained relief for military and overseas voters in the form of State legislation. We also obtained permanent relief in the form of legislation in a suit originally filed against Pennsylvania in 2004. All of these accomplishments prompted an award from the Department of Defense to the Deputy who supervised all of these cases. The Civil Rights Division will continue to make every effort to ensure that our citizens abroad and the brave men and women of our military are afforded a full opportunity to participate in Federal elections.

In 2006, the Voting Section also filed the largest number of suits under the National Voter Registration Act since immediately following the Act becoming effective in 1995. We filed lawsuits in Indiana, Maine, and New Jersey. The Voting Section's suits against New Jersey and Maine also alleged violations of the Help America Vote Act (HAVA). We resolved these two suits with settlement agreements that set up timetables for implementation of a statewide computer database. The suit against Indiana, which admitted that its lists contained more than 300,000 ineligible voters, also was settled by consent decree. We are still litigating a late 2005 suit against Missouri regarding its failure, over the course of many years, to remove from its voter rolls registrants who had moved or had died. The State's failure in that regard caused dozens of jurisdictions to report that voter registrations exceeded the total number of citizens eligible to vote and, in some cases, more voter registrations than total population. More recently, we filed suit and entered into a consent decree against a New Mexico County where the victims of the NVRA violations were primarily Native-American voters.

With January 1, 2006, came the first year of full, nationwide implementation of the database and accessible voting machine requirements of HAVA. Accordingly, we began making these statutory requirements a priority for enforcement. HAVA requires that each State and territory have a statewide computerized voter registration database in place for Federal elections, and that, among other requirements, there be accessible voting for the disabled in each polling place in the nation. Many States, however, did not achieve full compliance and are struggling to catch up. States missed these deadlines for many reasons, including ineffective time lines, difficulty resolving compliance issues, and various problems with vendors.

The Division worked hard to help States prepare for the effective date of January 1, 2006, through speeches and mailings to election officials, responses to requests for our views on various issues, and maintaining a detailed website on HAVA issues. We have been, and remain, in close contact with many States in an effort to help them achieve full compliance at the earliest possible date.

A significant example of the success of the Division's cooperative approach in working with States on HAVA compliance came in our agreement with California on compliance with HAVA's database provisions. Prior to the January 1, 2006, deadline, the Voting Section reached an important memorandum of agreement with California regarding its badly stalled database implementation. California's newly appointed Secretary of State sought the Division's help to work cooperatively on a solution, and the Division put significant time and resources into working with the State to craft a feasible agreement providing for both interim and permanent solutions. We are very proud of this agreement, which has served as a model for other States in their database compliance efforts.

Where cooperative efforts prove unsuccessful, the Division enforces HAVA through litigation. During 2006, the Section filed lawsuits against the States of New York, Alabama, Maine, and New Jersey. In New York and Maine, the States had failed to make significant progress on both the accessible voting equipment and the statewide databases. In Alabama and New Jersey, the States had not yet implemented HAVA-compliant statewide databases for voter registration. In addition, we filed a local HAVA claim against an Arizona locality for its failure to follow the voter information posting requirements of HAVA. The Section also defended three challenges to HAVA and won a judgment after a Federal court trial in Pennsylvania. A separate Pennsylvania State court judgment barring the use of accessible machines was overturned after the Division gave formal notice of its intent to file a Federal lawsuit.

A major component of the Division's work to protect voting rights is its election monitoring program, which is among the most effective means of ensuring that Federal voting rights are respected on election day. Each year the Justice Department deploys hundreds of personnel to monitor elections across the country. Last year, the Division deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. In total, over 800 Federal personnel monitored the polls in 69 political subdivisions in 22 States during the general election on November 7, 2006 – a record level of coverage for a mid-term election. In Calendar Year 2006, we sent over 1,500 Federal personnel to monitor elections, doubling the number sent in 2000, a presidential election year.

Such extensive efforts require substantial planning and resources. Our decisions to deploy observers and monitors are made carefully and purposefully so that our resources are used where they are most needed. To that end, I personally met with representatives of a number of civil rights organizations prior to the 2006 general election, including organizations that advocate on behalf of racial and language minorities, as well as groups who focus on disability rights. During these meetings, I encouraged these groups to share information about their concerns with us so that we could respond appropriately where needed. We made a detailed presentation about the Division's preparations for the general election and our election day

activities, distributed information about how to request monitoring for a jurisdiction, and explained how to contact us on election day through our toll free number and internet-based complaint system. I also met with representatives from the National Association of Attorneys General, the National Association of Secretaries of State and other representatives of similar associations before last year's general election. This meeting provided a forum for discussion of State and local officials' concern, and for the Division to provide information about our election day plans.

On election day, Department personnel here in Washington stood ready. We had numerous phone lines ready to handle calls from citizens with election complaints, as well as an internet-based mechanism for reporting problems. We had personnel at the call center who were fluent in Spanish and the Division's language interpretation service to provide translators in other languages. On Election Day, the Voting Section received approximately 141 calls and 88 e-mail complaints on its website. These 229 complaints resulted in approximately 332 issues raised, as some complainants had multiple issues. Many of these complaints were subsequently resolved on election day; we will continue the process of following-up on the rest.

CRIMINAL CIVIL RIGHTS PROSECUTIONS

The Civil Rights Division's Criminal Section continues to vigorously enforce Federal criminal civil rights protections, having set prosecution records in several areas in Fiscal Year 2006. Our overall conviction rate rose from 91% in Fiscal Year 2005 to 98% in Fiscal Year 2006 – the highest conviction rate recorded in the past two decades. We also charged 200 defendants with civil rights violations and obtained convictions of 180 defendants in Fiscal Year 2006 – both of which represent the highest totals in over two decades.

Our criminal prosecutions span the full breadth of the Division's jurisdiction. In color of law matters, we filed 44 cases (up from 29 the previous year) and charged 66 defendants (compared to 45 in the previous year) in Fiscal Year 2006. Additionally, we charged 22 defendants in cases of bias crime, including charges of conspiracy, murder, and post-September 11, 2001, "backlash" crimes.

Our human trafficking efforts continue at an unprecedented pace. Working with the various United States Attorneys' Offices, we charged 111 defendants in 32 cases and obtained 98 convictions in Fiscal Year 2006, a record number that nearly tripled the number of convictions in the previous year. Since 2001, the Department has prosecuted 360 human trafficking defendants, secured almost 240 convictions and guilty pleas, and opened nearly 650 new investigations. That represents a six-fold increase in the number of human trafficking cases filed in court, quadruple the number of defendants charged, and triple the number of defendants convicted in comparison to 1995-2000. On January 31, 2007, the Attorney General and I announced the creation of the new Human Trafficking Prosecution Unit within the Criminal Section. This new Unit is staffed by the Section's most seasoned human trafficking prosecutors who will work with our partners in Federal and State law enforcement to investigate and prosecute the most significant human trafficking crimes, such as multi-jurisdictional sex trafficking cases.

There has been renewed interest in the investigation and prosecution of unsolved civil rights era murder cases. The Criminal Section continues to play a central role in this effort. In January 2007, the Attorney General announced the indictment of James Seale on two counts of kidnapping and one count of conspiracy for his role in the 1964 abduction and murder of Charles Moore and Henry Dee in Franklin County, Mississippi. And, in February 2007, the Attorney General and the FBI announced an initiative to identify other unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal law.

Color of Law Violations

There is no doubt that law enforcement officers are asked to perform dangerous and difficult tasks to serve and protect our citizens. We ask these brave men and women to perform their duties with a professionalism that keeps us all safe from harm and places a great deal of public trust in them. I have no doubt that the overwhelming majority of law enforcement officers and State agents are deeply committed to protecting the private citizens and maintaining the integrity of the public trust. I think we all owe these hard-working men and women a deep sense of gratitude. Unfortunately, there are some who abuse their positions of trust to mistreat those in custody. Such unlawful behavior undermines the tireless efforts of the vast majority of law enforcement officers who perform a tough job with professionalism and courage. When an individual acting under the color of law abuses a position of authority and violates the law, the Civil Rights Division is committed to vigorously pursuing prosecution. The public must be able to trust that no one, including those who wear a badge, is above the law. If that trust is broken, public confidence in the police force is undermined and an already difficult job is made more difficult for those on the force.

In Fiscal Year 2006, nearly 50 percent of the cases brought by the Criminal Section involved such prosecutions. From Fiscal Year 2001 through Fiscal Year 2006, we obtained convictions of 50% more law enforcement officials for color of law violations than in the preceding six fiscal years. In *United States v. Walker and Ramsey*, for example, the Criminal Section successfully prosecuted two men for the politically-motivated assassination of the county sheriff-elect at the direction of the incumbent sheriff. In previous State trials, the sheriff had been convicted of murder and sentenced to life in prison, but the other defendants had been acquitted of murder charges. The Department stepped in and sought, successfully, convictions of two of the men, including a former deputy sheriff.

In *United States v. Marlowe*, a Federal jury convicted defendant Robert Marlowe, a former Wilson County Jail sergeant and night shift supervisor, of assaulting jail detainees. Marlowe participated in the beating of detainee Walter Kuntz and then failed to provide him with the necessary and appropriate medical care as he lay unconscious on the floor of the jail, resulting in his death. The jury also convicted Marlowe and defendant Tommy Conatser, a former jailor who worked for Marlowe, of conspiracy to assault jail detainees. Marlowe and other officers bragged about the beatings and filed false and misleading reports to cover up the assaults. During the course of this prosecution, six other former Wilson County Correctional

Officers pled guilty to felony charges relating to violations of the civil rights of inmates at the Wilson County Jail. This case was prosecuted in partnership with the U.S. Attorney's Office for the Middle District of Tennessee and the FBI. On July 6, 2006, defendant Marlowe was sentenced to life in prison. Other defendants received prison terms of up to 108 months in prison.

In addition to investigation and prosecution of color of law matters, Criminal Section staff conducts a significant amount of training and outreach. These efforts are designed to help law enforcement agencies prevent the occurrence of these violations. In Fiscal Year 2006, for example, we made presentations on the Criminal Section's civil rights enforcement program to local law enforcement officials attending the FBI's National Academy at Quantico, Virginia. We also made presentations to Federal officials such as the FBI and the Department of Homeland Security. Criminal Section staff also played a central role in designing and participating in a civil rights training program for Federal prosecutors at the Department's National Advocacy Center in Columbia, South Carolina.

As I noted earlier, I have tremendous respect for the men and women in police departments who risk their lives around the country each and every day to ensure that America is a safe place to live. To the extent that the Division can both assist further their mission and promote constitutional policing, we are performing a valuable task.

Hate Crimes

The Civil Rights Division is deeply committed to the vigorous enforcement of our nation's civil rights laws and, in recent years, has brought a number of high profile hate crime cases. We continue to aggressively prosecute those within our society who attack others because of the victims' race, color, national origin, or religious beliefs. During Fiscal Years 2006 and 2007, the Division has continued to bring to justice those who commit these terrible crimes. For example, in *United States v. Eye and Sandstrom*, the government is seeking the death penalty against defendants who allegedly shot and killed an African-American man because of his race. The government alleges that as the victim walked down the street, the defendants, whom he did not know, drove by and shot at him. Their shots missed the victim, so the defendants allegedly circled the neighborhood until they found him again. One of the defendants got out of the car, rushed up to the victim, and shot him in the chest, killing him. Trial is currently set for August 2007.

Our other cases involve equally disturbing violations. In *United States v. Saldana*, four members of a violent Latino street gang were convicted of participating in a conspiracy aimed at threatening, assaulting, and even murdering African-Americans in a neighborhood claimed by the defendants' gang. All four defendants received life sentences. As a result of this prosecution, Criminal Section Deputy Chief Barbara Bernstein recently was selected to receive the coveted Helene and Joseph Sherwood Prize for Combating Hate by the Anti-Defamation League. As one of the select few in law enforcement to receive the prestigious award, the ADL said that Deputy Chief Bernstein "exemplifies an ongoing commitment, support, and contribution in helping to eliminate hate and prejudice." In *United States v. Coombs*, a man in Florida pled guilty to

burning a cross in his yard to intimidate an African-American family that was considering buying the house next door to his residence. In *United States v. Fredericy and Kuzlik*, two men pled guilty for their roles in pouring mercury, a highly toxic substance, on the front porch and driveway of a bi-racial couple in an attempt to force them out of their home. In another case, *U.S. v. Walker*, we charged three members of a white supremacist organization with assaulting a Mexican-American bartender in Salt Lake City at his place of employment. These same defendants allegedly assaulted an individual of Native-American heritage outside another bar in Salt Lake City. This case is set for trial in April 2007.

And, as noted earlier, the Criminal Section is working closely with the FBI to identify unresolved civil rights era murders. Our commitment to this effort is illustrated in our track record of aggressively prosecuting civil rights era cases when we have been able to overcome jurisdictional and statute of limitations hurdles. As a result of these efforts, the Criminal Section, along with the United States Attorney's Office for the Southern District of Mississippi, recently secured the indictment of James Seale on two counts of kidnapping and one count of conspiracy for his role in the 1964 abduction and murder of Charles Moore and Henry Dee in Franklin County, Mississippi. This case is currently set for trial in April of 2007. And, in 2003, the Civil Rights Division successfully prosecuted Ernest Avants, a Mississippi Klansman who murdered an African-American man in 1966.

Human Trafficking

The prosecution of the despicable crime of human trafficking, a modern day form of slavery, continues to be a major element of our Criminal Section's work. The victims of human trafficking in the United States are often minority women and children, who are poor, are frequently unemployed or underemployed, and lack access to social safety nets. These victims have been exploited in the commercial sex industry or have been compelled into manual or domestic labor. The Attorney General's initiative on human trafficking has made the prosecution of these crimes a top priority. The Division continues to enhance our human trafficking prosecution program through vigorous prosecution of these cases, outreach to State and local law enforcement officers and non-governmental organizations who will find the victims of this terrible crime, and most recently through the creation of the Human Trafficking Prosecution Unit described above.

In Fiscal Year 2006, the Division continued to aggressively pursue those who commit human trafficking crimes, obtaining a record 98 convictions of human trafficking defendants. Working with the various United States Attorneys' Offices, we charged a record number of sex trafficking defendants (85) and 26 labor trafficking defendants. In addition to prosecuting the perpetrators of these horrible crimes, the Criminal Section also aids their victims. Under the 2000 Trafficking Victims Protection Act, 1166 trafficking victims from 75 countries have obtained eligibility for refugee-type benefits from HHS with the aid of the Civil Rights Division and other law enforcement agencies.

In Fiscal Year 2006, the Section obtained two of the longest sentences ever imposed in a sex trafficking case in *United States v. Carreto*. Defendants organized and operated a trafficking

ring that smuggled Mexican women and girls into the United States and then forced them into prostitution in Queens and Brooklyn, New York. On April 27, 2006, two defendants were sentenced to 50 years in prison and a third defendant was sentenced to 25 years in prison for their crimes. On March 2, 2007, Consuelo Carreto-Valencia, the mother of the Carreto brothers who participated in their sex trafficking scheme, was arraigned in Federal court on a 27-count indictment charging her with multiple counts of sex trafficking and related crimes. She was extradited to the United States from Mexico in January 2007.

In *United States v. Arlan and Linda Kaufman*, the defendants, who operated a residential treatment facility for mentally ill adults, forced their severely ill residents to labor on the Kaufmans' farm and to participate as subjects in pornographic videos. The defendants committed fraud when they billed Medicare for this "treatment" they provided the victims. In November 2005, the defendants were convicted on all 35 counts of the indictment, including conspiracy, forced labor, involuntary servitude, and fraud. On January 23, 2006, Arlan Kaufman was sentenced to serve 30 years in prison and Linda Kaufman was sentenced to serve seven years.

In *United States v. Evelyn and Joseph Djoumessi*, the defendants held a young Cameroonian woman as an involuntary domestic servant for four and a half years. They smuggled the 14-year-old victim into the United States with the false promise of an American education and then held her in their home, forced her to work, beat her, and sexually assaulted her. In March 2006, the defendants were convicted of conspiracy and involuntary servitude, and they await sentencing.

On May 26, 2006, in *United States v. Calimlim*, husband and wife Milwaukee medical doctors were convicted by a Federal jury for using threats of serious harm and physical restraint against a Filipino woman to coerce her labor as a domestic servant. The couple recruited and brought the victim from the Philippines to the U.S. in 1985 when she was 19 years old. For the next 19 years of her life, these defendants hid the victim in their home, forbade her from going outside, and told her that she would be arrested, imprisoned and deported if she were discovered. On November 19, 2006, the defendants were sentenced to 4 years imprisonment, and on February 14, 2007, the Federal court awarded the victim over $900,000 in restitution.

In addition to our work in enforcement, the Criminal Section also actively reaches out to educate law enforcement agencies about human trafficking. For example, our human trafficking staff designed and launched a series of interactive human trafficking training sessions broadcast live on the Justice Television Network in which nearly 80% of the U.S. Attorneys' Offices participated. The Division is also supporting the 42 task forces funded by the Bureau of Justice Assistance and Office for Victims of Crime by providing training and technical assistance. We are supporting the President's Initiative Against Trafficking and Child Sex Tourism by performing assessments of anti-trafficking activities in targeted countries and making recommendations on program development.

Additionally, a national conference on human trafficking was held in October 2006 in New Orleans, Louisiana. Division staff played a central role in developing the program,

moderated panels, gave speeches, and led interactive breakout sessions during the conference. Over six hundred practitioners from law enforcement, non-governmental organizations, and academia attended this very successful conference. At the conference, Attorney General Gonzales announced additional funding totaling nearly $8 million for law enforcement agencies and service organizations for the purpose of identifying and assisting victims of human trafficking and apprehending and prosecuting those engaged in trafficking offenses. The funding is being used to create new trafficking task forces in 10 cities around the country, bringing the total number of funded task forces to 42.

While we have made tremendous strides in the fight against human trafficking, there is still a great deal of work to be done. The Attorney General's initiative to eradicate this form of slavery will remain a top priority of the Division.

HOUSING AND CIVIL ENFORCEMENT

The Housing and Criminal Enforcement Section is charged with ensuring non-discriminatory access to housing, credit, and public accommodations. We understand the importance of these opportunities to American families, and we have worked hard to meet this weighty responsibility. During Fiscal Years 2006 and 2007, the Division's Housing and Civil Enforcement Section has continued its strong commitment to enforcing the Fair Housing Act (FHA), the Equal Credit Opportunity Act (ECOA), and Title II of the Civil Rights Act of 1964. In addition, in Fiscal Year 2006, it assumed enforcement jurisdiction over the Servicemembers Civil Relief Act (SCRA).

On February 15, 2006, the Attorney General launched Operation Home Sweet Home – a concentrated initiative to expose and eliminate housing discrimination in America. In announcing the program the Attorney General stated, "We will help open doors for people as they search for housing. We will not allow discrimination to serve as a deadbolt on the dream of safe accommodations for their family." I am committed to making the Attorney General's pledge a reality, and the Civil Rights Division will continue to dedicate renewed energy, resources, and manpower to the testing program through investigations and visits designed to expose discriminatory practices. Under Operation Home Sweet Home, the Civil Rights Division conducted substantially more fair housing tests in Fiscal Year 2006 than in Fiscal Year 2005 and is testing at record-high levels in Fiscal Year 2007. In addition to increasing the number of tests, Operation Home Sweet Home also strives to conduct more focused testing by concentrating on areas to which Hurricane Katrina victims have relocated and on areas that, based on Federal data, have experienced a significant volume of bias-related crimes.

Throughout this year, and in particular under Operation Home Sweet Home, the Division will continue to aggressively combat housing discrimination. The Division has expanded our outreach significantly by creating a new fair housing website (http://www.usdoj.gov/crt/housing/fairhousing/index.html), establishing a telephone tip line and a new e-mail address specifically to receive fair housing complaints, and sending outreach letters to over 400 public and private fair housing organizations. In Fiscal Year 2006, we filed two

cases developed through our testing program that allege a pattern or practice of discrimination. We have filed one testing case so far in Fiscal Year 2007 and expect to see more in the future as a result of our enhanced testing program.

We continue to enforce the anti-discrimination requirements of Title II. During Fiscal Year 2006, we filed and resolved a Title II lawsuit against the owner and operator of Eve, a Milwaukee nightclub. We alleged that the nightclub discriminated against African-American patrons by denying them admission for false reasons, such as that the nightclub was too full or that it was being reserved for a private party. Our settlement agreement requires the nightclub to implement changes to its policies and practices in order to prevent such discrimination. We also continue to monitor compliance with our 2004 consent decree in *United States v. Cracker Barrel Old Country Stores* as the company makes progress toward compliance with the comprehensive reforms mandated by that consent decree.

Notably during Fiscal Year 2006, the Civil Rights Division filed more sexual harassment cases than in any year in its history. Sexual harassment by a landlord is particularly disturbing because the perpetrator holds both the lease and a key to the apartment. For example, one suit alleges that the owner of numerous rental properties in Minnesota has subjected female tenants to severe and pervasive sexual harassment, including making unwelcome sexual advances; touching female tenants without their consent; entering the apartments of female tenants without permission or notice; and threatening to or taking steps to evict female tenants when they refused or objected to his sexual advances. In another case, the Housing and Civil Enforcement Section obtained a consent decree requiring the defendants, who were the property managers, owner, and a maintenance man, to pay $352,500 in damages to 20 identified aggrieved persons, as well as a $35,000 civil penalty.

Although most sexual harassment cases are filed under the Fair Housing Act, in Fiscal Year 2006 the Division filed its first-ever sexual harassment case under the Equal Credit Opportunity Act. The complaint alleges that a former vice president of the First National Bank of Pontotoc in Pontotoc, Mississippi, used his position to sexually harass female borrowers and applicants for credit. This case is currently in litigation.

Our lawsuits also protect the rights of Americans to purchase houses as well as rent them. Our fair lending enforcement efforts are another component of our fight against housing discrimination. While a lender may legitimately consider a range of factors in determining whether to provide a candidate a loan, race has no place in this determination. "Redlining" is the term used to describe a lender's refusal to give loans in certain areas based on the racial makeup of the area's residents. The Division is working hard to eliminate this form of discrimination, which places a barrier between Americans and the dream of owning their own home.

We recently filed and resolved a lawsuit against Centier Bank in Indiana, alleging violations of the Equal Credit Opportunity Act and the Fair Housing Act. In this case, we alleged Centier unlawfully refused to provide its lending products and services on an equal basis to residents of minority neighborhoods, thereby denying hundreds of loans to prospective African-American and Hispanic residents. Under the settlement agreement, the bank will open

new offices and expand existing operations in the previously excluded areas, as well as invest $3.5 million in a special financing program and spend at least $875,000 to promote its products and services in these previously excluded areas.

In Fiscal Year 2007, we filed and resolved a case against Compass Bank for violating the Equal Credit Opportunity Act by engaging in a pattern of discrimination on the basis of marital status in thousands of automobile loans it made through hundreds of different car dealerships in the South and Southwest. Specifically, we alleged that the bank charged non-spousal co-applicants higher interest rates than similarly-situated married co-applicants. Under the consent decree, the bank will pay up to $1.75 million to compensate several thousand non-spousal co-applicants whom we alleged were charged higher rates as a result of their marital status.

A vital element of the President's New Freedom Initiative is the Division's enforcement of the accessibility provisions of the FHA. The FHA requires that multi-family housing constructed after 1991 include certain provisions to make it usable by people with disabilities. In 2005, we launched our Multi-Family Housing Access Forum, intended to assist developers, architects, and others understand the FHA's accessibility requirements and to promote a dialogue between the developers of multi-family housing and persons with disabilities and their advocates. Our last Access Forum event, held in the Phoenix area in November 2006, attracted nearly 100 persons.

In addition to these proactive outreach efforts, the Division continues to actively litigate cases involving housing that is not designed and constructed in accordance with the Fair Housing Act and the Americans with Disabilities Act. We resolved five cases in Fiscal Year 2006 through consent decrees and have resolved four cases already in Fiscal Year 2007. We also filed three new design and construction cases in Fiscal Year 2006, which are currently in litigation.

In Fiscal Year 2007, we also settled two group home cases against municipalities. Our settlement with the City of Saraland, Alabama, requires the city to allow a foster-care home for adults with mental disabilities to operate in a single-family residential zone. The city must also pay $65,000 in damages and fees to the complainants and a $7,000 civil penalty to the United States. Our settlement with the Village of South Elgin, Illinois, requires the village to grant a permit for up to seven residents to a "sober home" providing a supportive environment for recovering alcoholics and drug users; to pay $25,000 in monetary damages to the owner of the home; to pay $7,500 to each of two residents who were forced to leave the home; and to pay a $15,000 civil penalty.

We also have begun our efforts to enforce the SCRA. We recently opened our first investigation and have several matters under review.

DISABILITY RIGHTS

Since the January 2001 announcement of the President's New Freedom Initiative, the Division's Disability Rights Section has achieved results for people with disabilities in over

2,000 actions under the Americans with Disabilities Act of 1990 (ADA), including formal settlement agreements, informal resolution of complaints, successful mediations, consent decrees, and favorable court decisions. In Fiscal Year 2006 alone, the Division achieved favorable results for persons with disabilities in 305 cases and matters, which provided injunctive relief and compensatory damages for people with disabilities across the country and set major ADA precedents in a number of important areas. The Division also continued its important work under Project Civic Access. Many Americans with disabilities are able to enjoy life in a much fuller capacity as a result of our enforcement activities, and the Division will continue to make our efforts in this area a priority.

Our work under the ADA during my tenure as Assistant Attorney General involved cases across the country and in a variety of settings, including hospitals, public transportation, restaurants, movie theaters, college campuses, and retail stores.

An example of our work in a hospital setting is an agreement we reached with Laurel Regional Hospital in Maryland on behalf of persons with speech or hearing impairments. The hospital agreed to assess the communication needs of individuals with speech or hearing disabilities and provide qualified interpreters (on-site or video interpreting) as soon as possible when necessary for effective communication.

In the area of public transportation, the City of Detroit agreed to take steps to ensure that public bus wheelchair lifts are operable and in good repair and to provide alternate transportation promptly when there are breakdowns in accessible bus service.

The Division has also entered into agreements with major movie theater companies to make the experience of going to the movies more accessible to all Americans. Two of the largest movie theater chains in the country, Cinemark USA, Inc. and the Regal Entertainment Group, agreed to dramatically improve the movie going experience for persons who use wheelchairs and their companions at stadium-style movie theaters across the United States. Both chains have agreed that all future construction at both theater chains will be designed in accordance with plans approved by the Department and barriers will be removed at certain existing theaters.

Project Civic Access (PCA) is a wide-ranging initiative to ensure that towns and cities across America comply with the ADA. The goal of Project Civic Access is to ensure that people with disabilities have an equal opportunity to participate in civic life. To date, we have reached 152 agreements with 141 communities to make public programs and facilities accessible. Each of these communities has agreed to take specific steps, depending on local circumstances, to make core government functions more accessible to people with disabilities. These agreements quite literally open civic life up to participation by individuals with all sorts of disabilities. The agreements have improved access to many aspects of civic life, including courthouses, libraries, parks, sidewalks, and other facilities, and address a wide range of accessibility issues, such as employment, voting, law enforcement activities, domestic violence shelters, and emergency preparedness and response. During the past 6 years, we have obtained more than 80% of the agreements reached under Project Civic Access since it began in 1999, improving the lives of more than 3 million Americans with disabilities.

On December 5, 2006, the Division entered its 150th Project Civic Access agreement with Kanawha County, a region of West Virginia where almost 22% of the population has disabilities. Under this agreement, the county will ensure access for people with disabilities to county programs and facilities, including administrative buildings, courts, emergency management programs and facilities, law enforcement programs and facilities, the website, and polling places. The agreement was signed at a ceremony along with two other agreements: the first, an agreement with Kanawha County Parks and Recreation, ensuring access for people with disabilities to the county's parks and recreation programs, services, activities, and facilities, and the second, an agreement with Metro 9-1-1 of Kanawha County, ensuring access to 9-1-1 emergency communication services for people in the county and the City of Charleston who are deaf, are hard-of-hearing, or have speech impairments.

We have expanded our PCA focus to include emergency preparedness for people with disabilities. Our activities related to recovery from the hurricanes in the Gulf region in 2005 have included working with the Department of Housing and Urban Development (HUD) to design specifications and floor plans that the Federal Emergency Management Agency (FEMA) can use to procure and install fully accessible travel trailers and mobile homes. We also provided guidance to FEMA on constructing accessible ramps for trailers and mobile homes, trained FEMA's equal rights staff on best practices in addressing the emergency-related needs of people with disabilities, and began working with certain local governments to ensure that their emergency management plans appropriately address the needs of individuals with disabilities. Under Executive Order 13347, Individuals with Disabilities in Emergency Preparedness, the Division is collaborating with the Department of Homeland Security's Office for Civil Rights and Civil Liberties in its emergency management and Gulf Coast rebuilding activities.

In October 2006, the Attorney General directed the Civil Rights Division to use the knowledge and experience the Division has gained in its work with State and local governments under Project Civic Access to begin a technical assistance initiative. As a result, the Division is publishing the "ADA Best Practices Tool Kit for State and Local Governments," a document to help State and local governments improve their compliance with ADA requirements. This Tool Kit is being released in several installments. In the Tool Kit, the Division will provide commonsense explanations of how the requirements of Title II of the ADA apply to State and local government programs, services, activities, and facilities. The Tool Kit will include checklists that State and local officials can use to conduct assessments of their own agencies to determine if their programs, services, activities, and facilities are in compliance with key ADA requirements.

The first installment, released on December 5, 2006, covered "ADA Basics: Statute and Regulations" and "ADA Coordinator, Notice and Grievance Procedure: Administrative Requirements Under Title II of the ADA." The second installment, issued on February 27, 2007, covered "General Effective Communication Requirements Under Title II of the ADA" and "9-1-1 and Emergency Communications Services." These installments, and all subsequent installments, will be available on the Department's ADA Website (www.ada.gov). While State and local officials are not required to use these technical assistance materials, they are strongly encouraged

to do so, since the Tool Kit checklists will help them to identify the types of noncompliance with ADA requirements that the Civil Rights Division has commonly identified during Project Civic Access compliance reviews as well as the specific steps that State and local officials can take to resolve these common compliance problems.

The Division continues to have great success with the Disability Rights Section's innovative ADA Mediation Program. Using more than 400 professional ADA-trained mediators throughout the United States, the ADA Mediation Program continues to expand the reach of the ADA at minimum expense to the government. It allows the Section quickly to respond to and resolve ADA complaints effectively, efficiently, and voluntarily, resulting in the elimination of barriers for people with disabilities throughout the United States. Since its inception, more than 2,500 complaints filed with the Department alleging violation of Title II and Title III have been referred to the program. Of the more than 1,900 mediations completed, 77% have been successful. Last fiscal year's success rate climbed to 82%, our highest ever.

The Division promotes voluntary compliance with the ADA through a wide range of technical assistance and outreach efforts. I have personally attended meetings of our ADA Business Connection, a multifaceted initiative for businesses started by the Department in 2002. This initiative includes conducting a series of meetings between disability and business communities around the country and producing publications on topics related to the ADA that are of particular interest to small businesses. In Fiscal Year 2006, a series of dynamic ADA Business Connection Leadership meetings were held in four cities with more than 150 participants from small and mid-sized businesses, large corporations, and organizations of people with disabilities.

In addition to the Business Connection meetings, we also operate an ADA Information Line as well as an informative website. Our ADA Information Line receives over 100,000 calls annually from people seeking to discuss specific issues with ADA Specialists or order technical assistance publications through the automated system. In Fiscal Year 2006, over 46,000 calls to the ADA Information Line were answered by ADA Specialists. Also, the Section's popular ADA Website, www.ada.gov, continues to be active. In Fiscal Year 2006, it served more than 3.1 million visitors who viewed the pages and images more than 49 million times, an increase in hits of over 30% over the prior year.

In addition to these outreach efforts, in Fiscal Year 2006 the Disability Rights Section sent a mailing to 25,000 State and local law enforcement agencies offering free ADA publications and videotapes developed specifically for law enforcement audiences. We also issued a revised and expanded guide for local governments on making emergency preparedness and response accessible for people with disabilities. Additionally, the Section participated in more than 70 speaking and outreach events in Fiscal Year 2006.

The Disability Rights Section publishes regulations to implement Title II and Title III of the ADA and serves as the Attorney General's liaison to the U.S. Architectural and Transportation Barriers Compliance Board (Access Board). During 2006 and 2007, the Section continued to develop revised ADA regulations that will adopt updated design standards

consistent with the revised ADA Accessibility Guidelines published by the Access Board in July 2004. The revised guidelines are the result of a multi-year effort to promote consistency among the many Federal and State accessibility requirements. We are now drafting a proposed rule and developing the required regulatory impact analysis.

SPECIAL LITIGATION

The Division's Special Litigation Section has two core missions: protecting the civil rights of institutionalized persons and promoting constitutional law enforcement.

The Civil Rights of Institutionalized Persons Act (CRIPA) authorizes the Attorney General to investigate patterns or practices of violations of the Federally protected rights of individuals in State-owned or -operated institutions. These include nursing homes, facilities for those with mental illness and developmental disabilities, prisons, jails, and juvenile justice facilities. Our investigations focus on a myriad of issues, including abuse, medical and mental health care, fire safety, security, adequacy of treatment, and training and education for juveniles.

In Fiscal Year 2006 alone, the Civil Rights Division conducted over 123 investigatory and compliance tours. Thus far in Fiscal Year 2007, the Division is handling CRIPA matters and cases involving over 195 facilities in 34 States, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of Guam and the Virgin Islands. The Division also continues its investigations of 95 facilities and monitoring the implementation of consent decrees, settlement agreements, memoranda of understanding, and court orders involving 99 facilities. Finally, in Fiscal Year 2007, the Division has opened six investigations of 25 facilities, obtained three settlement agreements, and issued three findings letters.

Since January 20, 2001, this Administration has authorized 70 CRIPA investigations, more than a 20 percent increase over the 57 investigations opened during the preceding six year period. With regard to juvenile justice facilities, this Administration has increased the number of settlement agreements by more than 60%, has more than doubled the number of investigations (21 vs. 9), and has more than doubled the number of findings letters (14 vs. 5) issued. One example of the Division's work regarding juvenile justice facilities is the successful resolution of our lawsuit against the State of Mississippi in connection with conditions of confinement at the Oakley and Columbia Training Schools in June 2005. The Division filed suit in December 2003 following an investigation that found evidence of shockingly abusive practices, including hogtying, pole-shackling, and placing suicidal students for extended periods of time into a "dark room," naked, with only a hole in the floor for a toilet. Children who became ill during strenuous physical exercise were made to eat their vomit. The consent decree requires the State to implement reform regarding protection from harm and use of force. We also separately entered into a settlement agreement with the State regarding mental health care and special education services. Since the settlement, we have made numerous monitoring visits to ensure that the principles of the settlement are effectuated. Division staff have made several on-site

visits to the facility in the last several months. We continue to vigorously enforce our agreement to ensure that youth are protected from harm and that mandated reforms are timely implemented.

The Division's important health care work is illustrated by a recent historic settlement with California involving four State mental health care facilities that provide inpatient psychiatric care to nearly 5,000 people committed civilly or in connection with criminal proceedings. The Division's investigation, which commenced in March 2002, initially involved one facility but ultimately expanded to include three others. Among other violations, we found a pattern and practice of preventable suicides and serious, life-threatening assaults by staff and other patients. In two instances, patients were murdered by other patients. The extensive reforms required by the consent decree, which was filed in court last summer, mandate that individuals in the hospitals are adequately protected from harm, are provided adequate services to support their recovery and mental health, and are served in the most integrated setting appropriate for their needs, consistent with the terms of any court-ordered confinement. To date, the State has been very cooperative with the Division's efforts to implement the comprehensive settlements.

In Fiscal Year 2006, the Division has aggressively pursued contempt actions against several recalcitrant jurisdictions to address their long-term failure to achieve compliance with agreed-upon settlement remedies. For example, in *United States v. Virgin Islands*, our inspections of the adult detention center revealed unsupervised housing units, inadequate medical and mental health care, and deplorable environmental conditions. As a result, the court granted the Division's motion to find the Virgin Islands in contempt of the court's previous orders and our consent decree addressing conditions at the detention center. Specifically, the court ordered the appointment of a special master to address ongoing violations of the constitutional rights of persons incarcerated at the facility. Although violence at the facility has been an ongoing issue, we have been working closely with the Special Master and the jurisdiction to address the long-term systemic failures at the facility.

In addition to its CRIPA work, the Special Litigation Section investigates patterns or practices of violations of Federally protected rights by law enforcement agencies under Section 14141 of the 1994 Violent Crime Control and Law Enforcement Act.

The Division has ensured the integrity of law enforcement by more than tripling the number of settlements negotiated with police departments across the country from 2001 to 2006. During this timeframe, the Administration has successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved by settlement during a comparable time period of the previous Administration. From 2001 to 2006, the Division filed more consent decrees (4 vs. 3) than in the preceding 6 years. We have issued, moreover, more than six times the numbers of technical assistance letters to police departments (19 vs. 3). Additionally, during the current fiscal year, the Division is focusing its resources on vigorously monitoring the enforcement of its nine existing settlement agreements to ensure timely compliance with the terms of those agreements. Similarly, the Division continues to place a great deal of emphasis on providing on-going

technical assistance to law enforcement agencies regarding best practices and how to conform their policies and practices to constitutional standards.

EMPLOYMENT DISCRIMINATION

The Civil Rights Division remains diligent in combating employment discrimination, one of the Division's most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission (EEOC). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive. In Fiscal Year 2006, we filed three complaints alleging a pattern or practice of employment discrimination.

In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the city will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. The *City of Chesapeake* litigation is ongoing.

In *United States v. Southern Illinois University*, the Division challenged under Title VII three paid graduate fellowship programs that were open only to students who were either of a specified race or national origin or who were female. While denying that it violated Title VII, the University admitted that it limited eligibility for and participation in the paid fellowship programs on the basis of race and sex. The case was resolved by a consent decree approved by the court on February 9, 2006.

Additionally, during Fiscal Year 2006, the Section resolved liability or relief issues in eight pattern or practice lawsuits. Six of these cases involved consent decrees that were filed in Fiscal Year 2006, and two involved cases in which consent decrees were filed in Fiscal Year 2005. One example is a pattern or practice case the Division brought against the Ohio Environmental Protection Agency. We reached a consent decree on September 5, 2006, that accommodated employees with religious objections to supporting the public employees' union. The consent decree permits objecting employees to direct their union fees to charity.

The Division also has enforcement responsibility for the Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA). USERRA was enacted to protect veterans of the armed services when they seek to resume the job they left to serve their country. USERRA enables those who serve their country to return to their civilian positions with the seniority, status, rate of pay, health benefits, and pension benefits they would have received if they had worked continuously for their employer. In Fiscal Year 2006, the Division filed four USERRA complaints in Federal district court and resolved six cases. In Fiscal Year 2007 thus far, we have filed 2 complaints in district court and resolved 3 cases.

During Fiscal Year 2006, we filed the first USERRA class action complaint ever filed by the United States. The original class action complaint, which was filed on behalf of the individual plaintiffs we represent, charges that American Airlines (AA) violated USERRA by denying three pilots and a putative class of other pilots employment benefits during their military service. Specifically, the complaint alleges that AA conducted an audit of the leave taken for military service by AA pilots in 2001 and, based on the results of the audit, reduced the employment benefits of its pilots who had taken military leave, while not reducing the same benefits of its pilots who had taken similar types of non-military leave. Other examples of recent USERRA suits include *Richard White v. S.O.G. Specialty Knives*, in which a reservist's employer terminated him on the very day that the reservist gave notice of being called to active duty. We resolved this case through a consent decree that resulted in a monetary payment to the reservist. In *McCullough v. City of Independence, Missouri*, the Division filed suit on behalf of Wesley McCullough, whose employer allegedly disciplined him for failing to submit "written" orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

The Division has proactively sought to provide information to members of the military about their rights under USERRA and other laws. We recently launched a website for service members (www.servicemembers.gov) explaining their rights under USERRA, the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), and the Servicemembers' Civil Relief Act (SCRA).

EQUAL EDUCATIONAL OPPORTUNITIES

The Division continues its important work of ensuring that equal educational opportunities are available on a non-discriminatory basis. The Division currently has hundreds of open desegregation matters, some of which are many decades old. The majority of these cases had been inactive for years, yet each represents an unfulfilled mandate to root out the vestiges of de jure segregation to the extent practicable and to return control of constitutionally compliant public school systems to responsible local officials.

To ensure that districts comply with their obligations, the Division actively reviews open desegregation cases to monitor issues such as student assignment, faculty assignment and hiring, transportation policies, extracurricular activities, the availability of equitable facilities, and the distribution of resources. In Fiscal Year 2006, the Educational Opportunities Section initiated 38

new case reviews to determine whether districts have met their desegregation obligations, our second highest total to date for any fiscal year. So far, in Fiscal Year 2007 the Section has initiated 30 new case reviews. For those districts that have achieved unitary status, we join in the school districts' motions to dismiss the case. For those districts that have not met their obligations, the Section works with the district to put it on the path to unitary status. In Fiscal Year 2006, we identified 14 cases in which additional relief was needed; to date, in Fiscal Year 2007, 5 cases were identified.

Based upon these efforts, in Fiscal Year 2006, the Division resolved United States v. Covington County, Mississippi. This is a district that operated under desegregation orders entered by a court in 1970 and 1975. The case review process revealed that although the majority of students district wide are African American, the largest school maintained in the district was nearly all white. The consent decree desegregated the schools, which resulted in reduced transportation times for many students and provided enrichment programs for one school that could not be easily desegregated.

We are also actively seeking relief in districts such as McComb, Mississippi, where we are opposing segregated classroom assignments. The Division worked to address other issues in education during Fiscal Year 2006, including inter-district student transfers. In Alabama, the Division entered into a statewide consent decree which addresses desegregation with respect to the construction of school facilities.

In Fiscal Year 2007, we filed a successful motion for summary judgment in West Carroll Parish, Louisiana. The court determined that the school board had failed to eliminate vestiges of discrimination in school assignments and required further student desegregation relief.

The Educational Opportunities Section is also achieving results for persons with disabilities in the education setting. In Fiscal Year 2006, the Section successfully defended the Department of Education's regulation interpreting the "stay put" provision of the Individuals with Disabilities Education Act in a case involving the Commonwealth of Virginia and a local school district. The Section also successfully defended the Equal Educational Opportunities Act of 1974's provision regarding the obligation to take action to overcome language barriers for English Language Learners from an attack by the State of Texas, which alleged that Congress did not properly abrogate the State's immunity from suit. In Fiscal Year 2007, we continued our work in this area by opening several new investigations. The Section also continued its work in investigating allegations of religious discrimination.

PROTECTING CIVIL RIGHTS AT THE APPELLATE LEVEL

During my tenure as Assistant Attorney General, the Division's Appellate Section has filed 149 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. Eighty-three of these filings were appellate briefs for the Office of Immigration Litigation (OIL). Excluding OIL decisions, 90% of the decisions reaching the merits were in full or partial accord with the Division's contentions. The courts of appeals rendered 39 merits decisions, 90% of which were in full or substantial accord with the Division's

contentions. The district courts rendered five decisions, four of which were in full or substantial accord with the Division's contentions. During this period, the Division filed 18 amicus briefs, bringing the total number of amicus briefs filed during this Administration to 94. I would like to highlight two cases that the Appellate Section has handled during my tenure as Assistant Attorney General.

In the United States Court of Appeals for Fifth Circuit, the Appellate Section filed a brief defending the conviction the Division obtained in *United States v. Simmons*. While on duty as a police officer, the defendant took a 19-year-old woman into custody, drove her to a remote wooded area in the middle of the night, and raped her as another police officer served as a lookout. He was acquitted of sexual battery and conspiracy charges in State court. After the State court verdict, the Division conducted its own investigation and located a number of witnesses who had not testified at the State trial. The defendant was then indicted by a Federal grand jury for sexual assault while acting under color of law, in violation of 18 U.S.C. § 242. He was convicted of this charge, with the jury finding that the offense involved aggravated sexual abuse resulting in bodily injury to the victim. The district court sentenced him to 20 years in prison. The defendant appealed his conviction, and the United States cross-appealed his sentence. The Fifth Circuit issued a decision affirming the defendant's conviction, vacating his sentence, and remanding for resentencing.

In *United States v. Lee*, the Appellate Section successfully argued in the United States Court of Appeals for the Ninth Circuit in support of the conviction and sentence obtained by the Division. The defendant, who owned and operated a garment factory in American Samoa, recruited workers from Vietnam, China, and American Samoa. Once the workers arrived at his factory, the defendant abused them in various ways, including imprisonment, starvation, and threats of deportation. The defendant was convicted of extortion, money laundering, conspiracy to violate civil rights, and holding workers to a condition of involuntary servitude. He was sentenced to 40 years' imprisonment. In affirming the defendant's convictions and sentence, the Ninth Circuit held, among other things, that a person arrested in American Samoa for allegedly committing crimes in America Samoa may properly be tried and convicted in the United States District Court for the District of Hawaii.

PROTECTION OF IMMIGRANTS' EMPLOYMENT RIGHTS

From our country's inception, we have been a nation built by immigrants who have continually come to America seeking new and better opportunities. This is still the case today, as new and recent immigrants make up a significant portion of the labor pool. Yet often, individuals who are work-authorized immigrants, naturalized U.S. citizens, or native-born U.S. citizens face workplace discrimination because they might look or sound "foreign."

This is where the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") takes action. OSC enforces the anti-discrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 ("IRCA"), which protects lawful workers from

intentional employment discrimination based upon citizenship, immigration status, or national origin, unfair documentary practices relating to the employment eligibility verification process, and retaliation.

OSC accomplishes its mission to protect lawful workers from discrimination through both enforcement and outreach. Our enforcement efforts include charge investigations, settlements and resolutions, informal telephone interventions, and litigation. OSC pursues both individual violations and patterns or practices of discrimination. A few examples of these actions include unlawful citizen-only hiring policies; preferences for undocumented workers; and refusal to employ lawful workers because employers did not follow proper employment eligibility verification procedures. The victims in these cases include native-born U.S. citizens, naturalized U.S. citizens, lawful permanent residents, asylees, refugees, and other work-authorized immigrants from around the world. The employers in these cases include some of the nation's largest companies as well as smaller businesses.

In Fiscal Year 2006, OSC settled 72 charges through either formal settlement agreements or letters of resolution and has settled 52 charges thus far in Fiscal Year 2007. For example, in *Luis A. Lopez v. GALA Construction, Inc.*, a lawful permanent resident from Mexico was refused hire because a construction company rejected his unrestricted Social Security card and Resident Alien card for employment eligibility verification. OSC settled the charge. As a result, the charging party received over $11,000 in back pay and front pay, and the company agreed to train its managers in proper employment eligibility verification procedures and non-discriminatory hiring practices. In addition, over the past year, OSC has investigated 85 charges of citizenship status discrimination filed by the Programmers Guild, a professional society that advances the interests of computer programmers. The Programmers Guild filed charges against software and information technology (IT) companies that placed internet ads stating an explicit hiring preference for temporary visa holders, such as H-1B visa holders, over U.S. citizens and other authorized workers. OSC has resolved 38 of these charges (inclusive of the 52 settled charges noted above). Consequently, IT companies across the nation have agreed to end hiring preferences for temporary visa holders over other U.S. workers and will no longer post discriminatory job advertisements. They also have agreed to post equal employment opportunity notices on their websites.

Informal interventions are another type of our enforcement activities. Through its hotlines, OSC often is able to bring early, cost-effective resolutions to employment disputes that might otherwise result in the filing of charges and litigation expenses. In Fiscal Year 2006, OSC successfully completed 189 telephone interventions and has completed 90 telephone interventions thus far in Fiscal Year 2007.

OSC also engages in educational and outreach activities to workers, employers, the bar, unions, legal services, and advocacy organizations to deter potential immigration-related employment discrimination. Our outreach program is multi-faceted and includes employer and worker toll-free hotlines, public service announcements, outreach and training materials designed to reach both English speakers and those with limited English proficiency, presentations, a website, and a periodic newsletter. OSC distributed approximately 65,400 individual pieces of

educational materials in FY 2006, 39 percent of which were in Spanish. Thus far in Fiscal Year 2007, OSC has distributed approximately 44,000 educational materials. Over the past eighteen months, its public service announcements have aired more than 20,750 times on television and radio in English and Spanish, reaching an estimated audience of approximately 48 million. Thus far in Fiscal Year 2007, over 650 television public service announcements have been aired, reaching an estimated audience of more than 6 million English- and Spanish-speaking viewers. OSC also administers a grant program which awards funds to organizations for the purpose of conducting public education programs under the anti-discrimination provisions of the Immigration and Nationality Act. OSC's grantees have included State and local fair employment practices agencies, business organizations, and non-profit and faith-based immigrant service organizations. This year's grants include, among other things, coordination of legal and social services for immigrant communities in the post-Katrina Gulf Coast region.

LIMITED ENGLISH PROFICIENCY

In addition to the Division's major efforts for those who are limited-English proficient in the areas of voting and education, we are also making strides on behalf of those who need language assistance in other areas. This Administration has made a priority of ensuring implementation and enforcement of civil rights laws affecting persons with limited English proficiency (LEP). The Division's Coordination and Review Section plays a central role in this effort, and during my tenure as Assistant Attorney General, it has continued its work to ensure that LEP individuals are able to effectively participate in or benefit from Federally assisted and Federally conducted programs and activities.

The Division works on behalf of LEP individuals in its role in implementing Executive Order 13166 and Title VI of the Civil Rights Act of 1964. The Division's Coordination and Review Section works to provide information and coordinate activities to ensure that Federal agencies are providing meaningful access to LEP persons in its Federally conducted programs and that recipients of Federal funds are providing meaningful access in their programs and activities. Executive Order 13166 requires that all Federal funding agencies use the Department's LEP Recipient Guidance Document, published on June 13, 2002, as a model in drafting and publishing guidance documents for their recipients, following approval by the Department.

In Fiscal Year 2006, the Coordination and Review Section continued its outreach and interagency efforts designed to provide information on the needs of persons who are limited English proficient. Among other things, these efforts included completing the development and release of the interagency video entitled "Breaking Down the Language Barrier: Translating Limited English Proficiency Policy into Practice" in English, Spanish, and Vietnamese, and subtitled in Chinese and Korean. The Section also issued a new brochure for Federal agencies and the agencies' recipients explaining the requirements and steps to ensure that LEP individuals have meaningful access to programs and services. The Division developed a survey form, which it distributed to all of the more than 80 Federal agencies about efforts to ensure access to LEP individuals in their own programs, and I personally sent a memorandum to all agencies asking

that they respond to the survey form. Many did, and our Coordination and Review Section has analyzed the results and is working on a report that will outline promising practices of Federal agencies. I was the featured presenter at the fourth anniversary meeting of the Federal Interagency Working Group on LEP on February 2, 2006, a meeting that was attended by almost 150 people from 40 different Federal agencies.

Another area of focus by the Coordination and Review Section during my tenure as Assistant Attorney General has been emergency preparedness. The Division continues to work with agencies to assist them in ensuring that the needs of national origin minorities (including LEP individuals) are effectively included in emergency preparedness activities and planning. As part of this effort, the Section recently began participating in activities of the Department of Homeland Security's Special Needs Work Group, which is providing comments on the National Response Plan. I also gave the keynote speech at the December 6, 2006, meeting of the Federal Interagency Working Group on LEP, a meeting entitled "The Importance of Language Access in Emergency Preparedness."

Probably the most significant event related to LEP access occurred just last week on March 15-16. The Coordination and Review Section coordinated the 2007 Federal Interagency Conference on Limited English Proficiency, which was held in Bethesda, Maryland, with over ten Federal agencies participating by either contributing funds or hosting sessions. Along with a personal letter from me, invitations were mailed to various entities including governors of each State as well as many local county and city executives and mayors. Other invitees included individuals with responsibility for implementing language access programs across State and local agencies; private entities that fund language access programs; language service providers; Federal officials with authority to focus Federal funding on cross-cutting language access projects; and a wide variety of community advocates and groups. The Conference represented a unique opportunity for invitees to share with and learn from the leaders in the field of LEP access. Over 400 invitees attended each day.

As part of its responsibility to ensure consistent and effective implementation by Federal funding agencies of Title VI and of Title IX of the Education Amendments of 1972, and to ensure implementation of Executive Order 13166 which requires access for LEP individuals, the Coordination and Review Section provided 52 separate training sessions for agencies during Fiscal Year 2006, up from 28 such sessions in 2005. So far in Fiscal Year 2007, the Section has provided 10 sessions. In a section of only eight attorneys and seven coordinator/investigators, this is quite remarkable.

The Coordination and Review Section continues to investigate and resolve administrative complaints alleging race, color, national origin (including access for LEP individuals), sex, and religious discrimination and to provide technical assistance to recipients, Federal agencies, and the public. During Fiscal Year 2006, the Section initiated six investigations and completed five investigations that resulted in no violation letters of finding. At this time, Coordination and Review has a caseload of 66 active investigations, 39 of which involve LEP allegations.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

One of my highest priorities since taking my oath of office in 2005 has been ensuring that the Division's staff, particularly its attorneys, are afforded every opportunity to improve their professional development. To that end, I established a Professional Development Office within a week of beginning my tenure and detailed two career supervisory attorneys with extensive civil rights litigation experience, one in civil and the other in criminal enforcement, to it. Because of the importance that I attach to this endeavor, that office reports directly to my principal deputy.

In its first year, the office took great strides to fulfill its important mandate. Through interviews of the Division's career leadership, a survey of the entire attorney staff, and a series of focus groups with newer attorneys, it devised a week-long orientation program for new Division attorneys. The program presents a mix of basic skills training, including writing, discovery, and evidence, with information on such topics as professional responsibility, ethics, administrative policies, and the importance of promptly responding to congressional correspondence.

The program's inaugural session, conducted in June of 2006, was an unqualified success. We have already held two additional sessions of the program, with the next offering scheduled for May. We plan to continue conducting these programs three or four times a year.

The office's responsibility also extends to providing advanced training opportunities for more experienced attorneys. In that regard, it has worked closely with the Department's Office of Legal Education, located at the National Advocacy Center (NAC) in Columbia, South Carolina, to provide two programs during 2006 – one on criminal civil rights enforcement and another focused on human trafficking. A seminar on civil enforcement of civil rights statutes was conducted in January 2007 – the first civil program on civil rights enforcement sponsored by the Office of Legal Education since 1996. We are scheduled to host a human trafficking program at the NAC in May, which will include participants from Federal and local law enforcement agencies, as well as attorneys in the Division and in U.S. Attorneys' Offices. In addition, the office has spearheaded the use of the Department's television network to broadcast training on civil rights issues live to departmental offices throughout the country. The first program, on the Division's enforcement responsibility to stem the flow of human trafficking, was held in September 2006. The second installment, on Proactive Investigation and Victim Outreach, was held live on March 13, 2007.

Several amendments to the Federal Rules of Civil Procedure became effective at the end of 2006. The most significant of these affects the discovery of electronically-stored information. The office coordinated a series of mandatory training sessions for the Division's civil litigating attorneys on the rights and responsibilities resulting from these revisions.

Finally, the Professional Development Office coordinates the Division's participation in both the Department's pro bono program, in which all attorneys are encouraged to take part, and its Mentor Program, which pairs attorneys new to the Division, most of whom are recent law school graduates or judicial clerks, with a more experienced attorney who serves as an informal resource and guide during the new lawyer's first year in the Department.

CONCLUSION

As the Division celebrates its 50 year anniversary, we are reflecting upon the achievements and successes in the struggle for civil rights over the last half century. However, we can not be satisfied. The work of the Civil Rights Division in recent years reflects the need for continued vigilance in the prosecution and enforcement of our nation's civil rights laws. As President Bush has said, "America can be proud of the progress we have made toward equality, but we all must recognize we have more to do." I am committed to build upon our successes and accomplishments and continue to create a record that reflects the profound significance of all Americans.

Mr. NADLER. Thank you, Mr. Kim. And I commend you for coming in under the 5-minute time limit.

I will now yield myself 5 minutes for questions. And as I said before, we will alternate from majority to minority in asking questions.

Mr. Kim, the recent Citizens' Commission report raises concerns about the Division's role in the pre-clearing mid-decade congressional redistricting plan enacted by the State of Texas. I am sure you are familiar with this. Probably everybody in the room is.

The plan targeted several areas of minority voting strength. The career staff of the Voting Section concluded that the plan violated section 5 because it resulted in the retrogression of minority electoral opportunity.

The department's political appointees rejected the staff's recommendations and pre-cleared the plan.

My question is how was the decision made to reject the recommendations of the career staff concerning the Texas redistricting plan, and what was the legal basis for the rejection of their recommendation?

Mr. KIM. Congressman, I appreciate the question on Texas redistricting. My recollection serves that was a plan that was precleared by the Department of Justice in December of 2003.

We can know a lot about what that plan accomplished today because that plan was the subject of extensive litigation in the Federal court, in the U.S. Supreme Court, and that plan actually produced an election.

Obviously, with pre-clearance determinations we——

Mr. NADLER. If I recall, it produced exactly what Mr. DeLay intended it to produce. But go ahead.

Mr. KIM. Mr. Chairman, with respect, the issue in retrogression as far as the Department of Justice is concerned is with the effective exercise of the electoral franchise rights by minority citizens.

And the plan that was adopted in December of 2003, I think, produced a map that had elected, I think, seven Members of Congress who are minority representatives from the State of Texas.

I believe the elections of 2004, which implemented the plan that was challenged, produced eight. And so the results of the election actually show that that plan was not retrogressive as to minority voting strength.

That plan was also subjected to extensive litigation in the courts.

Mr. NADLER. But, wait, wait, wait. Wasn't it true that the court, in fact, struck down the Bonilla seat, which is part of that plan, so the court held that, in fact, there was retrogression?

Mr. KIM. No, sir. The court did not hold that there was retrogression.

Mr. NADLER. Or rather that the court held that the plan was illegal under the Voting Rights Act?

Mr. KIM. The court held that—could I proceed by saying that there was two pieces of litigation with respect to that plan.

One was before a Federal three-judge panel under the Voting Rights Act. That panel blessed the entire plan. They said the entire plan was legal under every circumstance, Voting Rights Act as well as constitutional.

That plan was then challenged in the Supreme Court. The Supreme Court ruled that 31 districts of the 32 districts were properly constituted and posed no violation whatsoever.

Mr. NADLER. But my question, excuse me—the professional staff of the Division recommended that the plan not be pre-cleared. They were overruled by the—let's call it the political echelon, the recent appointees.

How was that done? That is to say, how was a decision made to reject the recommendations of the career staff, and what was the legal basis for the rejection?

Mr. KIM. Well, Mr. Chairman, I am trying to explain the legal basis of the decision, which is that the plan was not retrogressive as determined by the decision makers back in December 2003.

And the recommendation——

Mr. NADLER. The political people decided that the decision that the plan was retrogressive made by the professionals in the department was wrong and that they knew better.

Mr. KIM. Mr. Chairman, with respect, I think you are drawing those inferences from a lot of leaked documents and news accounts. I am not in a position to confirm or deny that. I am in a position to tell you how these decisions typically come up.

Mr. NADLER. No, that is not my question. All right. I thought that it was widely acknowledged. Did the political echelon—and by that I mean the appointees on the top—did they overrule the recommendations of the career staff?

Mr. KIM. Mr. Chairman, what I am trying to do is tell you exactly what happened without waiving any privilege.

Mr. NADLER. No, no, no. Without waiving any privilege, yes or no, did they do that or not? Because based on everything that I thought was common knowledge, we are assuming that they did. If they didn't, please say so.

Mr. KIM. Mr. Chairman, the pre-clearance letter was signed by a political appointee.

Mr. NADLER. Obviously. The question is was there a recommendation not to pre-clear by the professional staff and was that overruled?

Mr. KIM. Mr. Chairman, I can say there was a leaked memorandum that reflects a recommendation that was different. I am not trying to——

Mr. NADLER. So in other words, your answer is yes, sir, unless you say that that leaked memorandum was inaccurate.

Mr. KIM. Mr. Chairman, I am trying not to answer that question, because that would waive——

Mr. NADLER. Obviously.

Mr. KIM [continuing]. A privilege the department has never waived. I am trying to be as responsive——

Mr. NADLER. You are trying to not answer the question because that would waive a privilege?

Mr. KIM. That the department has never waived, yes, sir.

Mr. NADLER. And what privilege is that?

Mr. KIM. Attorney-client privilege. Deliberative process privilege.

Mr. NADLER. Attorney-client privilege? Who is the client and who is the attorney?

Mr. KIM. Well, sir, the recommendations of attorneys made to decision makers—those are typically attorney-client privileged.

And again, Mr. Chairman, I am trying to be responsive to your question. There was a leaked memorandum that purported to interpose an objection. The actual pre-clearance letter——

Mr. NADLER. All right. I have gotten your answer. We have very little time. I have one more question for you.

Mr. KIM. Yes, sir.

Mr. NADLER. In December of 2005, it was reported in several newspapers that the Division had barred staff attorneys from offering recommendations at all in their memoranda to the Division leadership. Is this true? If it is, when exactly was the process changed and why?

Mr. KIM. Mr. Chairman, that is not true.

Mr. NADLER. It is not true.

Mr. KIM. I have never asked for anything other than recommendations. And every single item of litigation that comes to my desk has a recommendation from the career attorneys.

And so I am—it is absolutely not the case that I bar recommendations from my staff.

Mr. NADLER. Well, I appreciate that you could answer that question. I appreciate your candor. And I appreciate that you asserted no privilege.

My time is expired. I will now recognize the Ranking Member of this Subcommittee, the Ranking minority Member of the Subcommittee, the distinguished gentleman from Arizona——

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. NADLER [continuing]. For 5 minutes.

Mr. FRANKS. Thank you very much, Mr. Chairman.

You know, I think sometimes when we are dealing with issues that are charged as much as civil rights issues, we should always realize that the substance and the essence of true tolerance is not in pretending that we have no differences.

It is in being kind and loving and decent to each other in spite of those differences. And I hope that that will always be our central focus and goal in this country.

With that said, Mr. Kim, I want to—if it is all right, if you feel you needed to have a chance to further elaborate on the rationale that was behind the question you were trying to answer when the Chairman was talking to you. Would that help you?

Mr. KIM. Yes, Mr. Franks, if I could just take a minute. I mean, at the end of the day, that decision was—the decision to pre-clear that Texas redistricting plan was based on a retrogression analysis.

It was not based upon a question of partisanship, because I think there were many acknowledged positions that the map was drawn, in part, for partisan purposes. And that is true in almost every redistricting plan that is ever created.

These are very difficult questions. A three-judge Federal panel approved the entire plan. The Supreme Court, by a vote of 5-4, approved 97 percent of that plan and found a section 2 voting rights violation with respect to one district, which was redrawn.

Under those circumstances, the map that was created in the Texas redistricting plan—every court that considered the issue ruled that 97 percent of it, at least, was a valid plan.

And so that does not call into question, I think, the Department of Justice's decision back in December 2003 or so to pre-clear that plan.

It would have been inconsistent with those judicial decisions to say that that entire plan, all 32 districts, could not be withdrawn, when at the end of the day many, many Federal judges, very, very smart, careful people, impartial people, looked at that map and they drew conclusions that basically said 100 percent or 97 percent of that plan should be pre-cleared—I am sorry, you know, should go into effect.

Mr. FRANKS. Well, thank you, Mr. Kim.

Mr. Kim, what are the Division's priorities for fiscal year 2007 and 2008 in general, and how are these priorities—how are they arrived at?

Mr. KIM. Well, Mr. Franks, I will say that my biggest priority, given my background as a career Federal prosecutor, and my background at the Department of Justice and what I view my role at the Department of Justice to be, first and foremost is to bring every available case based upon the facts and the law, without fear or favor.

And I echo and endorse entirely what the Chairman said about that being a critical role at the Department of Justice. It is a role that I have historically played and it is a role that I continue to play.

With respect to individual initiatives, the Attorney General has defined several. First of all, he has focused on the fact that we need to do more on human trafficking.

Congress has shown great leadership in this area by providing us tools to more effectively combat this form of modern day slavery. It is a problem that we see across the country. t is a problem that we have put our attention to from the beginning of this Administration, again, with the legislation enacted by Congress. It is an area that we have shown great strides, bringing 500 percent more prosecutions over the past 6 years, and it is an area that, quite frankly, we can do a lot more on, because the facts of these cases are absolutely disgusting.

Mr. FRANKS. Horrifying.

Mr. KIM. These are some of the most vile criminals out there in the world, someone who would profit from the misery of others and profit from the subjection of others.

And we intend to keep going full bore ahead to make sure that we investigate these crimes as proactively and as aggressively as possible.

Mr. FRANKS. Well, Mr. Kim, I think that is a, you know, very laudable thing, and I want to be the—you know, very strong record my own applause for that kind of effort.

I also mentioned in the opening statement that your Division has been more proactive in religious discrimination issues or discrimination of religious liberty.

It is my perspective—and I hope the perspective of the Committee here—that, you know, the religious differences that any people have are sometimes, you know, the issues that we really struggle with.

And if we can get that right, if we can respect each other's faith and religion, then a lot of the other kinds of differences between us can be respected.

Can you comment on what you think has been the underlying effect and ongoing efforts related to protecting the religious freedom of your clients?

Mr. KIM. Yes, Congressman. First of all, I certainly share many of your sentiments. I mean, I think at the end of the day this country is a country built on diversity. It is a country built on a lot of different people.

I spoke with you briefly before the hearing, and your wife is an immigrant. I am an immigrant. My entire family came from a different country. For many Americans, America is not the country of their birth. It is the country of their choice.

And the greatest of America is how it allows people to become full, patriotic, participating members of this country without barriers based on race, skin color, national origin, et cetera.

And that is something that I have truly viewed as one of the most blessed things that ever happened to my family, the ability to come here and to prosper, and to live a little part of the American dream that has been true for generations of Americans over time.

The protection of religious liberty certainly is an important component of that. It is one of the first things mentioned in the Bill of Rights. It has been a consistent theme in laws passed by Congress since the 1964 Civil Rights Act.

And ever since 9/11, I think we have become more aware of cultural, religious intolerance built of ignorance, and trying to break those barriers down is important to a welcoming society that we all live in.

Mr. FRANKS. Thank you, Mr. Kim.

Mr. NADLER. Thank you. The time of the gentleman has expired.

I now recognize the distinguished Chairman of the full Committee of the Judiciary Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you so much, Chairman Nadler.

I welcome you to this hearing. We consider it a very important one. And only yesterday the report of the civil rights commission—Citizens' Commission on Civil Rights has come out. Did you get a chance to peruse it yet?

Mr. KIM. Yes, sir, I did.

Mr. CONYERS. And did it seem to be a fairly accurate, unbiased analysis of the subject matter they discussed?

Mr. KIM. With respect, Mr. Chairman, I disagree with many of the conclusions raised in the report, and I can offer you some specifics. I would be happy to answer questions more focused from you.

Mr. CONYERS. Well, I would like you to submit to the Committee your reservations and objections and criticisms of the report. Could you do that subsequently?

Mr. KIM. Yes. Yes, sir, I would be happy to.

Mr. CONYERS. That would be very helpful to us.

Well, do you agree with the thrust of the report, declining civil rights enforcement under the Bush administration?

Mr. KIM. Mr. Chairman, I don't.

Mr. CONYERS. Okay.

Mr. KIM. Again, I mean, I could provide you with more focused responses. I mean, I think that there are many things in the report which is just—things that just are not true based upon my experience.

The report, for example, suggests——

Mr. CONYERS. Well, I want you to put it all in another document, because in 2 minutes or 3 minutes that is not going to give us the opportunities that we need.

Mr. KIM. Yes, Mr. Chairman.

Mr. CONYERS. Then I take it you disagree about—well, I shouldn't take anything. Let's just ask you. Political appointees intruded into the attorney evaluation process in certain instances. Could that have possibly happened?

Mr. KIM. Mr. Chairman, I don't do that. I talk with——

Mr. CONYERS. So the answer is no.

Mr. KIM. Not from me, sir, no.

Mr. CONYERS. Okay. Well, from anybody. Maybe there are people over you, with you or under you—anybody?

Mr. KIM. Well, Mr. Chairman, I am not in a position to talk about everyone who ever served in the Civil Rights Division. I only came to be assistant attorney general about 18 months ago.

What I am in a position to tell you about is what I do, what my practices are.

Mr. CONYERS. Well, I didn't expect you to do anything else. I don't expect clairvoyance here at these hearings, although we make serious demands on our witnesses.

Now, has any political appointee or management staff ordered section chiefs to change staff attorney performance evaluations?

Mr. KIM. Mr. Chairman, I have never done that.

Mr. CONYERS. All right. How many employees hired as career staff are currently working in the front office of the Division?

Mr. KIM. Mr. Chairman, I want to provide you with an entirely accurate number. I can——

Mr. CONYERS. Surely.

Mr. KIM [continuing]. Think of three off the top of my head, not all from the Civil Rights Division. I have one detail from the Criminal Division.

But certainly, I think that is very consistent with prior practices. I believe that there has always been career attorneys who work with the——

Mr. CONYERS. Okay. That is fine. Excellent response.

Now, Attorney Spakovsky—are you familiar with him?

Mr. KIM. I am sorry, sir?

Mr. CONYERS. Are you familiar with Hans von Spakovsky?

Mr. KIM. Spakovsky, yes, sir.

Mr. CONYERS. Okay—hired as a career staff attorney. Did he work in the front office?

Mr. KIM. Yes, sir.

Mr. CONYERS. And how long did he work in the front office, if you can remember?

Mr. KIM. Mr. Chairman, he was there when I came to the Civil Rights Division. He left a few weeks after I was confirmed to be

assistant attorney general, so I supervised him, I would say, for about 4 weeks or 5 weeks.

I can get you his exact tenure. I just don't know off the top of my head.

Mr. CONYERS. Well, I wouldn't expect you to. Do you know if he had a supervisory role?

Mr. KIM. He played a role in advising the assistant attorney general on primarily voting matters. I know that.

Mr. CONYERS. Well, if you disagree with this Citizens' Commission report, I think that forms a basis for questions that will have to go on beyond the 5-minute rule, and I am glad that you are open to filling this out supplementally.

We have had a number of questions that go back to the Mississippi congressional redistricting plan's pre-clearance under section 5 of the Voting Rights Act, and I take it you found no particular problem with that.

Mr. KIM. I would say that the presentation that I read in the report was incomplete, and I would be happy to supplement what I think the complete record would show.

Okay, for example——

Mr. CONYERS. Well, my time is out, but I have got a number of issues that we want to put to you and then have you explain to us your impressions of them, especially any matters that happened before you got there.

Mr. KIM. Yes, sir. And, Mr. Chairman, may I say that I would be more than happy to do that. I am prepared to do as much of it as I can today off the top of my head.

I will say that I don't think that anyone in the Civil Rights Division was shown a copy of this report before it was prepared. Certainly, we would be happy to provide you with our thoughts and comments upon it.

But it came to us a few days ago, and we have had a chance to review it. I have some initial impressions. I would be happy to flesh them out further.

Mr. CONYERS. We would be delighted.

Thank you very much.

Mr. NADLER. Thank you.

Thank you, Mr. Kim.

We will now go for 5 minutes of questioning to the distinguished gentleman from California.

Mr. ISSA. Thank you. I will take my 5 distinguished minutes and try to make the best of them.

I am interested in your report—your finding for a reason, and that is it is very clear that since September 11 the Muslim community, the community—particularly their places of worship, have been under various levels of attack or the color of discrimination.

And it appears as though the balance hasn't been changed dramatically, that your department continues to—more than 5 years after, continues to sort of say, "Okay, we have got so much for human trafficking, we have so much for African-American issues, we have so much for Native American issues," et cetera.

What were the new fundings to deal with this, and where did they come from?

And to ask the obvious question, how much more would you need to do the kind of work to make sure that places of worship and people of faith who happen to be of the same religion as those who attacked us on September 11 don't find themselves as second-class residents?

Mr. KIM. Well, you know, Congressman, thank you for raising that question, because you raise an extremely important issue. It is an issue of education. It is an issue of tolerance.

And ultimately, for us, it is an issue of law enforcement and making sure that those types of crimes are aggressively investigated and prosecuted wherever we find enough facts——

Mr. ISSA. Could I have regular order, please? Could I have regular order, please?

Mr. Chairman, could I have regular order, please? Please.

Mr. KIM. Thank you, Congressman. One of the first things we did after the September 11 attacks was to have a task force formed within the Department of Justice to go after ignorant crimes of bigotry based upon people who happen to be of the same race, national origin, religion as the perpetrators of September 11 and, quite frankly, people who were mistaken to belong to those races.

For example, one of the regular participant groups in the forums that we host are Sikh Americans who, of course, are not Muslim, are not Middle Eastern, but are yet often mistaken as such, and so——

Mr. ISSA. They include a Sikh who was killed.

Mr. KIM. Yes, sir. Yes. And so at the end of the day, what we have done is we have taken the huge spike in those types of crimes after September 11 and investigated those thoroughly.

I think we have done tremendous work in this area with respect to investigating and prosecuting those kinds of crimes. We investigated more than 700, got great cooperation from the FBI along the way.

We were able to prosecute, I think, about 35 defendants criminally. We helped State and local prosecutors bring prosecutions of about another 150.

Thankfully, America was able to become more normal, and Americans were able to appreciate and become Americans again and recognize that these are silly acts of violence.

And so the big spike that we saw after September 11 did return to better levels—not good levels, but better levels.

We saw additional smaller spikes after certain incidents in the Middle East occurred, and all along this time we have maintained regular contacts with people in the communities.

I meet every 6 weeks or so in my conference room with more than 30 representatives of many Middle Eastern, Arab, Muslim groups, as well as people from all the departments that are implicated in this issue, from the Department of State, from the Department of Homeland Security, from the FBI, from DHS.

And we make sure that issues affecting the community are aired. I am pleased to say that more and more these issues are not one of outright violence and bigotry, although we still get those, and we go after those.

Mr. ISSA. Actually, if I could ask an anecdotal question——

Mr. KIM. Yes, sir.

Mr. ISSA [continuing]. The 35 enforcements and convictions—would those include the two people that were brought to trial for trying to blow up my office in 2001?

Mr. KIM. You know, Congressman, I don't know the answer to that, but I certainly could find that for you. We have a comprehensive listing of the cases that we have brought.

Mr. ISSA. I would appreciate a little update information on that. Obviously, their prime target was a Muslim mosque, and they just took a Christian of half-Lebanese ancestry and threw me into the mix.

But I have a close attachment to the fact that there are people of hate who will—it doesn't matter if it is misguided. Dead is dead.

But 35 seems like a low number. I know my time is expiring.

From a resource standpoint, you know, you can always use more resources, but how much more would allow you to have a zero tolerance against these kinds of vandalisms and hate crimes targeted against Muslims and people from the Middle East or believed to be from that region?

Mr. KIM. Well, Congressman, two points. First, you hit it right on the head. Discrimination, bigotry—those are crimes based on ignorance. They are not crimes based on intelligent analysis of the facts, and that is why we condemn them uniformly.

With respect to resources, Congress has been very generous with the provision of resources to the Civil Rights Division. We investigate and we prosecute, where appropriate and where jurisdiction lies, all of these cases.

When you say 35 is a relatively low number, I would point out that we have investigated more than 700 incidents. And many of those never pan out to something that we can prosecute.

Mr. ISSA. If the gentleman could finish—he had to be stopped midstream.

Mr. KIM. And we have worked collaboratively with State and local prosecutors to prosecute 150 more. So at the end of the day, we go after these folks.

We need the assistance from law enforcement, and they have been able to provide it. So I have not seen a dearth of resources hurt us on this issue. If it does, I certainly would let you know.

Mr. ISSA. Thank you.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

The gentleman from Georgia?

Mr. DAVIS. The gentleman from Alabama will also——

Mr. NADLER. Alabama, excuse me.

Mr. DAVIS [continuing]. Allow himself to be recognized.

Mr. ISSA. Now, there is a form of prejudice if I ever saw it. [Laughter.]

Mr. DAVIS. Thank you, Mr. Chairman.

Let me try, Mr. Kim, to circle back to some of the questions that the Chairman raised at the outset.

You were somewhat reluctant to answer his questions about exchanges between senior personnel and career attorneys based on the doctrine of attorney-client privilege.

When the United States files a claim in United States District Court, who is the client?

Mr. KIM. The United States.

Mr. DAVIS. And that would presumably not be the attorneys for the Department of Justice, would it?

Mr. KIM. No, sir, it would be the United States of America acting through——

Mr. DAVIS. Has there been any assertion by the people of the United States of America regarding the scope of attorney-client privilege regarding those conversations? Obviously not.

So my point, and I think the Chairman's point, was that you used the term attorney-client privilege.

There may be some kind of a work product doctrine that is lurking out there, but I think—I don't want to certainly spend a lot of time on this, Mr. Kim, today, but I think you would agree with me as a lawyer that work product is considerably less protected than attorney-client privilege.

And I think secondly—you would agree with that as a general proposition.

Mr. KIM. Yes, sir.

Mr. DAVIS. And I assume you would also agree with the proposition that the Department of Justice is a taxpayer-subsidized entity that is meant to represent the United States government.

Congress has oversight functions. I assume that you acknowledge that, do you not?

Mr. KIM. I am here, Congressman, and I acknowledge that fully.

Mr. DAVIS. So I can't, frankly, see any way that this institution could perform its oversight function if the doctrine of work product means that we can't ask questions about communications.

So in this spirit, let me do that. The Chairman asked you about the standard for overruling career attorneys at the Department of Justice who make a recommendation.

I think he asked you that several times, and each time I think you didn't answer the question. You talked about what the legal analysis was. So let me go back to the question.

Mr. KIM. Sure.

Mr. DAVIS. What is the standard for determining when senior political appointees will overrule the recommendations of the line attorneys? What is the standard?

Mr. KIM. I think the standard is one of judgment.

Mr. DAVIS. Is that judgment based on professional expertise, or is it based on something else?

Mr. KIM. I believe it is based on professional, legal expertise and reasoned analysis.

Mr. DAVIS. All right. Taking those three things, what is the typical experience level of the line attorneys who practice in the Voting Rights Division who make analyses regarding pre-clearance? What is their typical experience?

Mr. KIM. They vary widely, sir.

Mr. DAVIS. What would be the most experienced that you would have who would be involved in making a decision or an evaluation regarding pre-clearance?

Mr. KIM. The chief.

Mr. DAVIS. Well, no, the line attorneys. We are talking about, again, the line attorneys who are making evaluations regarding pre-clearance.

In fact, let's take a specific case, the Texas case. What was the experience level of the line attorneys who were involved in making those recommendations?

Mr. KIM. You know, Congressman, I don't know, because I am not familiar with exactly who worked on that case.

Mr. DAVIS. Well, then let me ask another way.

Mr. KIM. Sure.

Mr. DAVIS. The people who make evaluations, who make recommendations to senior management regarding pre-clearance—you would agree with me that they are seasoned, experienced attorneys, typically, wouldn't you?

Mr. KIM. Yes, sir.

Mr. DAVIS. In fact, they wouldn't be in a position to make those recommendations but for the fact that they are seasoned and experienced career attorneys. Is that right?

Mr. KIM. Congressman, I am not trying to disagree with you. I just want to make one point for the record.

Mr. DAVIS. Yes.

Mr. KIM. Many of the people who make recommendations are analysts who are not attorneys, or paralegals who are not attorneys.

Mr. DAVIS. But at some point attorneys make the final sign-off.

Mr. KIM. Absolutely. Absolutely.

Mr. DAVIS. And they are experienced, seasoned attorneys, would you agree?

Mr. KIM. Yes, sir.

Mr. DAVIS. Who made the specific decision to grant pre-clearance in the context of the Texas redistricting?

Mr. KIM. That letter was signed by Sheldon Bradshaw, is my understanding.

Mr. DAVIS. And who was Sheldon Bradshaw?

Mr. KIM. Sheldon Bradshaw was then the principal deputy assistant attorney general.

Mr. DAVIS. For Civil Rights Division——

Mr. KIM. Yes, sir.

Mr. DAVIS [continuing]. Or overall?

Mr. KIM. Yes, sir, the Civil Rights Division.

Mr. DAVIS. Okay. And can you compare that individual's experience level with that of the line attorneys who made the recommendation? Are you able to make the comparison?

Mr. KIM. Again, because I am not familiar with exactly who worked on the Texas pre-clearance matter——

Mr. DAVIS. What about the Georgia Voter I.D.? That is another instance where it has been reported that that there was an overruling of career attorneys.

Can you contrast the experience level—or I would be happy to have the information for record eventually.

Mr. KIM. May I response to the Georgia I.D. matter?

Mr. DAVIS. Certainly.

Mr. KIM. With respect to the Georgia I.D. matter, the pre-clearance decision in that case was signed by the career section chief of the Voting Rights Section.

Mr. DAVIS. Well, again, going back to Texas——

Mr. KIM. Again, I think Joe Rich, who will testify shortly was the section chief at that time. He certainly has decades of experience in the Civil Rights Division.

Mr. DAVIS. Then let me close out on this line of questions, Mr. Kim. What we are getting at today is you have experienced career attorneys who were there.

They give you the benefit of their judgment. It would strike me that there ought to be a very high standard for a political appointee overruling them.

And I think as a matter of practice—we don't have to waste a lot of time on this—typically political appointees in these positions, no matter what the Administration, are, frankly, not as experienced in day-in, day-out litigation as the career professionals.

So that is why this is a subject of concern to the Committee. The fact that you sometimes have, in at least one instance, recommendations by experienced professionals that have been overruled by individuals who are less experienced.

Mr. KIM. May I respond to that point, Mr. Chairman?

Mr. NADLER. Quickly, please.

Mr. KIM. Congressman, I don't disagree with you one bit. That experience, that expertise is valued. I value it. I used to be a career attorney. And I thought that I offered value when I offered a recommendation or made an analysis in a case.

And it is extremely rare when those recommendations are not adopted—in the vast majority of circumstances, certainly as long as I have been assistant attorney general.

But at the end of the day, I come before this Committee. I have been confirmed by the Senate. I am accountable. I accept that accountability 100 percent.

And if I come to this Committee and answer a question as to why I did something or why I didn't do something, and I answer that question by saying I took a show of hands and did what the show of hands recommended, that would not be a responsible position.

And at the end of the day, accountability has to rest with the person who reports to the Congress. That is my position.

Mr. NADLER. Thank you, sir.

We are expecting votes on the floor at about 11:30. I would like to see if we can conclude and get to the next panel expeditiously.

So I think we have—I am sorry, Mr. Pence. I thought we had finished.

Mr. PENCE. I thank the Chairman. I will pass on the courtesy and just meld into the hearing on the next panel.

Mr. NADLER. Well, thank you. I thank the gentleman.

Mr. Scott?

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

Mr. Chairman, I would ask at this point, Mr. Chairman, if we could ask CRS for research on whether or not this attorney-client privilege exists, because I think our experience in other matters is that there really is no such privilege, and we ought to be able to get the information.

So I would ask for the Committee to consider that.

Mr. Kim, while we are on Voting Rights Act, if someone had a scheme where they intentionally had too few voting machines at a

precinct and created long lines intentionally, if you could prove it, would that be a violation of the Voting Rights Act?

Mr. KIM. If it was based on race, yes, sir.

Mr. SCOTT. If it was based on race.

Mr. KIM. Yes, sir, it would be a violation of section 2.

Mr. SCOTT. Okay. On religious discrimination, about 40-some years ago we passed legislation prohibiting discrimination based on religion because we felt it was so reprehensible that we made it illegal. Is there any reason to repeal religious discrimination laws in employment?

Mr. KIM. Congressman, that is a matter for Congress, but certainly we enforce the laws vigorously that Congress has passed.

Mr. SCOTT. Are you recommending taking a position that those laws need to be repealed?

Mr. KIM. Congressman, I am not in a position to make a legislative recommendation to the body. I certainly would take back any legislative recommendations the body wanted us to consider.

Mr. SCOTT. So you don't have any feeling one way or another whether those laws are still important?

Mr. KIM. Congressman, we enforce all the laws passed by Congress. I believe that the law has historically provided for protection from discrimination based on religion in many categories, and I believe those laws are important. And I believe Congress has made that judgment as well.

But certainly Congress is always free to reevaluate how it views the propriety of laws.

Mr. SCOTT. I mentioned to you earlier about the Deaths in Custody Act. Do you have a special litigation section that looks at problems with arrest and custody?

We have a law that is in effect now where jurisdictions are supposed to report to the Attorney General about any death that occurs in the custody of law enforcement in prison, in jail, process of arrest.

Could you review that information and ascertain whether or not you see any pattern of civil rights violations?

Mr. KIM. Certainly, Congressman.

Mr. SCOTT. Do you see any civil rights implications if U.S. attorneys are encouraged or coerced to be partisan political officials rather than law enforcement officials, or whether or not—any civil rights implications if they are evaluated based on partisan political implications——

Mr. KIM. Congressman——

Mr. SCOTT [continuing]. If you can prove it?

Mr. KIM. Congressman, I have worked at Department of Justice for most of my career, most of that time as a career attorney. I think it is improper for anybody to urge that any DOJ official at all take an action that is not based on the facts and the law.

Mr. SCOTT. And if such activity—if you could show that such activity occurred, partisan political activities, would that have civil rights implications?

Mr. KIM. Congressman, I would have to go back and evaluate the statutes. It would really depend on the context in which it would occur. And again, I am not suggesting that any of this——

Mr. SCOTT. I didn't say it occurred. I just said if it occurred, kind of like "If I Did It."

Mr. KIM. Congressman, if someone urged or told a prosecutor to do something that wasn't supported by the facts and the law, I think that would be improper on many levels.

Mr. SCOTT. Okay.

Mr. KIM. And I think at a very fundamental level, that is not the role of a prosecutor.

Mr. SCOTT. Does your office have jurisdiction over discrimination against Black farmers?

Mr. KIM. I believe, Congressman, you may be referring to the USDA matter. I believe that that is a matter which we did not have jurisdiction.

Again, Black farmers in what context would be the question. Obviously, if thy were being victimized physically, you know, certainly, that might invoke our jurisdiction. It really depends on the facts and circumstances of each case.

Mr. SCOTT. So that is not something you are presently very much involved in?

Mr. KIM. The litigation involving the Department of Agriculture, Congressman?

Mr. SCOTT. Well, Black farmer discrimination generally.

Mr. KIM. I can't answer that question, because——

Mr. SCOTT. Have you been doing work in discrimination in housing?

Mr. KIM. Yes, sir.

Mr. SCOTT. And mortgages?

Mr. KIM. Yes, sir. In fact, we recently brought a major redlining case against Centier Bank in Indiana just a few months ago.

Mr. SCOTT. Church burnings?

Mr. KIM. Sir, we remain vigilant on the church burning front. I know that you raised an issue a few years ago regarding a rash of burnings in your area. We have met extensively with the ATF to try to pursue those to the fullest extent permissible.

Mr. SCOTT. And I guess I have a couple of seconds left. Community relations—do you have resources to help communities deal with racial problems? And how is that going?

Mr. KIM. Congressman, that is committed to the jurisdiction of the Community Relations Service, which Congress established in the 1964 act. They are doing a very good job, as far as I can tell, and we coordinate with them often on areas where their expertise may be put to good use.

Mr. SCOTT. Thanks, Mr. Chairman.

Mr. NADLER. Thank you. The time of the gentleman has expired.

I thank the witness. Thank you, Mr. Kim.

Mr. KIM. Thank you. Thank you, Mr. Chairman.

Mr. NADLER. I would now like to introduce our second panel, and I will start reading the introductions while they come up, because we have votes on the floor all too soon.

Our first witness is William Taylor. He is a lawyer, teacher and writer in the fields of civil rights and education.

He will testify today in his capacity as the chairman of the Citizens' Commission on Civil Rights, a bipartisan group of former

Federal officials which has monitored Federal civil rights policies and enforcement efforts since the early 1980's.

The commission has just released a study entitled "The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration." Their work addresses many of the issues before the Subcommittee today.

Mr. Taylor has had a long and distinguished legal career beginning in 1954 when he worked for Thurgood Marshall and the NAACP Legal Defense and Education Fund.

In the 1960's he served as general counsel and later staff director of the U.S. Commission on Civil Rights, where he directed major investigations and research studies that contributed to the civil rights laws enacted in that decade.

Our second witness is Joseph Rich, the director of the Fair Housing and Community Development Project at the Lawyers' Committee for Civil Rights Under Law.

Prior to joining the Lawyers' Committee in May 2005, Mr. Rich spent almost 37 years in the Department of Justice's Civil Rights Division, where he was hired as part of the honors program in 1968.

He most recently spent 6 years as the chief of the Voting Section, from 1999 to 2005. Prior to his tenure in the Voting Section, Mr. Rich served for 12 years as deputy chief in the Housing and Civil Enforcement Section enforcing fair housing and fair lending laws.

He also served as deputy chief and trial attorney in the Educational Opportunities Section. He received his B.A. from Yale University and his J.D. cum laude from the University of Michigan, where he was an assistant editor of the Michigan Law Review.

Our third witness is Roger Clegg, president and general counsel of The Center for Equal Opportunity, a conservative research and educational organization based in Falls Church, Virginia that specializes in civil rights, immigration and bilingual education issues.

From 1982 to 1993, Mr. Clegg held a number of positions at the U.S. Department of Justice, including assistant to the solicitor general, where he argued three cases before the United States Supreme Court, and as the number two official in the Civil Rights Division and Environment Division.

From 1993 to 1997, Mr. Clegg was vice president and general counsel of the National Legal Center for the Public Interest, where he wrote and edited a variety of publications on legal issues of interest to business. He is a graduate of Rice University and Yale Law School.

Our fourth and final witness is Wade Henderson, the executive director of The Leadership Conference on Civil Rights and counsel to the Leadership Conference's Civil Rights Education Fund.

Prior to joining The Leadership Conference, Mr. Henderson was the Washington bureau director of the National Association for the Advancement of Colored People.

He was also previously the associate director of the Washington national office of the American Civil Liberties Union, where he began his career as a legislative counsel.

Mr. Henderson is a graduate of Howard University and the Rutgers University School of Law.

I am pleased to welcome all of you. As a reminder, each of your written statements will be made part of the record in its entirety.

I would ask that you now summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up.

And I would ask that we be a little more strict on time on this panel than with Mr. Kim, because we do have votes on the floor coming up, and I don't want to have to ask you to wait around till 2:30 to complete your testimony. So thank you.

And the first witness is, I believe, Mr. Henderson. Mr. Taylor is the first witness, I am sorry.

Mr. Taylor is recognized for 5 minutes.

TESTIMONY OF WILLIAM L. TAYLOR, CHAIR, CITIZENS' COMMISSION ON CIVIL RIGHTS

Mr. TAYLOR. Age before beauty, I see. [Laughter.]

Thank you, Mr. Chairman and Mr. Chairman of the full Committee, and Ranking Member Franks and Members of the Committee. That is a powerful incentive to stay within the time limit.

The commission, I think most of you know, is a bipartisan organization consisting largely of people who held cabinet or other high-ranking positions involving civil rights, founded in 1982 to monitor Federal policy on important issues of equal opportunity.

The report that we presented to the Committee is the eighth in a series that looks at the incumbent Administration and says as best we can what is going on. And that is a part of your record, I believe.

I also attached a letter from William Brown, who is a member of our commission and a former chair of the Equal Employment Opportunity Commission under President Nixon.

Mr. Brown, who is a Republican, notes that civil rights progress has been made in the past only through bipartisan cooperation, and he is deeply concerned about the lack of Republican participation——

Mr. NADLER. Mr. Taylor, you will submit the report and we will admit it into the record.

Mr. TAYLOR. Yes. Thank you very much.

The most distressing part of this report is the account of six former lawyers of the Civil Rights Division of the Department of Justice on how the Bush Administration has undermined the work of the Division.

As you know, the Division was established in 1957 and has been a pillar of successful efforts to transform this Nation from a White male society to one in which African-Americans and other persons of color and women and others who have been discriminated against have become active participants in our political and legal systems and in which people who were formerly excluded now have opportunities for education and for productive employment.

Yet as the Division approaches its 50th anniversary, it is in deep trouble because the Bush administration has used it as a vessel for its own political objectives, often disregarding the law and sullying the group's reputation for professionalism and integrity.

Some of the details of the Administration's actions will be presented by Joe Rich, who wrote and edited a good deal of the section on the Division. And I think in the interest of time, I will exclude even my summary of what he will summarize.

But the professional staff has been downgraded. Priorities have been changed without making sure that old priorities like hate crimes and misconduct of officers are still fully attended to by the Criminal Civil Rights Section.

And I would say that the assault of the Administration on the Civil Rights Division, taken together with the nomination of judges who are hostile to the enforcement of laws that ban discrimination, have left many people without the protections of laws on which they have come to rely.

Our report also deals with other important subjects including several where executive policy has had a major impact on the poor.

Among our concerns and reflected in the report is the maltreatment of immigrants and the seeming inability of the Administration to secure the enactment of reforms that will supply stability and end the growing interethnic conflict.

In addition, emblematic of the Administration's failures—the Nation's failures to address the needs of the poor is the lack of advocacy of affordable housing in places that will afford people access to good jobs, schools and services.

We will, if the Committee deems it permissible, try to respond to Mr. Kim's testimony and the additional testimony he supplies.

I have to say that this program called Home Sweet Home does not represent a real effort on the part of the Administration and on Justice Department—other Divisions to supply housing opportunities for people who need them. It must be treated with some irony by the people down in New Orleans.

Finally, we commend the Committee for its readiness to take on an agenda already loaded with the need for oversight in crucial areas in order to examine these failures of enforcement in civil rights.

I am finishing. We recommend that the Congress do more, and we have recommendations for a select committee to be appointed in this area, House and Senate, and the critical Committees are Civil Rights—this is a tall order, but we believe that the dire circumstances of civil rights enforcement compel such steps.

And as our society grows more diverse, strong civil rights laws are essential not only to equal justice but to ensuring the unity and stability of the Nation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Taylor follows:]

PREPARED STATEMENT OF WILLIAM L. TAYLOR

INTRODUCTION

Thank you for the opportunity to testify on behalf of the Citizens' Commission on the implementation of civil rights laws by the current Administration. The Commission is a bipartisan organization consisting largely of people who held cabinet or other high ranking positions involving civil rights. It was founded in 1982 to monitor federal policy on important issues of equal opportunity.

The report that we are presenting to the Committee is the eighth in a series of such studies that we have published to make information available on how civil rights laws have fared under incumbent Administrations.

I would like to place in the record a copy of our report—"The Erosion of Rights: Declining Civil Rights Under the Bush Administration," just publicly released. I also would offer a letter to the Committee from William H. Brown, a member of our Commission and former Chair of the Equal Employment Opportunity Commission under President Nixon. Mr. Brown, a Republican, notes that civil rights progress has been made in the past only through bipartisan cooperation and he is deeply concerned about the lack of Republican participation in preserving and extending rights now.

THE ATTACK ON THE CIVIL RIGHTS DIVISION

The most distressing part of this report is the account of six former lawyers of the Civil Rights Division of the Department of Justice on how the Bush Administration has undermined the work of the Division.

The Division, as many of you know, was established fifty years ago as part of the Civil Rights Act of 1957. It has been a pillar of successful legal efforts to transform the nation from a privileged white male society to one in which African Americans and other persons of color and women have become active participants in our political and legal systems and in which people formerly excluded now have opportunity for education and productive employment.

Yet as the Division approaches its 50th anniversary, it is in deep trouble because the Bush Administration has used it as a vessel for its own political objectives, often disregarding the law and sullying the group's reputation for professionalism and integrity.

Some of the details of the Administration's actions will be presented by Joe Rich who wrote and edited a good deal of our section on the Division. I would summarize only by saying that what we have been witnessing is an attack on the professionalism of the Division, with political leaders of the agency not only rejecting but failing to even consult these respected, experienced lawyers. We have also witnessed a shifting of priorities in the Criminal Civil Rights Section by moving into that section cases that have been ordinarily handled outside the Division by federal prosecutors. The cost has been to cases involving hate crimes and official misconduct that have been the staple of the Section's work.

In employment, the effective attack on patterns and practices of discrimination has been marred by a shift away from cases of discrimination against African Americans to what are described as "reverse discrimination" cases filed by white plaintiffs.

Nowhere is the downgrading of professional staff more damaging than in the area of voting where the Department has special responsibilities to approve electoral changes by states and localities. Because of the political sensitivity of such reviews, the Department has adopted procedures to ensure the integrity of the process. But the Administration has cast aside these protections in several cases, just as it seems to have done in punishing U.S. attorneys for not being political enough in their handling of vote fraud cases.

The assault of the Administration on the Civil Rights Division, taken together with the nomination of judges who are hostile to the enforcement of laws that ban discrimination, has left many persons without the protections of law on which they have relied.

EQUALITY OF OPPORTUNITY

Our report also deals with other important subjects including several where executive policy has a major impact on the poor. Among the Commission's concerns is the maltreatment of immigrants and the seeming inability of the Administration to secure enactment of reforms that will supply stability and end the growing interethnic conflict. In addition, emblematic of the nation's failures to address the needs of the poor is the lack of advocacy for affordable housing that will afford people access to good jobs, schools and services.

CONCLUSION

We commend the Committee for its readiness to take on an agenda already loaded with the need for oversight in several crucial areas in order to examine these failures of enforcement in civil rights. Indeed we recommend that the Congress do more by establishing a select committee of both Houses to undertake a two year review of the implementation of federal civil rights laws. The Committee should be composed of senior members of both parties who serve on the Judiciary Committees and on other committees that deal with education, employment, housing and the administration of justice.

This is a tall order, but we believe that the dire circumstances of civil rights enforcement compel such steps. As our society grows more diverse, strong civil rights laws are essential not only to equal justice under law but to ensuring the unity and stability of the nation.

ATTACHMENT

THE EROSION OF RIGHTS

Declining Civil Rights Enforcement Under the Bush Administration

William L. Taylor, Dianne M. Piché,
Crystal Rosario, and Joseph D. Rich, Editors

Report of the Citizens' Commission on Civil Rights
with the assistance of the Center for American Progress

2007

THE EROSION OF RIGHTS

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Report of the Citizens' Commission on Civil Rights
with the assistance of the Center for American Progress

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FOREWORD

This study has two parts. Part One consists of the report and recommendations of the members of the Commission and the Center for American Progress. Part Two is a series of working papers prepared by leading civil rights and public interest experts. Several of these authors contributed to earlier works of the Commission. While the Commission sought out and publishes these papers in order to advance public knowledge and understanding of a broad cross-section of civil rights issues, the views expressed in each paper represent those of the author/s and not necessarily of the Commission, the Center for American Progress, or any of their individual members.

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EXECUTIVE SUMMARY

The erosion of civil rights across our nation over the past six years is the result of willful neglect and calculated design. The Bush administration continues to use the courts and the judicial appointment process to narrow civil rights protections and repeal remedies for legal redress while allowing the traditional tools of the executive branch for civil rights enforcement to wither and die. The resulting inequality of opportunity, deteriorating civil liberties, and rising religious and racial discrimination are sad commentaries on the priorities of the current administration.

This new report by the Citizens' Commission on Civil Rights and the Center For American Progress catalogues why this is happening and how Congress can take action to remedy the situation. The 10 essays in this report encapsulate the administration's failure to enforce civil rights, protect civil liberties and confront long-standing and emerging threats to our nation's shining virtue: equality of opportunity. The authors of the report, many of them veterans of civil rights enforcement and advocacy, detail the methods employed by the administration to carry out these serious civil rights policy reversals and offer concrete solutions to slow the deterioration of our nation's civil rights and restore our promise as the land of equal opportunity.

The first section of the report, written by five former senior officials in the Department of Justice's Civil Rights Division, reveals exactly how civil rights enforcement by the executive branch has fallen in to a dangerous state of disrepair—on the eve of the division's historic 50-year anniversary. Joseph Rich, 38-year veteran of the division until his retirement in 2005, exposes the attacks upon the professionalism of the division by political appointees amid pointed lack of oversight by Congress into these transgressions.

Seth Rosenthal, a 10-year veteran of the division, then examines the shift in emphasis away from classic civil rights enforcement toward action against "human trafficking," a laudable goal, but one previously tackled by other divisions within the Justice Department.

Richard Ugelow, who retired from the Civil Rights Division four years ago, explains how civil rights action against discrimination in employment practices in the private sector and in local and state governments focuses today on "reverse discrimination" rather than clear patterns and practices of discrimination against African Americans and other racial minorities. Similarly, Joseph Rich and two of his former Civil Rights Division colleagues, Robert Kengle and Mark Posner, examine how the Bush administration has allowed "partisan political concerns to influence its decision-making" on enforcement of the Voting Rights Act, which cuts to the core of our democratic principles and is so critical to equality in our country.

To correct these miscarriages of civil rights enforcement, the report recommends that Congress establish a Select Committee of the House and Senate for civil rights. The new Select Committee would:

- Review the implementation of federal civil rights laws.
- Conduct oversight hearings and investigations into the enforcement of civil rights laws.
- Implement any needed changes to ensure better civil rights enforcement.

In addition, the report calls for Congress to enact a key change to Title VI of the Civil Rights Act of 1964 and the No Child Left Behind Act of 2002: enable people to bring civil suits in federal courts to redress violations of their civil rights. Only then can citizens count on the Justice Department and the courts to act to protect civil rights.

Fixing what ails the Civil Rights Division is an important step that must be taken, but disarray and desuetude at the Department of Justice is not the only reason the administration has failed to protect our civil rights. Elliott Mincberg and Judith Schaeffer, the former legal director and associate legal director for the People for the American Way, and Adam Shah at Media Matters for America, examine the administration's success at appointing conservative "activist" judges to the Supreme Court and lower courts—with the express aim of legislating conservative dogma from the bench.

The remedy? The president and the Senate must ensure that all judicial nominees to the federal bench have a demonstrated commitment to equal justice under law. Without judges fully committed to civil rights and liberties our nation risks losing its distinctive character as a country that offers opportunity to all and protects all against the excesses of the powerful.

These same characteristics of the American way of life are in jeopardy in other legal arenas. Shaheena Ahmad Simons, formerly of the Mexican American Legal Defense and Education Fund says the struggle for immigration reform in our country is complicated by the gap between those conservatives who want draconian enforcement of U.S. deportation laws and those who want cheap immigrant labor. The upshot, says Simons, has been no reform at all. The goal of reform should be a positive one: the enactment of a defined path to citizenship for millions of undocumented immigrants in our society.

Simon's colleague at the Mexican American Legal Defense and Education Fund, regional counsel Peter Zamora, tackles the shortcomings of states, local agencies and the federal government in implementing the guarantees of the No Child Left Behind Act that English language learners will be fully included in educational opportunities. By 2025, Zamora notes, 25 percent of the U.S. school population will be English language learners. The Bush administration and Congress must act now to fully enforce NCLB provisions to ensure our schools provide these students with the best opportunities to learn.

In communications policy, too, the administration's lack of civil rights enforcement and failure to offer equal opportunity access to new communications technologies leaves minorities under-represented in the communications industry and ill-served by its services. Mark Lloyd, a Senior Fellow at the Center for American Progress and expert on communications policies, notes that executive branch regulatory agencies have stymied past progress on affirmative employment and minority ownership in communications industries. Lloyd also examines how policymakers are not seeking to bridge the so called "digital divide" by offering Internet and computer access to all Americans.

His solutions are forthright: The Federal Communications Commission must enact race-conscious measures to advance equal employment opportunity and increase minority ownership in the communications industry. And the government must support the widespread provision of communications access points all across the country: in rural areas and the inner city, on Indian land and in hospitals, libraries and schools in every community.

Equal opportunity in housing, which is examined in the last chapter of our report, is perhaps the most important civil rights arena in that it determines access to education, jobs, and other crucial services. Yet, it poses the most formidable barriers to equality. Philip Tegeler, Executive Director of the Poverty and Race Research Action Council, explains why equal opportunity housing programs at the Department of Housing and Urban Development and the Department of the Treasury are not helping families move from higher-poverty segregated neighborhoods to less segregated areas.

Tegeler notes that all the legal and policy provisions to make these programs effective reside in the hands of executive branch officials at these two agencies. They must only be employed to help low-income families enjoy the housing mobility that middle- and higher-income families take for granted in America. He recommends that Public Housing Authorities cooperate across jurisdictions and embrace new housing mobility programs, and that the Treasury department and the Internal Revenue Service actively support fair housing programs and use the Low Income Housing Tax Credit program to encourage housing mobility.

The terrorist attacks of 9/11 in many ways distracted the nation from determination to improve and enforce existing civil rights laws. In this new environment the Bush administration has taken regressive steps that undermine our civil liberties, our civil rights and our expectations of equal opportunity. The detailed analysis that follows—alongside the specific recommendations to cope with the erosion of our civil rights over the past six years—provides Congress and the American people with a roadmap to help us reclaim the promise of equal opportunity for all.

PART ONE

Findings and Recommendations of the Citizens' Commission on Civil Rights and the Center for American Progress

CHAPTER 1

The Erosion of Rights

When the Citizens' Commission published the most recent of its series of reports on the record of the incumbent administration in carrying out the laws protecting civil rights, the nation was still reeling from the shock and tragedy of the September 11 terrorist attacks.

In the years since, much of the concern of those who play a role in our legal system has been focused on striking a balance between ensuring the physical security of the nation's people and preserving the personal liberties written into our Constitution and laws. Issues arising from the detention of people without charges against them for long periods of time, warrantless wiretaps and searches, and heightened security measures in many aspects of daily life have come to the fore and may still lack clear legal resolution.

Separate from these issues are others relating to the core principle of equality of opportunity. While separate, issues of equality that have been the Commission's continuing concern in this series are linked in several ways to the pervasive shadow of terrorism. In the first place, huge amounts of dollars that might otherwise have been spent on investing in opportunities for disadvantaged people have been channeled to the costs of war and security. Second, much of the burden of distrust in the current atmosphere falls on those who are "different" in skin color, in religion or in other ways. In an era of constraints, freedom and opportunity do not flourish for those who have been discriminated against and deprived.

Third, actions taken by the current administration and the courts to narrow civil rights protections and repeal remedies have escaped the public notice that they might otherwise receive in a time when people are less preoccupied with war and physical danger.

This report represents an effort to bring some of the major aspects of the erosion of civil rights to public attention and to spur action by Congress and others who have a responsibility to monitor the performance of the executive branch. In many ways the centerpiece of the report is in the four essays that make up the chapter on the Justice Department's Civil Rights Division, essays that document a systematic effort by the Bush administration to dismantle the government machinery for effectuating civil rights. The Division has served as the fulcrum for government's civil rights efforts ever since it was created from a much smaller Section as part of the Civil Rights Act of 1957, and particularly since Congress gave comprehensive substantive content to equal rights in the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

DEPARTMENT OF JUSTICE: CIVIL RIGHTS DIVISION

In the years following, the Civil Rights Division earned historical credit for helping to transform the nation from an almost exclusively white male society to one in which African Americans and other persons of color and women are active participants in the political and legal systems and in which people formerly excluded now have opportunities for education and productive employment.

But paradoxically, as the Division approaches its 50th anniversary, it has fallen on bad days. The current administration has treated the Division as a vessel for its own political objectives, often disregarding the law and sullying the group's reputation for professionalism and integrity.

This is not to say that the Division has not encountered hard times before. During the late 1960s and early 70s the Justice Department (along with the Department of Health, Education and Welfare) became the vehicle for President Nixon's effort to delay and curb school desegregation remedies in order to transform the South into Republican political territory. The Nixon administration's effort, although ultimately not successful in the courts, stalled progress and embittered the debate over civil rights.

Again, in the 80s, the incumbent administration installed leaders in the Justice Department and its Civil Rights Division who were committed to thwarting federal laws and court decisions that conflicted with its own political agenda. William Bradford Reynolds, who headed the Division under President Ronald Reagan, simply announced that he would not bring cases to implement the Supreme Court's decisions calling for the desegregation of Northern public schools. He twisted and limited voting remedies, refused to seek remedies for employment and housing practices that harmed minorities and were not dictated by business necessity and abandoned the Justice Department's previous position that universities that practiced racial discrimination should not receive tax exemptions.

Even in better times, the Justice Department and its Civil Rights Division have been subject to criticism. Entrusted by presidents from Lyndon Johnson on with coordinating the

policies of the entire federal government on civil rights, the Department and the Division have often taken the narrow view that court litigation is the only useful remedy and have neglected other legal avenues for progress.

But arguably, the Civil Rights Division has never fallen lower than it has over the past six years. As Joe Rich points out in his essay on the attack on professionalism in the Division, the current political leaders of the Division in many instances have not only rejected the advice of the professional civil rights lawyers, but have failed even to consult them. While protests and resignations of attorneys occurred in the Nixon and Reagan administrations, morale has been driven to a new low in the current administration. In previous administrations, Congress has exercised an oversight role over the work of the Division, but until 2007, with Republicans in control of both houses of Congress and with fewer sympathetic legislators, there has been almost no effective challenge to the Division's many failures.

Seth Rosenthal, like all the other contributors to this section an alumnus of the Division, brings to light another technique used by political appointees to shortchange important civil rights programs. The Criminal Civil Rights Section of the Division has focused increasing attention on crimes of "human trafficking," usually involving foreign nationals brought to the United States. While this is clearly an important area of law enforcement, until recently some of the prosecutions had been handled by other units of the Justice Department. The shift has meant that fewer resources are devoted to cases involving hate crimes or misconduct by state or local law enforcement officials—categories of offenses that many of the division's lawyers have regarded as the core mission of the Criminal Section.

Richard Ugelow, a veteran fair employment lawyer, writes of the decline of cases initiated by the Employment Section to deal with "patterns or practices" of discrimination and also of cases involving discrimination by state or local governments. Much of the decline is in cases where the complainants are African American while devoting more resources to "reverse discrimination" cases where the complainants are white.

Joe Rich and colleagues Bob Kengle and Mark Posner also write about the critical area of voting. Here the Justice Department has special responsibilities under Section 5 of the Voting Rights Act to approve or disapprove proposed electoral changes by states and localities. Because of the political sensitivity of such reviews, the Department has adopted procedures to ensure the integrity of the process. But the Bush administration has cast these protections aside in cases arising in Mississippi, Texas and Georgia.

The result, the authors say, is that "the Bush administration has abused the authority entrusted in the Justice Department to fairly and vigorously enforce Section 5… by allowing partisan political concerns to influence its decision-making. This has damaged the Section 5 process, undermined the credibility of the Justice Department and the Civil Rights Division and resulted in discriminatory voting changes being precleared."

These essays, carefully documented, cover only a part of the work of the Justice Department. The Education Section, for example, is entrusted with enforcing the central constitutional principle of equal educational opportunity established in *Brown v. Board of Education*. In the last administration, the Section initiated discussions of voluntary efforts to preserve school desegregation in districts where litigation had not been filed or court decrees had expired. A brief was filed by the Department in one case defending the voluntary desegregation policy against an attack lauded by a white parent displeased with his child's assignment. In the current administration, the Bush administration took the issue out of the hands of the Civil Rights Division and the Solicitor General filed a brief in the Supreme Court arguing that race-conscious desegregation policies violate the Constitution. The result the Department argued for could tear a gaping hole in the *Brown* decision and educational opportunities for children.

The Commission intends to follow up this report with studies of the performance of the Division in education and other areas not covered here.

RESHAPING THE COURTS

As Elliot Mincberg and Judith Schaefer document, the Bush administration has seized upon the advent of two vacancies on the Supreme Court to turn the Court in a decidedly conservative direction. With the confirmation of John Roberts to succeed William Rehnquist as Chief Justice and Samuel Alito to replace Sandra Day O'Connor as an Associate Justice, the precariously balanced Court has taken a clear turn to the right.

While it is still early in the new regime, there are strong signs that established principles in the areas of school desegregation and reproductive freedom are in peril along with protections in other areas of personal liberties. In many cases Justice Anthony Kennedy will succeed Justice O'Connor as the swing vote on the Court and he has demonstrated a decidedly more conservative bent.

As Adam Shah details in his review of lower court nominations, the story of nominations to courts of appeals (and district courts as well) has been much the same. The Bush administration has been relentless in its efforts to pack the lower courts with conservative ideologues. Democratic Senators, in the minority until this year and faced with near unanimity by Republicans, were reduced to threatening a filibuster of the nominees they regarded as most threatening to rights and liberties. But they could not sustain their opposition to many nominees whose views they found repugnant. As a result, Democrats struck a deal with the Republicans that allowed a significant number of nominees to be approved without a filibuster. Senate approval of these nominations has given a conservative (even a right wing) cast to several of the Circuit Courts of Appeal.

The question is not one of judicial restraint versus judicial activism. Indeed, the Rehnquist Court in recent years has exceeded the activism of its predecessors by showing a willingness to overturn acts of Congress designed to benefit poor or minority citizens. Nor are the Bush nominees to the Court people who fit the mold of thoughtful conservatives such as John Marshall Harlan, Felix Frankfurter or Lewis Powell.

Rather they are people who reject the Supreme Court's principle that searching judicial inquiry must be applied whenever these "discrete and insular minorities" suffer prejudice for which there is no available remedy in the political process.[1] If a willingness to protect the rights of the powerless were a requirement for judicial service, few, if any, of the Bush nominees would qualify.

THE STRUGGLE FOR IMMIGRATION REFORM

In the battle over immigration policy, the Bush administration has sought to thread its way between the draconian arguments of some conservatives that people not in the nation lawfully should be treated harshly and deported and the arguments of progressive groups that new laws should provide worker protections and a pathway to citizenship for people who reside in the U.S. but lack legal status.

As Shaheena Ahmad Simons recounts, the administration has advocated a "get tough" border security initiative and increased enforcement of immigrations laws at work sites while at the same time raising hopes that it would embrace measures that would reunites families and help people obtain legal status.

Although local attacks on day laborers have grown, the November elections suggested that positive treatment of immigrants might also be good politics for both parties. One thing seems certain: a failure by the administration and Congress to find a constructive solution would be a recipe for escalating interethnic conflict in the years to come.

POLICIES TO HELP ENGLISH LANGUAGE LEARNERS

When Congress established in the No Child Left Behind Act the goal of closing the academic gap between well off children and those who are disadvantaged and discriminated against, one of the biggest challenges was to secure academic progress for English language learners (ELLs).

A great deal rides on meeting this challenge. While most of the 5.2 million English language learners are native born American, the population is increasing rapidly and experts predict that by 2025, one-quarter of the total U.S. school population will be ELLs. Three-quarters of current ELLs are Spanish speaking and two-thirds come from low-income families.

As Peter Zamora reports, the record of states, local agencies and the Federal government is at best mixed. Most states have not taken the steps needed to create assessments that yield valid and reliable results for ELLs. Although the NCLB contemplates the development of native language assessments as a measure to reflect what students know and can do while they are learning English, the Department of Education has not moved to develop such assessments or ensure that they are widely used. Nor has the Department vigorously enforced the provisions of NCLB designed to ensure good assessments.

COMMUNICATIONS POLICY AND CIVIL RIGHTS

As Mark Lloyd observes, "communication policy determines who gets to speak to whom, how soon and at what cost." The stakes are high in an era of advanced information technology. Those who lack access may have their economic prospects stunted, their status as participants in society diminished.

The essay reviews a three-decade long effort in federal policy to introduce affirmative employment policies to the broadcast industry. While the effort met with some success in the 90s, it has since been stymied by regressive Supreme Court decisions and crabbed interpretations of the law by the Federal Communications Commission. Efforts to increase the numbers of minority owners have met similar obstacles.

At the same time, the Internet has been increasing rapidly in importance as an instrument of commerce and communication. Some initiatives by Congress have sought to address the "digital divide" between "haves" and "have-nots" in access to computers and the Internet. Some initiatives by Congress and federal agencies have produced progress; these include a program to support telecommunications services in remote and rural areas and other places where costs are high; the E-Rate program to provide classrooms and libraries informational services through the Internet; and healthcare services to patients in rural areas. But the E-Rate and other programs have had to struggle against members of Congress suspicious of its purposes.

Large disparities exist for Latinos, Black and Native Americans, and people with disabilities in their access to computers. The struggle for equality in these and related areas is likely to persist for years.

FEDERAL HOUSING POLICY: FUNDAMENTAL NEEDS AND UNTAPPED POTENTIAL

While civil rights advocates fight battle after battle to retain the protections of laws being administered and adjudicated by hostile guardians, some of the most important barriers to equality remain largely unattended.

If people of color who are poor had a route to find decent, affordable housing and the ability to choose locations, they would have access to educational opportunities, services and jobs that would allow them to work themselves out of poverty. The federal government, having dug the policy hole that has left the minority poor in concentrated poverty, certainly has a responsibility to help them.

As Philip Tegeler points out, the government does in fact maintain programs that could provide the assistance needed. "Virtually alone among federal housing programs," he writes, "the Section 8 program has provided an option to families who choose to move from higher-poverty segregated neighborhoods to less segregated areas." But a variety of obstacles, including jurisdictional barriers when families in one area could be matched with housing opportunities in another, prevent the voucher program from being effective in achieving this goal. Since, as Tegeler states, the major constituency is the housing industry, mobility for families does not rank high.

Similarly, the Federal Low Income Housing Tax Code program is the nation's largest low-income housing productions program and could serve to provide units for families in areas of opportunity. But here too, the agency charged with implementing the law—the Department of Treasury—has virtually ignored the mandate of the Fair Housing Act that *all* federal agencies take steps to further fair housing. So the Department omits entirely from its regulations the all important subject of site selection. Often the statute works to provide housing in a way that concentrates poverty and racial isolation, directly contrary to national policy.

New national policies designed to provide opportunities for those who are worst off in society must focus on ways in which government policies distort the market and block access to the development of affordable housing in racially and economically integrated areas.

RECOMMENDATIONS

To restore the foundation of our civil rights laws and strengthen their enforcement, the Citizens' Commission and the Center for American Progress offer the following recommendations:

CIVIL RIGHTS MONITORING BY CONGRESS

We recommend that Congress establish a Select Committee of the House and Senate to conduct a two year review of

the implementation of federal civil rights laws. The committee should be composed of senior members of both parties who serve on the Judiciary committees and on the other committees of each house that deal with education, employment, housing and the administration of justice.

The Select Committee should have subpoena power and should conduct public hearings on the performance of each departmental agency that has significant responsibilities for administering civil rights laws. The Select Committee should publish one or more reports containing specific recommendations or directives for the restoration of vigorous civil rights enforcement. The Select Committee should also recommend to the Congress any needed changes in statutes designed to make enforcement more effective.

At the same time, the Committees of Congress that vote on nominations for executive officers should conduct scrupulous reviews of all nominations to ensure that the nominees are committed to the implementation of the civil rights laws.

As the four essays reviewing the Civil Rights Division of the Department of Justice reveal, enforcement of the nation's civil rights laws has fallen into a dangerous state of disrepair. The situation cannot be remedied by half measures, but requires reconstruction of the agencies with a new commitment to fidelity to law by cabinet-level officers, new policy and a regulatory process that seeks full realization of the rights specified in the statute, and civil rights officials and reliance on the professional judgment of experienced lawyers.

STATUTORY REMEDIES TO EFFECTUATE CIVIL RIGHTS

We recommend that Congress ensure that every statute protecting civil rights specifically authorize aggrieved persons to bring civil suits in the federal courts to redress violations of the law. The most important statutes requiring the specification of a private right of action are Title VI of the Civil Rights Act of 1964 and the No Child Left Behind Act of 2002.

The Civil Rights Act of 1964 called upon federal agencies to prevent racial discrimination in programs or activities assisted by federal funds. While the law has been an effective tool for striking down discrimination in schools, health facilities, housing, public transportation and other areas, the Supreme Court, in the Sandoval *case, ruled that individuals have no right to sue to enforce regulations that bar practices that have a disparate impact on minorities and that are not dictated by necessity. While in the past some aggrieved parents have successfully brought suit for violations of the Elementary and Secondary Education Act (the underlying law of NCLB) in recent years the Supreme Court has been reluctant to imply a right of action that is not explicitly set forth in the statute.*

Strong government enforcement of civil rights laws is a necessary, but not a sufficient condition for vindicating the civil rights of persons whom the law is designed to protect. The courts must be available to those who are discriminated against in violation of the laws. Congress may wish to establish administrative remedies that may be the first resort for people seeking redress. But any such administrative process should be speedy and efficient and should ensure that there will be rapid access to the courts.

SECURE JUDGES COMMITTED TO EQUAL JUSTICE

President Bush should not nominate persons to the federal bench and the Senate should not confirm nominees unless the person under consideration has a demonstrated commitment to equal justice under law.

Over the past six years, the president has nominated to the federal courts many people who have lacked a commitment to equal justice and in some cases have demonstrated active hostility to civil rights. The Senate has not in most instances conducted a thorough review of the records of these nominees. Democrats, lacking a majority until this year, have not had the unanimity needed to reject most nominations. Republicans have followed the party line. Even the few who in the past have demonstrated independence have apparently shrunk from opposing administration candidates for fear of losing their influence in the party.

As a result, several of the federal circuit courts of appeals have become places notably unfriendly to the assertion of civil rights and liberties and to claims for environmental and consumer protection. The Supreme Court, far from exercising judicial restraint, has attacked precedents dating back more than half a century in order to deprive Congress of the authority to use the Commerce Clause and Section 5 of the Fourteenth Amendment to protect equality of opportunity and the general welfare.

Unless our leaders take steps now to reverse this trend, we are in real danger of losing our distinctive character as a nation that offers opportunity to all and protects all against the excesses of the powerful.

In addition, the report includes the following recommendation from our contributing authors:

Immigration

The administration and Congress should define a meaningful and comprehensive fix for the immigration system including a defined path to citizenship for millions of undocumented immigrants living and working in the United States and steadfast vigilance against counterproductive "get tough" enforcement at the federal, state and local levels.

Educating English Language Learners

The Department of Education should fully enforce NCLB assessment provisions and provide effective, ongoing and adequately funded technical assistance to state education agencies in the development of appropriate assessments.

States should focus on developing and implementing valid and reliable assessments including native language assessments for English language learners.

States as well as school districts and schools should develop and implement sound and consistent methods for classifying ELLs and the latter should implement the best instructional practices that will provide ELLs with the best opportunity to learn. Parents and advocates should insist that ELLs continue to be included in NCLB accountability systems to ensure that schools will focus attention on the academic needs of these students.

Communications Policy

The FCC, possibly in conjunction with other federal agencies, should conduct a Croson/Adarand analysis to determine the rationale for race-conscious measures to advance equal employment and increase minority ownership in the communications industry.

The FCC should review the impact of current ownership rules in broadcasting on minority ownership opportunities and service to minority communities.

More efforts and resources should be directed to improve access to telecommunications services on Indian land.

The E-Rate program should help make technology available to communities by supporting Community Technology Centers.

The FCC should gather and distribute information that will assess the access that all people have to advanced telecommunications services.

Housing

Congress and HUD should take action to remove impediments to racially and economically integrated housing and to actively promote such housing. Among these steps are the elimination of financial penalties imposed on Public Housing Authorities when families move from one jurisdiction to another; reauthorization of the program that permitted somewhat higher rents in more expensive, lower poverty areas; encouragement of cooperation among PHAs operating similar voucher programs in the same metropolitan area, e.g. offering financial incentives for sharing waiting lists; adopting common application forms; enactment of a new housing mobility program modeled on the successful Gautreaux Assisted Housing Mobility Program in Chicago.

The Department of Treasury and the Internal Revenue Service should fulfill their responsibility to provide guidance to state grantees on fair housing performance. This guidance should induce at minimum the collection of racial and economic data; advice on affirmative marketing methods to ensure access for low-income families of color to low poverty areas; the requirement that project siting avoid the perpetuation of segregation; IRS disapproval of state use of exclusionary techniques that limit development of LIHTC units to high poverty areas; encouragement of the use of Section 8 and LIHTC together to increase the numbers of housing opportunities available on a racially and economically integrated basis.

ENDNOTES

1 See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

PART TWO

Working Papers

CHAPTER 2

Department of Justice: Civil Rights Division

The Attack on Professionalism in the Civil Rights Division

By Joseph D. Rich

Since its creation as a congressionally mandated unit of the Department of Justice in the Civil Rights Act of 1957, the Civil Rights Division has been the primary guardian for protecting our citizens against illegal racial, ethnic, religious and gender discrimination. Through both Republican and Democratic administrations, the Division earned a reputation for expertise and professionalism in its civil rights enforcement efforts.

During much of the history of the Division, its civil rights enforcement work has been highly sensitive and politically controversial. It grew out of the tumultuous Civil Rights Movement of the 1960s, a movement which generated great passion and conflict. Given the passions that civil rights enforcement generates, there has always been potential for conflict between political appointees of the incumbent administration, who are the ultimate decision makers within the Division and the Department, and the stable ranks of career attorneys who are the nation's front line enforcers of civil rights and whose loyalties are to the department where they work. Career attorneys in the Division have experienced inevitable conflicts with political appointees in both Republican and Democratic administrations. These conflicts were almost always resolved after vigorous debate between career attorneys and political appointees, with each learning from the other. Partisan politics was rarely injected into decision-making, in large measure because decisions usually arose from career staff and, when involving the normal exercise of prosecutorial discretion, were generally respected by political appointees. In a similar fashion, the hiring process for new career employees began with the career staff, who made recommendations to the political appointees that were generally respected.

During the Bush administration, dramatic change has taken place. Political appointees have made it quite clear that they did not wish to draw on the expertise and institutional knowledge of career attorneys. Instead, there appeared to be a conscious effort to remake the Division's career staff. Political appointees often assumed an attitude of hostility toward career staff, exhibited a general distrust for recommendations made by them and were very reluctant to meet with them to discuss their recommendations. The impact of this treatment on staff morale resulted in an alarming exodus of career attorneys—the longtime backbone of the Division that had historically maintained the institutional knowledge of how to enforce our civil rights laws, tracing back to the passage of our modern civil rights statutes.

Compounding this problem was a major change in hiring procedures, which virtually eliminated any career staff input into the hiring of career attorneys. This has led to the perception and reality of new staff attorneys having little if any experience in, or commitment to, the enforcement of civil rights laws and, more seriously, injecting political factors into the hiring of career attorneys. The overall damage caused by losing a large body of the committed career staff and replacing it with persons with little or no interest or experience in civil rights enforcement has been severe and will be difficult to overcome.

RELATIONSHIP OF POLITICAL APPOINTEES AND CAREER STAFF

Brian K. Landsberg was a career attorney in the Civil Rights Division from 1964–86 during which he was chief of the Education Section for five years and then chief of the Appellate Section for 12 years. He now is professor of law at McGeorge Law School. In 1997, he published *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (University Press of Kansas), a careful and scholarly analysis of the history and operation of the Division. Landsberg devoted a full chapter to the "Role of Civil Servants and Appointees." He summarizes the importance of the relationship between political appointees and career staff at page 156:

> Although the job of the Department of Justice is to enforce binding legal norms, three factors set up the potential for conflict between political appointees, who represent the policies of the administration then in power, and civil servants, whose tenure is not tied

> to an administration and whose loyalties are to the department where they work and the laws they enforce: the horizontal and vertical separation of powers; the indeterminacy of some legal norms; and the lack of a concrete client. The vertical separation of powers was designed to enable both civil service attorneys and political appointees to influence policy. *This design, as well as wise policy, requires cooperation between the two groups to achieve the proper balance between carrying out administration policy and carrying out core law enforcement duties. Where one group shuts itself out from influence by the other, the department's effectiveness suffers.* (emphasis added)

Rather than making efforts to cooperate with career staff, it became increasingly evident during the Bush administration that political appointees in the Division were consciously closing themselves off from career staff. Indeed, on several occasions there was hostility from political appointees toward those who voiced disagreement with their decisions and policies or were perceived to be disloyal. This was apparent in many ways:

- Longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. In April, 2002, the employment section chief and a longtime deputy chief were summarily transferred to the Civil Division. Subsequently, a career special litigation counsel in the Employment Section was similarly transferred. In 2003, the chief of the Housing Section was demoted to a deputy chief position in another section and shortly thereafter retired. Also in 2003, the chief of the Special Litigation Section was replaced. In the Voting Section, many of the enforcement responsibilities were taken away from the chief and given directly to supervisors or other attorneys in the section who were viewed as loyal to political appointees. In 2005, the chief of the Criminal Section was removed and given a job in a training program, and shortly after that, the deputy chief in the Voting Section for Section 5 of the Voting Rights Act was transferred to the same office. On only one occasion in the past had political appointees removed career section chiefs, and on that occasion it was on a more limited basis. In short, it is rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance. Never in the past had deputy section chiefs been removed by political appointees.

- Regular meetings of all of the career section chiefs together with the political leadership were virtually discontinued from the outset of the administration. Such meetings had always been an important means of communication in an increasingly large Division that was physically separated in several different buildings.

- Communication between the direct supervisors of several sections at the deputy assistant attorney general level and section staff also was greatly limited. In the Voting Section, for instance, section management was initially able to take disagreements in decisions made at the deputy assistant attorney general level to the assistant attorney general for resolution. But it became increasingly evident that such debate, which is so important to the healthy development of policy, was frowned on. In 2003, it was made plain that efforts to raise with the assistant attorney general issues on which there was disagreement would be discouraged. In past administrations, section chiefs had open access to the assistant attorney general to raise issues of particular importance. Attempts to hold periodic management meetings with political appointees were also usually not acted upon. This resulted in political appointees not receiving the expertise and institutional knowledge of career staff on many matters. Indeed, a political special counsel in the front office was assigned to work solely on voting matters and often assumed many of the responsibilities I held as the chief of the section.

- Communication between sections was also discouraged. This was especially true when the appellate section was handling the appeals of trial section cases or amicus briefs on the subjects handled by a trial section. When drafting briefs in controversial areas, appellate staff were on several occasions instructed not to share their work with the trial sections until shortly before or when the brief was filed in court. This was extremely frustrating for career staff in both the trial and appellate sections and hindered the adequate development of briefs and full debate of issues in the briefs.

- Political appointees have inserted themselves into section administration to a far greater level than the past. For example, on many occasions, assignments of cases and matters to section attorneys were made by political employees, something that was a rarity in the past. Moreover, assignment of work to sections and

attorneys was done in a way that limited the civil rights work being done by career staff. This was especially true of attorneys in the appellate section, where close to 40 percent of attorney time has been devoted to deportation appeals during 2005.[1] Similarly, selected career attorneys in that Section were informed that they would no longer receive assignments to civil rights cases, and disfavored employees in other sections were assigned the deportation appeal cases. Political appointees also intruded into the attorney evaluation process in certain instances, something that did not happen in the past.

IMPACT ON MORALE OF CAREER EMPLOYEES

It is hard to overemphasize the negative impact that this type of administration of the Division has had on the morale of career staff. The best indicator of this impact is in the unprecedented turnover of career personnel. It should be noted that the impact has been greater in some sections than others, and often attorneys in the sections most directly affected by the hostility of political appointees transferred to other sections in which the impact was less. The sections most deeply affected have been voting, employment, appellate, and special litigation.

- Based on a review of personnel rosters in the voting section, since April 2005 19 of the 35 attorneys in the section (over 54 percent) have either left the Department, transferred to other sections (in some cases involuntarily) or gone on details. During the same period, only one of the five persons in section leadership (the chief and four deputy chiefs) remains in the section today.

- Based on a review of personnel rosters in the employment section, the section chief and one of four deputy chiefs were involuntarily transferred to the Civil Division in April, 2002. Shortly after that, a special counsel was involuntarily transferred to the Civil Division. Since then, two other deputy chiefs left the section or retired. Overall, since 2002, the section chief and three of the four deputy chiefs have been involuntarily reassigned or left the section. In addition, in that period, 21 of the 32 attorneys in the section in 2002 (over 65 percent) have either left the Division or transferred to other sections.

- Loss of professionals—paralegals and civil rights analysts in both the voting and employment sections—has also been significant. In the employment section alone, twelve professionals have left, many with over 20 years of experience.

- In the appellate section, since 2005, six of the 12–14 line attorneys in the section transferred to other sections or left the Department. Two of the transfers were involuntary.

There has always been normal turnover in career staff in the Civil Rights Division, but it has never reached such extreme levels and never has it been so closely related to the manner in which political appointees have administered the Division. It has stripped the division of career staff at a level not experienced before.

HIRING PROCEDURES

Compounding the impact of the extraordinary loss of career staff in recent years has been a major change in the Division's hiring practices. Since 1954, the primary source of attorneys in all divisions in the Department has been the attorney general's honors program. This program was instituted by then Attorney General Herbert Brownell in order to end perceived personnel practices "marked by allegations of cronyism, favoritism and graft."[2] Since its adoption, the honors program has been consistently successful in drawing top law school graduates to the Department.

Until 2002, career attorneys in the Civil Rights Division played a central role in the process followed in hiring attorneys through the honors program. Each year career line attorneys from each section were appointed to an honors hiring committee which was responsible for traveling to law schools to interview law students who had applied for the program. Because of the tremendous number of applications for the honors program, committee members generally would limit their interviews to applicants who had listed the Civil Rights Division as their first choice when applying. The Civil Rights Division had earned a reputation as the most difficult of the Department's divisions to enter through the honors program because only a few positions were open each year and so many highly qualified law students desired to work in civil rights.

After interviewing was completed, the hiring committee would meet and recommend to the political appointees

those who they considered the most qualified. Law school performance was undoubtedly a central factor, but a demonstrated interest and/or experience in civil rights enforcement and a commitment to the work of the Division were the qualities that interviewers sought in candidates selected to join the career staff of the Division. Political appointees rarely rejected these recommendations.

Hiring of experienced attorneys followed a similar process. Individual sections with attorney vacancies would review applications and select those to be interviewed. They would conduct initial interviews and the section chief would then recommend hires to Division leadership. Like recommendations for honors hires, these recommendations were almost always accepted by political appointees.

These procedures have been very successful over the years in maintaining an attorney staff of the highest quality—in Republican as well as Democratic administrations. A former deputy assistant attorney general in the Reagan administration, who was interviewed for a recent *Boston Globe* article about Division hiring practices, said that the system of hiring through committees of career professionals worked well. The article quoted him as saying: "There was obviously oversight from the front office, but I don't remember a time when an individual went through that process and was not accepted. I just don't think there was any quarrel with the quality of individuals who were being hired. And we certainly weren't placing any kind of litmus test on…the individuals who were ultimately determined to be best qualified."[3]

But, in 2002, these longstanding hiring procedures were abandoned. The honors hiring committee made up of career staff attorneys in the Civil Rights Division was disbanded and all interviewing and hiring decisions were made directly by political appointees with little or no input from career staff or management. As for non-honors hires, the political appointees similarly took a much more active role in selecting those persons who received interviews, and almost always participated in the interviewing process.

Not surprisingly, these new hiring procedures have resulted in the resurfacing of the perception of favoritism, cronyism, and political influence which the honors program had been designed to eliminate in 1954. Indeed, information that has come to light recently indicates that in many instances, this is more than perception. In July, 2006, a reporter for the *Boston Globe* obtained pursuant to the Freedom of Information Act the resumes and other hiring data of successful applicants to the voting, employment, and appellate sections from 2001–2006. His analysis of this data indicated that:

- "Hiring of applicants with civil rights backgrounds—either civil rights litigators or members of civil rights groups—has plunged. Only 19 of the 45 [42 percent] lawyers hired since 2003 in those [the employment, appellate, and voting] sections were experienced in civil rights law, and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies." By contrast, "in the two years before the change, 77 percent of those who were hired had civil rights backgrounds."

- "Meanwhile, conservative credentials [of those hired] have risen sharply. Since 2003, the three sections have hired 11 lawyers who said they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns."

The reporter noted that current and former Division staffers "echoed to varying degrees" that this pattern was what they observed. For example, a former deputy chief in the Division who now teaches at the American University Law School testified at an American Constitution Society panel on December 14, 2005 that several of his students who had no interest in civil rights and who had applied to the Department with hopes of doing other kinds of work were often referred to the Civil Rights Division. He said every one of these persons was a member of the Federalist Society.[3]

Early on in the Bush administration, the hiring in the voting section was overtly political. In March, 2001, after the contested 2000 election, Attorney General Ashcroft announced a Voting Rights Initiative. An important part of this initiative was the creation of a new political position—Senior Counsel for Voting Rights—to examine issues of election reform. Two voting section career attorney slots were filled as part of this initiative to help this appointee. The decision to create these new positions was made with no input from career staff and, once the new hires were on board, they operated

separately from the voting section on election reform legislation. The person named as the Senior Counsel for Voting Rights was a defeated Republican candidate for Congress. The two line attorneys who filled career attorney slots assigned to the voting section were hired with no input from the section and had been active in the Republican party. One of those "career" attorneys, Hans von Spakovsky, was promoted to a political position in 2003—special counsel to the Assistant Attorney General. For the two and a half years that this attorney held this position, he spent virtually all his time reviewing voting section work and setting the substantive priorities for the section. Although he was clearly in a political supervisory position, he continued to be listed as a voting section line attorney and enjoyed career status until he received a recess appointment to the Federal Election Commission in December, 2005.

CONCLUSION

During the Bush administration there was an unprecedented effort to change the make-up of the career staff at the Civil Rights Division. This has resulted in a major loss of career personnel with many years of experience in civil rights enforcement and in the invaluable institutional memory that had always been maintained in the Division until now—in both Republican and Democratic administrations. Replacement of this staff through a new hiring process resulted in the perception and reality of politicization of the Division, and high-profile decisions in voting matters have added significantly to this. The overall impact has been a loss of public confidence in fair and even-handed enforcement of civil rights laws by the Department of Justice.

The damage done to one of the federal government's most important law enforcement agencies is deep and will take time to overcome. Crucial to this effort is careful and continuous congressional oversight, now and in the future. Until November 16, 2006 there had not been a Senate Judiciary Committee oversight hearing of the Civil Rights Division for over four years. Renewed oversight is required to restore the Civil Rights Division to its historic role of leading the enforcement of civil rights laws.

ENDNOTES

1 See Confirmation Hearings for Wan Kim, October, 2005. Answer No. 12 to Written questions of senator Durbin ("According to available records, it is my understanding that during FY 2005, the Appellate Section filed 120 appellate briefs in the Office of Immigration Litigation, and that for the first three quarters of FY 2005 for which information is currently available, approximately 38.8% of attorney hours in the Appellate Section of the Civil Rights Division have been spent on cases regarding the Immigration and Nationality Act.

2 Landsberg, *Enforcing Civil Rights* at p. 157.

3 Charlie Savage, *Civil Rights Hiring Shifted in the Bush Era*, July 23, 2006 at A1.

4 *Id.*

5 American Constitution Society, *The Role of Political and Career Employees of the U.S. Department of Justice, Civil Rights Division*, December 14, 2005; video available at www.acslaw.org.

The Criminal Section

By Seth Rosenthal

During the Clinton years, the Civil Rights Division sought to bolster the enforcement program of its Criminal Section. Among other things, the Division requested and, at the end of President Clinton's second term, received authorization to hire additional lawyers into the Section. It also endeavored to bring new attention to the scourge of international trafficking in persons, or "human trafficking." Most importantly, the Division pushed successfully for a new law, the Trafficking Victims Protection Act (TVPA), which makes it easier to prosecute criminal misconduct involving human trafficking. The TVPA was enacted immediately before the November 2000 presidential election.

With the additional lawyers and the new law, the Criminal Section under President Bush has shifted gears. Moving away from its traditional focus on prosecuting police misconduct and hate crimes, the Section now prioritizes cases involving human trafficking, especially cases involving "sex trafficking," which includes the forced prostitution of adult women and any prostitution of minors. Unlike labor trafficking cases—which involve the involuntary servitude of farm, factory and domestic workers, among others—sex trafficking cases did not fall within the Section's responsibilities prior to passage of the TVPA.

In the aggregate, the changed emphasis does not appear to have had an appreciable effect on the Section's traditional work. Based on both the perceptions of Section staff and the difficult-to-assess statistics maintained by the Division, the Section continues to prosecute law enforcement misconduct and bias crimes at roughly the same clip as in years past. Because the Section now employs from 30–50 percent more prosecutors than it did in the late 1990s, one might expect its efforts in those areas to have increased. But because of the changed emphasis, the added, collective muscle provided by the new prosecutors has been applied entirely to trafficking cases, and mostly to cases involving sex trafficking.

BACKGROUND

The Criminal Section enforces the provisions of the U.S. criminal code that protect individuals' constitutional and civil rights. The Section prosecutes cases involving:

- unwarranted physical and sexual assaults, illegal arrests and personal property theft by public officials, such as police officers
- acts of violence and intimidation, motivated by racial, ethnic or religious hatred, that interfere with housing, employment, voting and public accommodations
- involuntary servitude, compelled labor and forced prostitution, each of which often involves international trafficking in persons
- acts of violence and intimidation directed at abortion providers and clinics
- acts of violence (often arson) targeting houses of religious worship

Prosecutions involving clinic violence and church desecration have occurred only since the mid-1990s, when Congress passed laws proscribing such misconduct. Since then, these prosecutions have made up only a small percentage of the Section's caseload, which is dominated by matters in the other enforcement areas.

Because the Section prosecutes newsworthy cases involving police brutality, hate crimes, human trafficking, church arsons and abortion clinic-related violence, its work is typically high-profile, often garnering nationwide attention and, at the very least, media coverage within the jurisdictions where the cases arise. Among the Section's best-known victories are the prosecutions of a Tennessee judge who sexually abused female litigants and court employees, Los Angeles Police Department officers who beat Rodney King, and Ku Klux Klansmen who murdered civil rights workers James Chaney, Michael Schwerner and Andrew Goodman.

The Section's core mission, indeed its historical raison d'etre, has been to prosecute hate crimes[1] and official misconduct[2]—crimes that disproportionately victimize racial minorities. There are historical reasons for involving the federal government in such cases. Until recently, local prosecutors, especially in the South, often lacked the

political will and/or the resources to bring cases involving racially-motivated violence and intimidation. Similarly, for practical reasons, local prosecutors often found it difficult to investigate and bring charges against wayward law enforcement officers, who belong to the very same police departments they work with and count on every day.

Through the years, the Section also has prosecuted severe cases of worker exploitation qualifying as "peonage" and "involuntary servitude"—crimes that formerly victimized African Americans but now mainly victimize foreign nationals brought to the United States.[3] The Section's work in this area was once circumscribed by a judicially-crafted requirement effectively forcing the government to prove that the labor in question was compelled by violence or physical restraint. More subtle means of coercion were not prosecutable.[4] In addition, cases involving either forced prostitution or the prostitution of minors were prosecuted under statutes that did not fall within the Section's purview. They were handled by other components of the Justice Department under the Mann Act[5] and, if they involved illegal aliens, the criminal provisions of the immigration laws.[6]

In the late 1990s, the Clinton administration sought to focus attention on the plight of criminally-exploited workers, women and girls, most of whom are now being "trafficked" into the U.S. It initiated the multi-agency Worker Exploitation Task Force, which was designed to coordinate and intensify the federal government's anti-trafficking enforcement activities. The Division also worked with Congress to make it easier for prosecutors to bring forced labor and prostitution cases. Thanks to those joint efforts, the legal landscape regarding worker exploitation prosecutions changed. The TVPA, which became effective on October 28, 2000, now facilitates the prosecution of labor compelled by means of coercion less extreme than physical assaults or locked gates, including, for instance, threats of "serious harm," threats of deportation, and any "scheme plan or pattern intended to cause [the victim] to believe that, if [the victim] did not perform … labor or services, [the victim] or another person would suffer serious harm …"[7] The new law also specifically identifies and proscribes "sex trafficking," which involves either: (a) recruiting, enticing, harboring, transporting or providing women for the purpose of prostitution, knowing that the prostitution will be compelled by "force, fraud or coercion"; or (b) recruiting, enticing, harboring, transporting or providing any minor for the purpose of prostitution.[8]

Significantly, the Department determined that the Criminal Section would oversee the prosecution of nearly all offenses arising under the TVPA. This decision expanded the Section's enforcement responsibilities, especially insofar as misconduct constituting "sex trafficking" had previously been prosecuted and monitored by other DOJ components.

A SHIFT IN ENFORCEMENT PRIORITIES

When the Bush administration assumed power, the political appointees within the Justice Department, and particularly within the Civil Rights Division, made a conscious effort to prioritize human trafficking prosecutions. The enactment of the TVPA, and the expanded authority the Section obtained as a result of it, facilitated the new emphasis. Reflecting that emphasis is: a ramped-up, trafficking-centered public relations initiative; the dedication of new resources to anti-trafficking efforts; and an increased number of trafficking (mostly sex trafficking) prosecutions. While still being well-served, the Section's core enforcement mission—the prosecution of official misconduct and hate crimes—has not enjoyed a similar boost, despite an increase in the number of Section attorneys.

PUBLIC RELATIONS

Perhaps the biggest indicator of the Section's new focus is the Department's substantial push to publicize the anti-trafficking program. The public comments of former Attorney General Ashcroft and current Attorney General Gonzales regarding civil rights enforcement invariably emphasize the Section's efforts to combat trafficking.[9] President Bush himself has spoken about the Department's anti-trafficking initiative—the only civil rights enforcement effort he has touted at length.[10] The Bush administration also built on the Clinton-created Worker Exploitation Task Force, repackaging it as a new initiative called the Trafficking in Persons and Worker Exploitation Task Force. And just as this report was going to press, Attorney General Gonzales convened a briefing to announce the creation of a specialized Human Trafficking Prosecution Unit, which is housed within the Section.[11]

The home page of DOJ's Web site highlights the Department's anti-trafficking program.[12] An information-filled, dedicated jump-page describes the problem of trafficking and the Department's efforts to combat it, with numerous links to additional material.[13] The Department also regularly publishes a Section-prepared "Anti-Trafficking News Bulletin," which highlights recent prosecutions, outreach and training by Department officials, new state and federal legislative initiatives, and public statements by Department leadership.[14]

The core civil rights enforcement work of the Section does not enjoy the same level of Department-generated publicity. While the information on the Web site regarding the Section's anti-trafficking work is constantly updated, information regarding the Section's other work is rather out of date; as of this writing, most of the material, except for the "press releases" link, is several years old. Additionally, whereas the Department consistently touts the number of trafficking prosecutions during the Bush years, it does not publicize the statistics regarding its official misconduct and hate crimes cases. On the Division's Web site, statistics regarding trafficking prosecutions are readily accessible.[15] Statistics regarding the Section's other work cannot be located.

RESOURCES

In the past few years, the Section has obtained additional resources, which it has used to beef up its anti-trafficking efforts. Most significantly, in the 1999 and 2000 budget cycles, the Division requested and received authority to hire new Section lawyers. The reinforcements began arriving as George W. Bush assumed the presidency. Whereas the Section employed 31 prosecutors in FY 1998, it had 47 by FY 2003.[16] It now employs upwards of 50. The added manpower has facilitated the transition to a Section docket that features an increased number of trafficking cases (principally sex trafficking cases), but no appreciable difference in other enforcement areas.

In addition, whereas every section attorney and supervisor has traditionally handled every kind of case that the Section prosecutes, the Section during the Bush years began formally assigning or hiring a handful of mid-level managers to work exclusively on trafficking issues. These managers occasionally have handled or supervised cases. They have spent much of their time, however, traveling both nationally and internationally to: coordinate federal and local law enforcement efforts to combat human trafficking; educate local, state, federal and foreign officials about the trafficking problem; train law enforcement agents on investigating and prosecuting trafficking cases; and conduct outreach to public officials, non-governmental organizations and victims' rights advocates.

On January 31, 2007, as noted above, Attorney General Gonzales unveiled plans to expand and formally organize this loose-knit group into a specialized team called the Human Trafficking Prosecution Unit.[17] The Unit, which the Section houses, is led by a career Division attorney. Other Section attorneys have been tapped to serve as special counsels—a couple already enjoyed that title—and more prosecutors and support staff will be added shortly. All of the attorneys in the Unit will deal exclusively with trafficking cases and anti-trafficking policy development.

The Bush administration has not launched similar efforts to bolster the Section's work in other enforcement areas, with the exception of the formation of a modest 9/11 Backlash Initiative.[18] Created in response to an increased number of ethnically-motivated crimes committed in retaliation for the September 11 attacks, the Initiative is devoted to investigating and prosecuting criminal civil rights violations against Muslims, Sikhs and South Asians, and those perceived to be members of those groups. While the Department put an experienced Section lawyer in charge of the Initiative, it did not bring on any new attorneys to help staff it, and only a few Section attorneys have been assigned significant investigations generated by it. The Initiative has netted a handful of convictions. Many of the matters it has monitored have been prosecuted successfully by state authorities.

OUTPUT

Staff Sentiment

While the Section has increased the number of attorneys by 30–50 percent over the past seven years, the feeling among Section attorneys is that the Section is accomplishing more in one area only—human trafficking. Given that the Section received authorization to bring the new hires on board at least in part because of the expanded prosecutorial responsibilities that the TVPA has provided it, this is not entirely surprising, though the new hires were originally intended to bolster enforcement efforts in other areas as well. It is also unsurprising given the FBI's revamped

priorities. Historically, the FBI has been the federal law enforcement agency that investigates the crimes the Section prosecutes. With its post-9/11 emphasis on terrorism investigations, however, many FBI field offices appear not to be pursuing the same number of thoroughly-worked criminal civil rights investigations as in years past. One result has been to allow another federal law enforcement agency, the Department of Homeland Security's Immigration and Customs Enforcement (ICE, formerly INS), to step in and partner up with the Section. But ICE has taken up the slack only in the one area of criminal civil rights enforcement that concerns it—human trafficking. There has not been a corresponding reinforcement of investigative resources in traditional enforcement areas.

Section attorneys find that although neither the quantity nor quality of their work in traditional enforcement areas has suffered, trafficking cases take up an increasing amount of their time because, unlike bias and official misconduct cases, which usually involve one or at most several discrete incidents, trafficking cases are characterized by continuous patterns of criminal behavior spanning months or years. Section attorneys with at least a few years of experience on the job have borne a particularly heavy burden recently, as the departures of a relatively large number of experienced lawyers have forced them to pick up the slack left by new hires, who require time and guidance to learn to do the job properly.

Section supervisors also have felt pressured, largely because of the increase in trafficking work. They perceive that while they spend the same amount of time on traditional cases, trafficking cases command an increasing amount of their energies, not only because they are supervising the trafficking dockets of trial attorneys, but also because they are conducting trafficking prosecution training and outreach around the country. The recent creation of the specialized Human Trafficking Prosecution Unit may relieve some of the burden.

Statistics

It is exceedingly difficult to gauge whether the Section's prosecution statistics bear out Section staff's perception that Section output has increased in the trafficking arena while remaining largely static in core enforcement areas. It should also be emphasized up front that year-to-year statistics might not always reflect how productive the Section is. A number of variables might cause fluctuations in the number of cases filed, and the number of defendants charged, from year to year. For instance, the number of prosecutable civil rights violations that occur and are reported may change; some cases are far more complex, and thus far more time-consuming and resource-intensive, than others; and the number of cases filed in previous years that are still being litigated may take up time and resources that would otherwise be devoted to new cases.

Even assuming that year-to-year statistics at least partly reflect how effectively the Section is performing on a comparative basis, there are seemingly intractable difficulties in using existing statistics to discern how the Section has fared during the Bush years. First, the numbers differ depending on which entity has kept them. The statistics the Section/Division has kept on the number of cases and defendants charged per year: (a) regularly differ from those maintained by another Justice Department component, the Executive Office of U.S. Attorneys (EOUSA), which monitors prosecutions in every enforcement area, including civil rights, all over the country; (b) appear to differ from those maintained by the Federal Judicial Center's Administrative Office of the Courts (AO) ("appear to" because there is a three-month lag between the Division's fiscal year and AO's calendar year numbers); and (c) have not always been entirely internally consistent. Perhaps more significantly, it is unclear how any of these entities—the Division, EOUSA or AO—count particular cases as "civil rights cases" in the first place. Do they include cases filed only under the statutes over which the Section enjoys primary enforcement responsibility? Do they include more—i.e., cases resembling those charged under such statutes but not actually so charged?

The following illustrates how the numbers have differed:

- From FY 2002–2005, the years for which EOUSA data are currently published online, the Division and the EOUSA have come up with quite different numbers regarding new civil rights prosecutions initiated per year. In FY 2002, EOUSA reported 81 new cases filed, while the Division reported a lesser number, 74. In FY 2003–05, though, the Division's numbers exceeded EOUSA's: 57 vs. 51 in FY 2003, 96 vs. 72 in FY 2004, and 83 vs. 67 in FY 2005.[19] The statistics prepared by the Division under the Bush administration regarding the number of civil rights defendants prosecuted per year also differed from those maintained by EOUSA—and, curiously, they

uniformly paint a less favorable picture of the Section's output during the final two years of the Clinton administration than EOUSA did (138 vs. 159 in 1999; 122 vs. 127 in FY 2000) and a more favorable picture of the Section's output during the Bush years (191 vs. 148 in FY 2001; 125 vs. 115 in FY 2002; 123 vs. 81 in FY 2003 and 151 vs. 110 in FY 2004).[20]

- There have also been disparities between the AO's statistics and the statistics reported by the Division under Bush personnel. Some disparity is inevitable because the AO tracks cases on a calendar year basis, while the Division does so on a fiscal year basis. The disparities in the number of cases filed each year from 1999–2004 are generally not very significant, with the exception of 2004, where the Division claimed 96 new prosecutions (for FY 2004), as compared to only 44 for the AO (for calendar year 2004).[21] The disparities in the number of defendants charged each year is greater, however, with the Division's numbers usually coming in much higher: 191 vs. 122 for FY 2001 vs. calendar year 2001; 125 vs. 125 for 2002; 123 vs. 98 for 2003; and 151 vs. 98 for 2004.[22]

Whatever the difficulties of statistically assessing how productive the Section is now as compared to years past,[23] the numbers maintained by the Division remain the only ones that distinguish among the different kinds of cases the Section handles. Neither EOUSA nor the AO does so publicly. Accordingly, it is only by looking at the Division's own statistics that one can tell how comparatively productive the Section has been in specific enforcement areas.

What the Division's own numbers show generally validates the perceptions of Section lawyers. In the core enforcement areas—official misconduct and hate crimes—the number of prosecutions initiated during the last three years of President Clinton's final term roughly average the number initiated during the first four years of President Bush's tenure.[24] (There was a noticeable dip in official misconduct cases filed in FY 2003, which some have attributed to the reluctance of the then-principal deputy assistant attorney general to prosecute law enforcement officials.) In the area of human trafficking, by contrast, the number of prosecutions has increased. Most of that increase is attributable not to labor trafficking cases, a traditional enforcement area, but rather to sex trafficking cases, which, prior to the passage of the TVPA, the Section did not prosecute, oversee or include in any statistical tallies, as noted above.[25]

A June 2006 DOJ report on trafficking prosecutions shows that the number of sex trafficking cases filed by all DOJ components (including cases filed under statutes not falling within the Criminal Section's purview) has climbed steadily since the enactment of the TVPA in October 2000: from four in FY 2001, to seven in FY 2002, to eight in FY 2003, to 23 in FY 2004, to 26 in FY 2005. By contrast, the number of labor trafficking cases filed (again, including cases filed under statutes not falling within the Section's purview) has fluctuated but remained pretty constant: six in FY 2001, three in FY 2002, three in FY 2003, three in FY 2004 and eight in FY 2005.[26]

Nor does the annual number of labor trafficking cases filed during the Bush years differ materially from the number filed during President Clinton's second term, particularly given that, unlike the Bush administration, the Clinton administration did not include in its statistical tallies forced labor cases prosecuted under statutes that the Section was not given primary authority to enforce. The Section brought one labor trafficking case under the involuntary servitude statute in FY 1996, five in FY 1997, one in FY 1998, four in FY 1999 and none in FY 2000.[27]

While the Department under the Bush administration has gone to some length to publicize the statistics regarding its anti-trafficking achievements, it has not similarly publicized the statistics regarding its record in bias crimes and official misconduct prosecutions.

Given the Section's change in emphasis, the increased number of trafficking prosecutions during the Bush years—however inexact and marginally useful the statistics—is what was or should have been expected. The Section now has more lawyers than it did before, and given that the numbers in the traditional enforcement areas appear to have remained the same, it stands to reason that the numbers show the added manpower provided by the new lawyers to have been collectively applied to trafficking cases. Moreover, it is unsurprising that the increase is attributable largely to sex trafficking prosecutions. Influential political conservatives favor prioritizing prosecution of sex-related offenses (take, for instance, the Department's recent push to prosecute obscenity), and some believe that the Department should employ the new sex trafficking statute to prosecute neatly

any form of prostitution, coerced or not. More significantly, while the forced labor provision of the TVPA makes it marginally easier to prosecute labor trafficking cases than pre-TVPA provisions of the criminal code, the provision does not make it appreciably easier, so a substantial increase in the number of labor trafficking cases may have been too much to expect. By contrast, the sex trafficking provision of the TVPA opens up to prosecution an entirely new category of misconduct that the Section did not address before, so a healthy increase in numbers could have been expected. This is especially true given that prior to the Bush years, the Section never kept track of, and never claimed credit for, forced prostitution cases prosecuted under pre-TVPA statutes like the Mann Act and the immigration laws.

LOOKING AHEAD

The changed emphasis of the Criminal Section during the Bush years is not a negative development. Human trafficking is an international scourge that violates the most elemental civil and human rights. The Bush administration deserves credit for using the TVPA, enacted immediately before President Bush's election, to bring attention to it.

The Section must remain vigilant, however, in ensuring that its new focus, especially on sex trafficking prosecutions, does not adversely affect its traditional mission. Crimes involving both racial/ethnic bias and law enforcement misconduct still occur, and they still demand the attention of the Section. Local prosecutors, to their credit, ordinarily handle bias crimes prosecutions now. But sometimes, as they acknowledge, they lack the expertise and the resources that the FBI and the Section bring to bear on the investigation and prosecution of such cases.

Federal prosecutors—Section prosecutors, in particular—also ordinarily remain better equipped to prosecute official misconduct. There are several reasons for this:

- First is the issue of will. Because they need to maintain strong working relationships with the law enforcement agencies they rely on every day, many local prosecutors find it difficult to vigorously prosecute wayward police or corrections officers within their jurisdictions. This holds especially true for state prosecutors, but it is also occasionally true for federal prosecutors in U.S. Attorney's Offices, who rely on the work of local law enforcement agencies as well.
- Second is the issue of resources. Taking on official misconduct cases is time-consuming and resource-intensive. Local prosecutors and law enforcement agencies are already stretched thin prosecuting a vast array of criminal conduct, and misconduct by law enforcement officers understandably does not top their list of priorities. By contrast, prosecuting official misconduct remains a Justice Department priority, and even after 9/11, the Justice Department (including the FBI) has reserved vital resources to address the issue.
- Third is the issue of expertise. Investigating and prosecuting abusive conduct by public officials is a specialized area of law enforcement. It is qualitatively different from investigating and prosecuting other kinds of crimes. Among other things, it requires a different use of the grand jury, a different approach to witnesses, and a different kind of presentation at trial. Although a smattering of local prosecutors may possess the specialized knowledge, experience and resources that effectively prosecuting official misconduct entails, many do not. Section prosecutors and some AUSAs do.

The Department can ensure that the Section does not depart from its traditional priorities by hiring new lawyers, of course. But apart from that, there is at least one other sensible way for the Department to preserve the Section's historical role: devolving primary prosecutorial responsibility for sex trafficking cases, which are taking up an increasing amount of the Section's workload, to U.S. Attorneys' Offices.

As it now stands, Section attorneys are actively involved in most sex trafficking cases country-wide, teaming up with U.S. Attorneys' Offices in the jurisdictions where the offenses occur. Because of the Section's expertise, this is the way all civil rights prosecutions are ordinarily handled. But in the long run, active collaboration seems less essential to effectively prosecuting forced prostitution cases.

Prior to the passage of the TVPA, U.S. Attorneys' Offices handled such cases by themselves, under the Mann Act and other relevant statutes, with no help from the Section and little or no help from any other litigating component in the Criminal Division at main Justice. The sex trafficking provision of the TVPA put a new arrow in their quiver, but investigating and prosecuting these cases is not much different than before. In fact, many investigations that begin

as sex trafficking investigations end up producing evidence of ordinary prostitution only—prostitution, in other words, that is prosecutable under the Mann Act, immigration laws, or local vice laws, but not under the TVPA. It seems, therefore, that U.S. Attorneys' Offices could rather easily assume primary responsibility for investigating and prosecuting sex trafficking cases, with Section attorneys available to assist if needed. This is, after all, the way things work in many other areas of federal criminal law enforcement. In cases involving narcotics, fraud, public corruption, and more, U.S. Attorneys' Offices ordinarily handle prosecutions by themselves, with the Criminal Division sections that specialize in each area very loosely maintaining oversight and providing assistance when needed.

Both sex trafficking and ordinary prostitution that initially looks like sex trafficking are prevalent. If the Department does not consider transferring primary authority for investigating and prosecuting these crimes from the Section to U.S. Attorneys' Offices, it might run the risk of gradually transforming the Section into a roving, nationwide vice squad. That was not what the Department intended when it tapped the Section to take the lead on enforcing the TVPA, and it is not consistent with the Section's traditional, still-vital mission.

CONCLUSION

The country continues to look to the Civil Rights Division to deliver justice to the victims of hate crimes, to combat extreme forms of worker exploitation, and to hold abusive police officers, corrections officers and mental health workers accountable for willfully flouting individuals' constitutional rights. As important as the Division's anti-trafficking initiative is, the Division must not lose sight of the Criminal Section's core mission.

ENDNOTES

1 Such offenses are prosecuted under 18 U.S.C. §245 (proscribing violence and intimidation based on race, religion and national origin in public accommodations, employment, education and employment) and 42 U.S.C. §3631 (proscribing racially-, ethnically- and religiously-motivated interference with housing rights).

2 Such offenses are prosecuted under 18 U.S.C. §§ 241–42.

3 Such offenses are prosecuted under 18 U.S.C. §§ 1581–84.

4 *United States v. Kozminski*, 487 U.S. 931 (1988) (interpreting 18 U.S.C. §1584).

5 18 U.S.C. § 2421 et seq.

6 8 U.S.C. §§ 1324–28.

7 18 U.S.C. §§ 1589–90.

8 18 U.S.C. § 1591.

9 See, e.g., *Transcript of Attorney General Alberto R. Gonzales, Assistant Attorney General Wan Kim and Senior Department Official at Pen and Pad Roundtable on Human Trafficking*, January 31, 2007 (available at http://www.usdoj.gov/crt/speeches/crt_speech_070131.html); *Prepared Remarks of Attorney General Alberto Gonzales at the Freedom Network USA Conference*, March 15, 2006 (available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0603151.html); John Ashcroft, *Path-Breaking Strategies in the Global Fight Against Sex Trafficking*, Feb. 25, 2003 (available at http://www.usdoj.gov/archive/ag/speeches/2003/022503sextraffickingfinal.htm).

10 *Remarks by President George W. Bush at the National Training Conference on Human Trafficking*, July 16, 2004.

11 See *Attorney General Alberto R. Gonzales Announces Creation of Human Trafficking Prosecution Unit within the Civil Rights Division*, January 31, 2007 (available at http://www.usdoj.gov/opa/pr/2007/January/07_crt_060.html).

12 See http://www.usdoj.gov.

13 See http://www.usdoj.gov/whatwedo/whatwedo_ctip.html.

14 See http://www.usdoj.gov/crt/antitraffic_bull.html.

15 See http://www.usdoj.gov/whatwedo/whatwedo_ctip.html.

16 *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).

17 See *Attorney General Alberto R. Gonzales Announces Creation of Human Trafficking Prosecution Unit within the Civil Rights Division*, January 31, 2007 (available at http://www.usdoj.gov/opa/pr/2007/January/07_crt_060.html).

18 See http://www.usdoj.gov/crt/nordwg.html.

19 Compare *United States Attorneys' Annual Statistical Reports* for FY 2002, 2003, 2004 and 2005 (available at http://www.usdoj.gov/usao/reading_room/foiamanuals.html) with *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).

20 Compare *United States Attorneys' Annual Statistical Reports* for FY 2002, 2003, 2004 and 2005 (available at http://www.usdoj.gov/usao/reading_room/foiamanuals.html) and *Transactional Records Access Clearinghouse, Civil Rights Enforcement by Bush Administration Lags, Nov. 21, 2005*, at http://trac.syr.edu/tracreports/civright/105/ [hereinafter Enforcement Lags] (reporting EOUSA statistics regarding number of civil rights defendants charged per year between FY 1999 and FY 2003) with *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).

21 Compare Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2005*, Table D-2 (available at http://www.uscourts.gov/caseload2005/contents.html) with *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).

22 *Id.*

23 In 2004–05, the disparities between the EOUSA's and AO's numbers on the one hand, and the numbers offered by the Division on the other, led to a public spat between the Division's political appointees and a Syracuse University-based, non-partisan research group called the Transactional Records Access Clearinghouse (TRAC). Using the EOUSA's numbers regarding defendants charged from FY 1999–FY 2003, and the AO's numbers regarding cases filed between calendar years 1999 and 2003, TRAC concluded that the Department of Justice's overall criminal civil rights enforcement efforts had "sharply declined" during the Bush administration. See *Enforcement Lags*. (Oddly, the numbers that TRAC used are not precisely the same as the numbers that can be obtained from looking directly at EOUSA's and AO's numbers for corresponding years; they are, however, very close.) Political appointees in the Civil Rights Division immediately responded by citing—in a press release and on Tavis Smiley's National Public Radio program—the Division's internally-maintained statistics for those years, which, as noted above, differed from EOUSA's and the AO's. In the process, the appointees not only cited numbers on defendants charged per year that were, for the Bush years, higher than EOUSA's, they also suggested that the Department had initiated a greater number of official misconduct prosecutions during the first three years of the Bush administration (FY 2001–03) than during the final three years of the Clinton administration (FY 1998–2000). See Press Release, Nov. 22, 2004 (available at http://www.trac.syr.edu/tracreports/civright/115). Curiously, however, the official misconduct numbers they touted for FY 2001–03 were far greater than the numbers they had provided just a few months before to the Senate Judiciary Committee (146 vs. 119). The numbers provided to the Committee show rough equivalence (119 vs. 115) between the two three-year periods. Equally curiously, the political appointees did not respond to what was perhaps TRAC's most serious charge—that the *overall* number of civil rights prosecutions initiated per year had declined. (It might have been difficult to do so, however, since as noted above, TRAC's numbers on that subject relied on the AO, which maintains statistics on a calendar year basis, whereas the Division maintains them on a fiscal year basis.)

Concerned about the deviation between the statistics internally-recorded by the Division and those maintained by EOUSA and the AO, TRAC subsequently made a Freedom of Information Act request for the Division's statistics, which, unlike EOUSA's and AO's, are not publicly available. Based on the material it received, TRAC concluded that from FY 1999 to FY 2003, the Division's internal record-keeping gradually improved: early on the Division "missed quite a few cases" that were included in the EOUSA's and AO's numbers, but "[a]s time went on the … Division record systems improved and fewer cases were missed." Letter from Susan B. Long and David Burnham to Attorney General Alberto Gonzales, June 9, 2005 (available at http://www.trac.syr.edu/tracreports/civright/115). The result, according to TRAC, was that the purported increase in the Division's numbers "was only an artifact of improved recording." TRAC stuck by its earlier conclusion, based on EOUSA and AO statistics, that there had been a "real decline in the cases that actually were filed in court against different kinds of civil rights violators." *Id.*

It is difficult to assess the validity of these conclusions. First, while comparing information obtained from the Division with information from EOUSA and AO may well show that the Division missed cases in the "early years" of the study (presumably 1999 and 2000), it does not follow that "fewer cases" were missed "as time went on" for one simple reason: the Division's numbers are higher for the later years (2001–03, presumably) than EOUSA's or AO's. The fact that the disparities neither went away nor decreased suggests either that the FOUSA and AO missed cases, that the Division overreported, or that the various entities tally the numbers differently—not that the Division missed fewer cases. It is similarly difficult to figure out how TRAC reached the conclusion that there was a "real decline" in cases filed. TRAC seems to imply that the Division's numbers in "later years" (2001–03) are not inflated (unless by counting as "civil rights cases" those not brought under civil rights statutes), only that the numbers for earlier years are depressed due to faulty record-keeping. If that is the case, it does not lead inexorably to the conclusion that there has been a "real decline" in the number of cases filed, and TRAC does not explain how it reached that conclusion.

24 *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).

25 *Report on Activities to Combat Human Trafficking*, March 15, 2006, at 24–29 [hereinafter *Combat Trafficking Report*]; *Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2005* (June 2006), at 15–17 [hereinafter *FY 2005 Trafficking Report*]. Both reports are available at http://www.usdoj.gov/wharwedo/wharwedo_ctip.html.

26 *FY 2005 Trafficking Report*, at 15–17.

27 *Combat Trafficking Report*, at 27.

Employment Litigation Section

By Richard S. Ugelow

INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] prohibits discrimination in employment based upon race, sex, religion and national origin. With the enactment of the Equal Employment Opportunity Act of 1972 (1972 Amendments),[2] Title VII's coverage was extended to cover public as well as private sector employees. The 1972 Amendments designated the DOJ as the federal agency to enforce Title VII against public sector employers, while the Equal Employment Opportunity Commission (EEOC) was given responsibility for enforcement in the private sector. Within the DOJ, the Employment Litigation Section (ELS) of the Civil Rights Division is the office delegated day-to-day enforcement responsibility of Title VII against state and local government employers.

This chapter discusses the Department of Justice's enforcement of Title VII, with a particular emphasis on the period following January 20, 2001. A review of the DOJ's enforcement activity during the Bush administration reveals that the number of Title VII lawsuits filed is down considerably from prior administrations—both Republican and Democratic—and that the mix of cases filed also has changed. Most importantly, the DOJ has reduced significantly the number of "disparate impact" cases filed. These are cases that seek broad systemic reform of employment selection practices that adversely affect the job opportunities for a traditionally protected group, such as African Americans or women. Equally troubling, the Department is filing few cases that allege that African Americans are the victims of racial discrimination. The DOJ also has reduced its efforts to reach out to groups of employers, like fire and police chiefs, and professional groups, such as the Society for Industrial Organization Psychologists (SIOP) and the International Personnel Management Association Assessment Council (IPMAAC) to discuss selection procedure assessment and reform. Thus, the DOJ is not using its formidable "bully pulpit" to encourage voluntary compliance with Title VII by state and local government employers. Neither is it seeking input from professional organizations that advise employers and help them develop and implement selection procedures.

This diminished enforcement program surely has not gone unnoticed by the employer community. In the past, the DOJ's vigorous enforcement action and outreach efforts pressured employers to take prophylactic measures. In addition, the DOJ's reduction in enforcement activity removes an incentive for employers to take voluntary measures to ensure equal employment opportunities. This self-analysis process is not only expensive, it also is often controversial in the local community. Without the pressure of government oversight, it is far easier for governmental employers to do nothing rather than to engage in a self-evaluation of the procedures it uses to select employees.

The importance of the Department of Justice to the effective enforcement of Title VII cannot be overstated. It is an organization with the prestige, expertise, and financial and personnel resources to challenge discriminatory employment practices of state and local government employers. As a general rule, private attorneys and public interest organizations lack the financial and staff resources needed to act as private "attorneys general" in the Title VII enforcement scheme. Since the enactment of Title VII in 1964 and certainly since the statute was amended in 1972 to extend its reach to public sector employers, the DOJ has been the lead agency in eradicating employment discrimination.

The sections that follow describe two methods of demonstrating a violation of Title VII, the statute's employment scheme, and the current administration's record of enforcement.

THEORIES OF LIABILITY FOR EMPLOYMENT DISCRIMINATION

The two most common legal theories of demonstrating a violation of Title VII are disparate treatment and disparate impact.

DISPARATE TREATMENT

Disparate treatment is the most easily understood type of discrimination. The plaintiff has the burden to demonstrate by a preponderance of the evidence (that is, it is more likely

than not) that the discrimination charged was intentional or purposeful. Since direct evidence of discrimination rarely exists, circumstantial or indirect evidence of discrimination is used by the plaintiff to establish a violation of Title VII. The most common type of circumstantial evidence is to compare how the alleged victim (a minority or a female) of discrimination was treated with the treatment accorded a similarly situated non-minority or male. Claims of disparate impact typically involve individual allegations of employment discrimination and they constitute the overwhelmingly largest number of Title VII lawsuits.

DISPARATE IMPACT

Unlike disparate treatment, cases brought under a disparate impact theory do not require evidence of intentional discrimination or discriminatory motive. In disparate impact cases, the focus is on the effects of the employment practice or the criteria on which the employment decision was based. For example, does a practice—like a physical performance test—eliminate more female than male applicants? If it does, the burden then shifts to the employer to demonstrate that the procedure is a valid predictor of successful job performance.

Disparate impact cases seek to eliminate or modify a systemic discriminatory employment practice(s), generally are very complex and expensive to pursue, and present resource issues for private plaintiffs. For this and other reasons, the Department of Justice files most disparate impact cases against state and local government employers and the EEOC files most of the disparate impact cases against private employers.

THE STATUTORY SCHEME

The DOJ's enforcement authority derives from sections 706 and 707 of Title VII.[3]

SECTION 706 OF TITLE VII

Section 706 of Title VII authorizes the attorney general to file a suit based upon an individual charge of discrimination that has been referred to the Department of Justice by the EEOC. Under Title VII, individuals who believe they are the victims of employment discrimination may file a charge of discrimination with the EEOC. If the charge of discrimination is against a state or local government employer, the EEOC may refer it to the Justice Department for a determination that the charge has merit and efforts to resolve the matter voluntarily have failed. The DOJ receives more than 500 of these referrals each year, and after review typically files suit on between 10 and 14 of them. Even though cases brought pursuant to section 706 referrals do not affect large numbers of employees or may not establish new law, they are nevertheless important enforcement vehicles. Among other things, these cases often address unique issues of intentional or purposeful discrimination or address issues that members of the private bar might not be qualified or able to handle. In smaller communities, for instance, members of the private bar might not be willing to represent an individual in a suit against the local government for fear of retaliation. Section 706 cases are always brought under the disparate treatment theory of Title VII liability.

SECTION 707 OF TITLE VII

By contrast, section 707 of Title VII authorizes the Attorney General to bring suit against a state or local government employer where there is reason to believe that a "pattern or practice" of employment discrimination exists. The Attorney General has "self-starting" authority to initiate pattern or practice investigations and cases. That is to say, unlike section 706 cases, pattern or practice cases are not dependent upon the receipt or referral of a charge of employment discrimination to the DOJ.

Pattern or practice cases are the most important and significant cases brought by the DOJ because they have the greatest impact. Not only do pattern or practice cases affect a large number of employees, they often break new legal ground. The number of pattern or practice cases is a strong indicator to the employer community that the DOJ is actively enforcing Title VII.

Pattern or practice cases seek to alter employment and selection practices—such as residency requirements, recruitment methods, tests, assignments, and promotions—that have the purpose or effect of discriminating on the basis of race, sex, religion, and national origin. Pattern or practice cases can be brought by the attorney general under either a disparate treatment or a disparate impact theory or both. Most commonly, they are brought under the disparate impact theory because it is unnecessary to prove discriminatory motive. The challenged employment practices are

usually "facially neutral" in the sense that they apply to all applicants equally regardless of race, sex, religion or national origin. Thus, for example, every applicant has to take the same written test or the same physical performance test or be a resident of a municipality for a year before being eligible for employment. But a look at the impact or the effect of such a practice on certain groups of applicants may reveal a different picture. A test that on its face appears to be fair to all may disproportionately and unjustifiably eliminate from consideration a class of qualified applicants, such as African Americans or women. Similarly, requiring applicants to reside in a jurisdiction for a year before becoming eligible for government employment may appear to be fair and non-discriminatory because it applies to all applicants. Its effect, however, may be to disqualify virtually all African American applicants because historically the city or municipality is a "white" jurisdiction with few or no African American residents. The attorney general's use of his/her pattern or practice authority is an important vehicle for challenging and hopefully altering such issues.

The attorney general has used his/her section 707 authority successfully to challenge and eliminate a pre-application durational residency requirement of 13 municipalities in the Chicago and 18 municipalities in the Detroit suburbs.[4] Each municipality possessed three similar characteristics. First, they had few, if any, African-American residents. Second, they had a common border with a largely African American area of Chicago or Detroit. Finally, candidates for municipal employment had to be residents of the municipality for at least one year prior to application. Thus, the residency requirement served to exclude from consideration for employment significant numbers of African Americans. Because the municipalities were not able to demonstrate that the residency requirement was job-related or somehow predictive of successful job performance, the practice violated Title VII.

The DOJ also has used pattern or practice authority to reform cognitive tests that disproportionately exclude minorities (African Americans and Hispanics) from police officer, fire fighter, correctional officer and myriad other positions. Similarly, the authority has been used to ensure that women have access to physically demanding jobs in which they were underrepresented, such as police and correctional officer, for which they were otherwise qualified. Indeed, historically, the DOJ focused its litigation efforts on dismantling artificial (non job-related) barriers that denied job opportunities to minorities and women in such protective service jobs because these positions offer prestige, promotional opportunities, and excellent pay and benefits.

Pattern or practice cases often are politically charged and highly controversial because they challenge the practices used by state and municipal civil service systems. Many civil service systems require that employment decisions be made using the rank-order results of traditional tests of cognitive ability and/or physical performance to select and promote protective service personnel. A lawsuit filed by DOJ presents a direct assault on these practices and may require the defendant to alter its selection practices by adopting new tests and to reconsider how it makes employment decisions. Often the reaction of an employer to a lawsuit is that the DOJ seeks to "dumb down" hiring or promotion standards and to lower the quality of new hires. Indeed, the DOJ's goal is exactly the opposite.

Over the years, the DOJ's litigation has shown that most employers have very little objective evidence that their selection procedures in fact produce high-quality employees. Many employers are satisfied with the status quo because it is easier and less expensive not to change. And maintaining the status quo does not usually draw the wrath of the unions or the public. The threat of a legal challenge to employment practices is a powerful motivator for an employer to take prophylactic voluntary measures. In response to a DOJ investigation or lawsuit, employers may retain experts to review and improve their current selection practices. The ultimate goal is to adopt practices that recruit and select the best applicants for employment and have the least discriminatory impact upon protected groups.

Pattern or practice suits are critically important vehicles for meaningful and far-reaching reform of employment practices that unjustifiably limit employment opportunities for minorities and women—and the DOJ is the only organization that is equipped to bring them. Pattern or practice suits are expensive and require substantial expertise. Litigation of a pattern or practice suit typically requires the use of expert witnesses, such as industrial organization psychologists, statisticians, exercise physiologists, and labor economists. It can cost many thou-

sands of dollars to retain experts for litigation, a cost that most private litigants can not bear. Few private parties or organizations have the expertise or resources to bring these suits. Thus, there is nobody to fill the void if the DOJ fails to bring such suits.

A COMPARISON OF PRE- AND POST-JANUARY 20, 2001 ENFORCEMENT

Since January 20, 2001, the Bush administration has filed 32 Title VII cases, or an average of approximately five cases per year.[5] This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York (using its own resources).[6] By comparison, the Clinton administration filed 34 cases in its first two years in office. By the end of its term in office, the Clinton administration had filed 92 complaints of employment discrimination, or more than 11 cases per year. Standing alone, the lack of Title VII enforcement by the ELS is grave cause for concern. A close look at the types of cases reveals an even more disturbing fact, which is a failure to bring suits that allege discrimination against African Americans.

Of the 32 Title VII cases brought by the Bush administration, nine are pattern or practice cases, five of which raise allegations of race discrimination. Two of the race discrimination cases are "reverse" discrimination cases, alleging discrimination against whites.[7] Another case alleges discrimination against Native Americans[8] and one case was filed by the U.S. Attorney's Office for the Southern District of New York.[9] Thus, the Employment Litigation Section can lay claim to filing exactly *one* pattern or practice case in five years that alleges discrimination against African Americans. And that case was not filed until February 7, 2006, more than five years into the Bush administration.[10] In its first two years alone, the Clinton administration filed 13 pattern or practice cases, eight of which raised race discrimination claims.

The Bush administration's record does not fare any better when looking at its use of section 706 enforcement authority. Twenty-four section 706 cases have been filed since January 20, 2001, five of which allege that the defendants engaged in race discrimination in violation of Title VII. Since the year 2000, the EEOC referred more than 3,200 individual charges of discrimination to the ELS.[11] It is inconceivable that there were only five litigation-worthy suits to be filed on behalf of African Americans in that group. During its term in office, the Clinton administration filed 73 section 706 cases, of which 12 alleged violations of race discrimination.

These statistics show that the current administration demonstrably has reduced Title VII enforcement, and this is especially true when it comes to bringing actions on behalf of African Americans.

It seems that the reduction in enforcement of anti-discrimination laws is by design and is not limited to the DOJ. *The Washington Post* reported that the EEOC workforce has been reduced by 19 percent since 2001, that its backlog of unresolved charges of discrimination has increased to 47,516 from 33,562 in 2005, and that its proposed 2007 budget is $4 million less than 2006.[12]

Despite losing resources, approximately 21 percent of the cases brought by the EEOC in 2005 contained allegations of race discrimination. This statistic is evidence that the failure of the DOJ through the ELS to initiate race-based litigation is not because of a reduction of discrimination against African Americans. Rather, it is evidence that the DOJ has made a conscious decision to allocate its resources to other areas.

It is also interesting to note that while the EEOC is losing employees and resources, the ELS became top heavy with management, which is likely to be part of the reason its productivity is way down. The ELS has a staff of approximately 60, of whom seven are managers, 25 are line attorneys, 12 are paralegals and one is a trained statistician. The remaining staff provides administrative support.[13] Until 2001, the Section's management team consisted of a section chief and three, occasionally four, deputy section chiefs. Today, there is one section chief and six deputy section chiefs. This means that there is approximately one supervisor for every three high-level line attorneys.[14] Since supervisors typically do not personally handle investigations and cases, the inexplicable increase in the ELS management team means that there are fewer attorneys available to tend to the Section's Title VII enforcement responsibilities.

The Bush administration's enforcement of Title VII not only has devalued the need to ensure that African

Americans are not the victims of race-based employment discrimination; it has affirmatively taken measures to see that whites are not disfavored. While all citizens are entitled to the protections of Title VII, it is also true that African Americans have historically and currently been the primary victims of employment discrimination. For that reason alone the DOJ has always committed substantial resources to ending race-based discrimination against African Americans. Additionally, African Americans have greater difficulty than whites in obtaining legal representation and access to the courts. In comparative terms, whites, therefore, may not need the DOJ to champion their cause to the extent that African Americans usually do. It seems incongruous for the DOJ disproportionately to devote its limited resources to the filing of two pattern or practice "reverse" discrimination cases while at the same time virtually ignoring the plight of African Americans.

Moreover, the Bush administration seeks to have the courts endorse a very restrictive view of Title VII violations. In an amicus curiae brief filed in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 126 S. Ct. 2405 (2006), the Solicitor General advocated for a narrow interpretation of Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), that was rejected by the Supreme Court. After the plaintiff filed a complaint alleging that she was a victim of sexual harassment, Burlington Northern transferred the plaintiff from the position of fork lift operator to the less desirable job of laborer. The plaintiff was later suspended without pay for insubordination. The solicitor general joined with the employer in that case in arguing that the anti-retaliation provision confines actionable retaliation only to employer action and harm that concerns employment and the workplace. The Supreme Court held that such a narrow interpretation is inconsistent with the language of Title VII and inconsistent with the primary objective of the anti-retaliation provision: to provide broad protection to employees who participate in Title VII enforcement. In rejecting the solicitor general's interpretation, the Court noted that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace" (original emphasis). The administration should be seeking to expand Title VII's coverage and not the other way around. Even a very conservative Supreme Court disagreed with the DOJ.

CONCLUSIONS & RECOMMENDATIONS

It is vital that the Department of Justice become more vigorous and outspoken in the effort to reduce if not eradicate employment discrimination. Since assuming office, the Bush administration has cut back radically on its enforcement efforts. It has not filed Title VII lawsuits in substantial numbers and it appears to have abandoned serious Title VII enforcement on behalf of African Americans.

The Employment Litigation Section should get back to its roots. It should reduce the number of managers and thereby increase the number of attorneys available to perform substantive Title VII work. The ELS should file cases at a rate comparable with historic levels. This would mean that about 14 cases per year would be filed, of which 10–12 would be section 706 cases and 2–4 would be section 707 cases. The investigations conducted and cases filed should also recognize the reality that discrimination persists against African Americans.

Beyond its litigation program, the DOJ needs to demonstrate leadership by using the bully pulpit. The Department needs to reach out and talk to constituent groups and help and encourage employers to develop better and more job-related selection procedures, which make job opportunities available to all qualified applicants regardless of their race, sex, religion, or national origin.

ENDNOTES

1 42 U.S.C. § 2000e *et seq.*

2 P.L. 92-261.

3 42 U.S.C. §§ 2000e-5 & 6.

4 David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?* 42 Vand. L. Rev. 1121, 1161 (1989).

5 http://www.usdoj.gov/crt/emp/papers.html, last visited June 28, 2006.

6 Three of these cases are interventions in ongoing litigation filed by three Jane Does against the District of Columbia. Each case raises an identical issue – the lawfulness of a pregnancy policy. See *Jane Doe and the United States v. District of Columbia*, C.A. 02-2338(RMU) (D.D.C. filed Aug. 5, 2004); *Jane Doe II and the United States v. District of Columbia*, C.A. 02-2339(RMU) (D.D.C. filed Aug. 5, 2004); and *Jane Doe III and the United States v. District of Columbia*, C.A. 02-2340(RMU) (D.D.C filed Aug. 5, 2004.) . These cases, because they raise a single legal issue, should be counted as one and not three cases.

7 *United States v. Board of Trustees of Southern Illinois University*, C.A. 06-4037-JLP (S.D. Ill. Filed Feb. 8, 2006) and *United States v. Pontiac, Michigan Fire Department*, 2:05cv72013 (E.D. Mich., filed July 27, 2005).

8 *United States v. City of Gallup, NM*, CIV 04-1108 (D.N.M. filed Sept. 29, 2004).

9 *United States v. City of New York and New York City Housing Authority*, 1:02-cv-044892-DC-MHD (S.D.N.Y. filed June 19, 2002).

10 *United States v. Virginia Beach Police Department*, 06cv189 (E.D. Va. filed Feb. 7, 2006).

11 Letter from the Department of Justice dated July 14, 2006. In the author's possession.

12 Christopher Lee, "EEO Is Hobbled, Groups Contend," *The Washington Post*, June 14, 2006, at A21.

13 These numbers are, of course, dynamic.

14 Most attorneys in HLS are promoted to the GS-15, senior trial attorney level, within about three years of hire. A criterion for being promoted to senior trial attorney is the demonstrated ability to handle complex matters independently.

The Voting Section

By Joseph D. Rich, Mark Posner and Robert Kengle

INTRODUCTION

This article is designed to critique the enforcement record of the Civil Rights Division's Voting Section during the Bush administration. Since publication of *Rights at Risk* in 2002, the debate over the federal government's enforcement of voting rights laws has grown very contentious. In 2005 there was extensive newspaper publicity indicating politicization of voting rights enforcement by the Department of Justice's Civil Rights Division and the negative impact that this politicization was having on the protection of minority voting rights, particularly for African Americans. Other articles have reported adversarial attitudes and efforts to marginalize the pre-existing career Division management, accompanied by fundamental changes in the Division's hiring procedures, by Bush political appointees. This article focuses upon the Voting Section's enforcement record.

BACKGROUND

ENFORCEMENT RESPONSIBILITIES OF THE VOTING SECTION

The mission of the Voting Section historically has centered upon enforcement of the Voting Rights Act of 1965 ("VRA"), the primary federal statute banning racial discrimination in the election process. There are several important sections of the VRA that traditionally have been the primary focus of the Voting Section's enforcement program.

First, a critical part of the Voting Section's work involves Section 5 of the VRA. Section 5 requires that jurisdictions covered under the special provisions of Section 4 (nine states in their entirety and portions of seven other states) prove to the Department of Justice or the District Court for the District of Columbia that any and all new voting procedures will not have either the purpose or the effect of denying or abridging the right to vote on account of race or membership in a language minority group. Covered jurisdictions may not implement new voting procedures unless and until such federal "preclearance" is obtained. All voting changes submitted to the Department of Justice are reviewed by the Voting Section, and if the Section finds a violation of Section 5, it forwards a recommendation to the Assistant Attorney General for Civil Rights that a written objection be issued prohibiting the jurisdiction from proceeding with implementation of the submitted change. Similarly, if a covered jurisdiction seeks preclearance by filing a Section 5 declaratory judgment action before the District Court for the District of Columbia, the Attorney General is the sole statutory defendant and the litigation is handled by the Voting Section. The Voting Section plays a special and critical role in enforcing Section 5 since minority voters do not have any statutory role in the Section 5 administrative or judicial processes, though the Voting Section actively solicits comments from minority voters when conducting its administrative reviews and minority voters often are able to intervene in Section 5 declaratory judgment lawsuits.

Second, the Voting Section is responsible for enforcing Section 2 of the VRA. As amended in 1982, Section 2 sets forth a nationwide prohibition on practices and procedures that deny individuals an equal opportunity to participate in the political process on the basis of race or membership in a language minority group. Section 2 is enforced through litigation brought by the Justice Department, and also frequently is enforced through lawsuits filed by private individuals and groups. The most complex and important Section 2 cases have been the vote dilution cases, and because of the Voting Section's resources and expertise, the Justice Department has played a crucial role in the enforcement of Section 2. The 1982 amendments to the VRA established a "results test" for proving minority vote dilution under Section 2. Since then, the most important VRA cases brought by the Voting Section have been those challenging at-large elections and redistricting plans that dilute African-American, Hispanic and American Indian voting strength.

Third, Section 203 and Section 4(f)(4) of the VRA , which first were passed in 1975, require jurisdictions to provide language assistance including bilingual written materials and oral assistance if the numbers of limited English proficient Spanish Heritage, Asian American or American Indian voting age citizens exceed specified thresholds.

Fourth, Sections 6, 7 and 8 of the VRA provide the attorney general with the authority to dispatch federal observers to monitor the voting process in the jurisdictions covered under Section 4.

The Voting Section also enforces several other voting rights laws not directly addressing discrimination issues—the Help America Vote Act of 2002 (HAVA), the National Voter Registration Act of 1993 (NVRA or Motor-Voter) and the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA).

STRUCTURE OF THE CIVIL RIGHTS DIVISION'S VOTING SECTION

The Voting Section is a component of the Department of Justice's Civil Rights Division. The Voting Section reports to the assistant attorney general for civil rights, a presidential appointee, to whom the attorney general has delegated the authority to institute and defend voting rights litigation on behalf of the United States, and to make administrative decisions under Section 5 of the VRA. The immediate staff of the assistant attorney general are primarily political appointees, although one attorney historically has served as a "career" deputy assistant attorney general. Typically one deputy assistant attorney general and one or more counsel review the recommendations of the Voting Section on behalf of the assistant attorney general, although the ultimate decision to bring litigation or interpose Section 5 objections remains with the assistant attorney general.

The Voting Section's Section 5 work is handled by a staff of career attorneys and civil rights analysts, who, together with the support staff, are managed by a section chief and several deputy chiefs. A principal deputy position was created in 2005. Career attorneys also fill several special counsel positions. The deputy chiefs and special counsel supervise particular investigations, litigation and other matters. The Voting Section also has carried a staff of social science professionals, which recently has included a geographer, a statistician and a historian.

From the early 1980s a single deputy chief has been designated to supervise the crucial Section 5 administrative review process, although as of January 2007 that position had been unfilled for a number of months. The Section's staff of career civil rights analysts is dedicated to reviewing Section 5 administrative submissions; the Section's attorneys also review the more complex administrative submissions as required. It has been a longstanding practice to assign several career attorneys to serve as full-time "attorney-reviewers" to assist the Section 5 deputy in supervising the review of Section 5 administrative submissions by attorneys and analysts. Approximately 40 percent of the Section's staff has been allocated to Section 5 responsibilities.

SUMMARY OF VOTING SECTION ENFORCEMENT

SECTION 5

Background Information

Section 5 applies mostly, but not exclusively, to states located in the South and Southwest. As enacted in 1965 and amended in 1970, jurisdictions were covered based upon their use of literacy tests and other discriminatory devices that were known to have been used to bar African American citizens from registering and voting. In 1975, Section 5 coverage was extended to jurisdictions that administered their elections only in the English language in a manner that inhibited participation by language minority citizens. Currently, the covered areas include Alabama, Arizona, Georgia, Louisiana, Mississippi, three of New York City's five boroughs, forty of North Carolina's one hundred counties, South Carolina, Texas, and all of Virginia except for a few counties and independent cities that recently have been released from coverage, as permitted by Section 4 of the VRA. In addition, Section 5 covers a small number of counties in California, Florida and South Dakota, and townships in Michigan and New Hampshire.[1]

The Section 5 preclearance requirement applies to any and all types of voting changes that the covered jurisdictions enact or seek to initiate. This includes changes that have the potential to dilute the opportunity of minority citizens to cast an effective vote, such as redistrictings, changes in the method of electing officials (including changes to at-large elections, majority-vote requirements, and provisions limiting or prohibiting the use of single-shot voting), and annexations and other changes in jurisdictions' boundaries. It also includes changes regarding the administration of elections, including changes in voter registration procedures, polling place procedures, early voting and absentee voting procedures, polling places and early voting locations, the procedures for providing election information in

languages other than English, and candidate qualifications and qualification procedures.[2]

As a matter of practice, jurisdictions almost always choose the Justice Department route to preclearance because it is substantially faster, cheaper, and simpler than initiating a case in the District Court for the District of Columbia. The Justice Department's records reflect that, since 1965, Section 5 jurisdictions have submitted over 440,000 voting changes to the Justice Department but have filed only sixty-eight preclearance lawsuits involving perhaps several hundred voting changes.

Section 5 Nondiscrimination Standards

As noted, Section 5 prohibits covered jurisdictions from enacting or seeking to administer voting changes that have a discriminatory purpose or a discriminatory effect. The specific meaning of these two nondiscrimination standards has been the subject of recent controversies and is discussed below.

First, the Section 5 effect standard prohibits covered jurisdictions from implementing any voting change that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[3] Pursuant to this standard, an "effects" analysis is conducted by comparing minority voters' relative electoral opportunities under the new and the pre-existing provisions. A change has a discriminatory effect if it would worsen minority electoral opportunity, but does not have that effect if it either would improve minority opportunity or leave that opportunity unchanged. A non-retrogressive voting change does not violate the Section 5 effect standard even if it fails to allow minority voters an equal and nondiscriminatory opportunity to participate in the political process.[4]

Historically, both the courts and the Justice Department have applied the retrogression standard to those changes that potentially might dilute minority strength by focusing on the effect of the changes on the ability of minority voters to elect candidates of their choice. However, in 2003 the Supreme Court substantially reinterpreted this approach in its controversial five-to-four decision in *Georgia v. Ashcroft*. The Court held that while the retrogression analysis would continue, in part, to include consideration of the impact of a change on the ability of minority voters to elect candidates of their choice, it also must include consideration of the impact of the change on the opportunity of minority voters to influence (but not decide) elections, and the impact of the change on the ability of representatives chosen by minority voters to exert leadership, influence, and power once they enter into the legislative body to which they were elected.[5] This revision of the retrogression standard raised substantial concern that it would allow discriminatory changes to be precleared and, furthermore, that it did not provide a workable basis on which to analyze the effect of submitted voting changes. As a result, in 2006 Congress amended Section 5 (as part of a Section 5 reauthorization, discussed below) to return the retrogression standard to the previous "ability to elect" focus.

The Section 5 purpose standard historically has been implemented by the courts and the Justice Department to complement the effect standard by broadly interpreting it as prohibiting the implementation of voting changes that have any discriminatory intent, regardless of whether the intended harm is retrogression or vote dilution. In 2000, however, in another controversial 5–4 decision, the Supreme Court in *Reno v. Bossier Parish School Board* held that discriminatory purpose under Section 5 only could have a much more limited meaning: henceforth, only an intent to cause retrogression would violate Section 5 and other discriminatory purposes no longer would be prohibited.[6] This effectively read the purpose standard out of Section 5 since, as reinterpreted, the standard now added little or nothing to the prohibition on retrogressive voting changes contained in the Section 5 effect standard.[7] The Court's holding in *Bossier Parish School Board* also effectively reversed several prior decisions of the Court that held that the Section 5 purpose standard applies to any and all discriminatory purposes, and was not limited to retrogressive purpose.[8] In response, Congress amended Section 5 in 2006 to return the purpose standard to its former meaning, so that it now again prohibits the implementation of voting changes that have any discriminatory purpose.

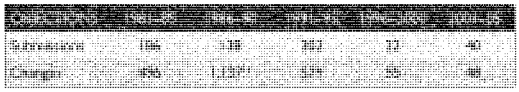
Prior to 1997, the Justice Department also reviewed voting changes to determine whether they complied with other provisions of the VRA, including Section 2 and Sections 4(f)(4) and 203. However, in that year the Supreme Court held, this time by a 7–2 vote, that such reviews are not permitted by Section 5.[9] This reinterpretation of Section 5 was not altered by Congress in the 2006 legislation.

ENFORCEMENT OF SECTION 5 BY THE BUSH ADMINISTRATION

Two things stand out with regard to the Bush administration's administrative enforcement of Section 5. First, it has interposed very few Section 5 objections. As discussed below, this appears to be the result of forces outside the control of the Justice Department, and, with the notable exceptions discussed below, does not appear to be a consequence of the manner in which the Bush administration has exercised its discretionary enforcement authority. Second, the Bush administration's stewardship of the Section 5 preclearance process in certain high profile submissions has been highly politicized and, as a result, the Justice Department made inappropriate decisions and damaged its credibility.

The Low Number of Section 5 Objections

From 2001 through 2005, the Justice Department interposed objections to a total of only 48 voting changes contained in 40 separate submissions made by Section 5 jurisdictions. The extent to which this represents an historically low number of objections is made clear when one compares the number of objections interposed during this five-year period to previous five-year periods dating from 1981 though 1995. As indicated by the following table, the number of objections remained high until the mid-1990s, when there was a sharp drop-off in objections that has continued to the present day.[10]



Calendar Years	1981–85	1986–90	1991–95	1996–2000	2001–05
Objections	186	118	102	77	40
Changes	490	1,197	1,[illegible]	95	48

It does not appear that the low number of Section 5 objections during the Bush administration generally is the result of any failure on the part of the Justice Department to vigorously enforce the preclearance requirement. As noted, the number of objections noticeably began to decrease during the Clinton administration, when the Justice Department was seeking to enforce Section 5 to its full extent. The conclusion that the Justice Department's enforcement approach generally is not responsible for the low objection numbers also is supported by the experiences of two of the authors of this essay who, up until recently, occupied leadership posts in the Voting Section of the Department's Civil Rights Division.

The lower number of objections during the Bush administration also is not attributable to a decrease in the overall number of preclearance submissions to the Justice Department. From 2001 to 2005, Section 5 jurisdictions submitted over 81,000 voting changes to the Department in a total of almost 25,000 submissions. These numbers are comparable to the submission numbers for the previous five-year periods included in the preceding data table.

Instead, the lower number of objections appears to be the result of other factors. First, the Supreme Court's 2000 decision in *Bossier Parish School Board* appears to have exacted a heavy toll on the Justice Department's ability to interpose objections. Prior to that holding, an increasing percentage of the Department's objections were to nonretrogressive voting changes and were based on the Section 5 purpose standard. During the 1980s, a little over a fourth of the objections fell in that category and, in the 1990s, a little over a half did so.[12] The Department particularly relied on the purpose standard in interposing objections to redistricting plans: about a third of the Department's objections to post-1980 redistricting plans were to nonretrogressive plans and were based on discriminatory purpose; and in the 1990s over four-fifths of the redistricting objections fell in that category.[13] In addition, from the mid-1980s to the mid-1990s, the Department interposed a significant number of objections based on discriminatory purpose to changes from at-large election methods to mixed systems of districts and at-large seats.[14] The number of objections to redistrictings and mixed election systems initially fell in the mid-1990s, when the post-1990 Census redistricting cycle ran its course and the number of jurisdictions changing from at-large elections also substantially slowed. However, following the 2000 Census, it is likely that a larger number of objections again would have been interposed to non-retrogressive, intentionally discriminatory redistricting plans but for the Supreme Court's decision in *Bossier Parish School Board*, given the history of Section 5 redistricting objections following the previous two censuses.

Second, it appears that the reduction in the number of objections beginning in the mid-1990s also may be attributed to the success the VRA has enjoyed in requiring or encouraging local governments in the covered

areas to abandon their at-large election systems in favor of single-member district systems, or mixed district/at-large systems, that better reflect minority voting strength. Historically, the three types of voting changes that have accounted for the great majority of the Justice Department's Section 5 objections are annexations, election method changes, and redistrictings. Annexation objections typically have been based on the retrogressive effect of annexing white population in the context of an at-large method of election and racially polarized voting; a substantial portion of the Department's election method objections similarly have been based on retrogression and the use of at-large elections in the context of polarized voting (i.e., objections to the adoption of at-large elections, and the adoption of provisions such as majority-vote requirements and numbered posts that may limit minority electoral opportunity when added to a pre-existing at-large system). During the 1980s and into the 1990s, a large number of counties, cities and school districts in the covered areas changed from at large to district or mixed election systems as a consequence of Congress' adoption of the Section 2 results standard in 1982, and also as a result of Section 5 objections to annexations and other changes.[15] This may have increased the possibility of the covered jurisdictions enacting discriminatory redistricting plans, but it has substantially reduced the number of discriminatory annexations and election method changes that recently have been adopted.

There are other, somewhat more speculative explanations that could be offered for the reduction in the number of Section 5 objections over the past ten years. First is the increased deterrent effect of Section 5.[16] In other words, it may be that the covered jurisdictions are doing a better job at avoiding discriminatory voting changes because they are paying more attention to Section 5 during the process of adopting voting changes. Second, some might argue that jurisdictions are doing a better job because of a sea change in attitudes toward minority participation in the political process as minority registration has dramatically increased in covered jurisdictions. Third, and related to the above explanations, there has been an increase in the number minority elected officials (largely due to the election method changes noted above), and such representation has increased the ability of the minority community to successfully oppose discriminatory voting changes.

The Politicization of Section 5

Historically, the Justice Department has adhered to a strong institutional norm against efforts to inject partisan political considerations into its Section 5 decision-making.[17] This has been a significant accomplishment given that its preclearance decisions can directly affect who gets elected to office, particularly its decisions regarding redistrictings, election method changes, and annexations. The political appointees in the Bush administration, however, have failed to maintain this high standard of conduct. In a series of preclearance determinations regarding voting changes of great importance to minority voters, the Justice Department has corrupted the Section 5 process by allowing partisan politics into the Section 5 decision-making calculus.

The influence of politics first became apparent only a few months after the Bush administration's political leadership of the Civil Rights Division was put in place in the summer of 2001. In December 2001, the Justice Department was asked by the State of Mississippi to review its plan for redrawing its congressional districts in light of the 2000 Census. In conducting this review, the Department proceeded to use the Section 5 process to enable the Republican Party of Mississippi to substitute its plan for the state's plan. The Department took this action not because of any discrimination concerns associated with the state's plan, but rather simply because the Republican plan would better enable President Bush's party to elect congresspersons from this state.[18]

The somewhat complicated chain of events that set the stage for the Justice Department's Section 5 decision-making on the Mississippi plan is as follows. Under state law, the Mississippi legislature was responsible for enacting a new congressional redistricting plan, but failed to do so. A Mississippi state court then ordered a plan into effect a plan that was favored by the state Democratic Party. Because the state court is an arm of the state government, the new plan had to receive Section 5 preclearance to be implemented, and accordingly the State of Mississippi submitted this plan to the Justice Department for review. However, the Republican Party brought its own lawsuit in federal district court, and the federal court entered into the fray by stating that it would order into effect its plan, drawn by the state Republican Party, if the state court plan was not precleared by the Department of Justice by February 27, 2002. This at first did not seem to be noteworthy since the State's December 2001 submission to the Justice

Department gave the Department ample time to review the state plan by the February 27, 2002 deadline (Section 5 grants the Department 60 calendar days in which to conduct administrative reviews, and that 60-day period was due to expire before February 27). Indeed, Voting Section staff attorneys quickly reviewed the state court plan and, when that review demonstrated that the plan did not adversely affect minority voters, they recommended that the Department grant preclearance.

Nonetheless, political appointees in the Assistant Attorney General's office rejected the preclearance recommendation, notwithstanding the fact that they failed to identify any discrimination concerns with regard to the plan submitted by the State. Instead, they ordered that the Department exercise its authority to extend the review period beyond the February 27 deadline by asking the State on February 14, 2002, to provide a substantial amount of additional written information with regard to the fact that it was a state court, rather than the state legislature, that had adopted the new plan. This change in the enacting authority was technically a voting change (because the state court previously had not been thought to have the authority to order a state congressional plan into effect) and this voting change technically needed to be precleared by the Department in order for the Department to preclear the state's new congressional plan. However, there was no reason to believe that it was discriminatory for a state court to have the authority to order a new plan into effect if and when the state legislature fails to carry out its redistricting responsibility. As a result of this "more information" letter, the February 27 deadline passed without a final preclearance decision by the Justice Department on the state plan, and the federal court ordered its plan into effect.

The Justice Department's request for additional information was highly irregular first because, as noted, the Department was seeking information that almost certainly was not going to affect the its ultimate preclearance decision.[19] In addition, the decision to request additional information was irregular because it was made by the Civil Rights Division's political staff over the unanimous recommendation of the Division's career staff to preclear the state court plan as well as the change in the authority of the state court. It is extremely unusual and perhaps unprecedented for the Division's political staff to override a unanimous staff recommendation to preclear a submitted change.

In 2003, partisan political concerns again played an important role in the Justice Department's preclearance of the controversial mid-decade Congressional redistricting plan enacted by the State of Texas. This was the highly partisan plan that had been adopted by the state legislature at the urging of then Republican House Majority Leader Tom DeLay. It was drawn in 2003 after an initial post-2000 plan had been implemented by a federal district court in 2001 (following the Texas legislature's failure to adopt a new plan). The 2003 plan was designed solely to increase the voting strength of the Republican Party in Texas (and it eventually resulted in the gain of five congressional districts for Republicans). However, in order to accomplish this end, the plan targeted several areas of minority voting strength, which had the effect of both limiting the opportunity of minority voters to elect candidates of their choice to Congress and their opportunity to exert a substantial influence in congressional elections.[20] As a result, the career staff of the Voting Section concluded in a detailed, lengthy memorandum that the plan violated Section 5 because it resulted in a retrogression of minority electoral opportunity.[21] Nonetheless, the Department's political appointees precleared the plan.[22]

In 2005, the Justice Department precleared a Georgia law requiring voters to present government-issued picture identification in order to vote at the polls on election day. The enactment represented one of the leading examples of legislation advocated by a number of Republicans across the country to deal with alleged problems of fraudulent voting at the polls but which would erect barriers to voting that particularly would harm minority voters. The Voting Section staff prepared a detailed memorandum recommending an objection. Included in the memo was reference to an explicitly racial statement by a state legislator who was the sponsor of the legislation. The legislator said, "if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud" and added that "when black voters in her black precincts are not paid to vote, they do not go to the polls."[23] Yet, the very next day the Department precleared this law even though it received additional information from the State on that same day that was not fully analyzed. Contrary to the normal procedure within the Department, the staff memorandum recommending an objection was not forwarded to the Assistant Attorney General for Civil Rights for consideration prior to him making the final preclearance decision.[24]

Historically, the Justice Department has avoided partisan application of the preclearance requirement in large part because of the well-established, bottom-up, process applied to Section 5 decision-making. Under this process, the nonpolitical career staff of the Civil Rights Division is solely responsible for investigating and making recommendations on all Section 5 submissions, and the staff's analyses frame each preclearance determination in terms of the law of Section 5 and the facts pertinent to the specific submitted change. This has had the effect of steering the political staff to make appropriate Section 5 decisions based upon the law and the facts, and not based upon partisan interests.

The rejection of the staff recommendations in each of the high profile and sensitive matters discussed above is an historical anomaly. In both Democratic and Republican administrations the political staff almost always has agreed with staff recommendations to interpose an objection and, as noted, it is extremely unusual for the political staff to reject a recommendation that a submitted change be precleared. In the few instances when staff recommendations to deny preclearance have been rejected by political appointees during past administrations, memoranda or written explanations of the reasons for such rejections were prepared by political decision-makers for career staff to provide the legal rationale for the decision and to make a complete record of the decision-making process to guide future Section 5 decisions. This longstanding deliberative process also has played an important role in ensuring that inappropriate political factors do not influence Section 5 decision-making. However, in each of the above instances in which staff recommendations were rejected, political staff did not prepare any such explanation for their rejection of the staff recommendations. This not only deviated from longstanding practice but also reflected the chasm that had grown between career and political staff in the Bush administration.

Compounding this break from well-established process was the Department's response to staff memoranda with which they disagreed. As reported in *The Washington Post* in December 2005, Voting Section leadership instituted a new rule requiring that staff members who review Section 5 voting submissions limit their written analysis to the facts surrounding the matter and prohibited the career staff from making recommendations as to whether or not the Department should impose an objection to the voting change.[23] This is a radical change in the Voting Section's Section 5 analytical practices, undermining the bottom-up decision-making process developed over the past thirty years. This is especially disturbing in light of the series of decisions discussed above because prohibiting staff recommendations on submissions increases the ability of political appointees to make politically-motivated preclearance decisions without appearing to repudiate career staff directly. The abandonment of the process does serious damage to a principled administration of the law.

In sum, the Bush administration has abused the authority entrusted in the Justice Department to fairly and vigorously enforce Section 5 of the VRA, and thereby protect the voting rights of our nation's minority citizens, by allowing partisan political concerns to influence its decision-making. This has damaged the Section 5 process, undermined the credibility of the Justice Department and the Civil Rights Division, and resulted in discriminatory voting changes being precleared.

Section 5 Declaratory Judgment Actions

During the Bush administration, Section 5 jurisdictions have filed five declaratory judgment actions in the District Court for the District of Columbia seeking preclearance of particular voting changes. All but one of these lawsuits was dismissed when the changes were addressed by the Justice Department in administrative reviews. The one lawsuit that was litigated, in part, was the *Georgia v. Ashcroft* case discussed above. The State sought judicial preclearance of its 2001 congressional, state house of representatives, and state senate redistricting plans. The Justice Department agreed that the congressional and state house plans were entitled to preclearance, and opposed preclearance of the state senate plan only with regard to the manner in which three senate districts had been redrawn. The district court agreed with the Justice Department that the state senate plan should not be precleared[24] but, for the reasons noted above, the Supreme Court vacated the district court's decision. On remand, the suit was dismissed after the State's interim senate plan (which had a population deviation nearly identical to the 2001 plan at issue in the D.C. case) was found unconstitutional in a separate case by a federal court in Georgia based upon a one-person, one-vote violation, and thus the D.C. Court did not address the legality of the 2001 plan on remand.

REAUTHORIZATION OF SECTION 5 IN 2006

The Substance of the Reauthorization Legislation

In July 2006, Congress enacted and President Bush signed into law the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006, reauthorizing Section 5 for an additional twenty-four years, until 2031. The previous reauthorization of Section 5, in 1982, had extended the statute until 2007.[27] As is discussed in further detail below, the legislation also extended the language minority requirements of Sections 4(f) and 203 until 2031 and 2032, respectively, and extended to 2031 the authority of the Attorney General to send federal observers to monitor elections in the Section 5 jurisdictions.[28]

The 2006 legislation made two important changes to the Section 5 nondiscrimination standards, as discussed above, while retaining the statute's existing geographic and subject-matter coverage limitations and the existing preclearance procedures. The legislation overrides the Supreme Court's re-interpretation of the Section 5 purpose standard, in the 2000 *Reno v. Bossier Parish* case, by specifying that "[t]he term 'purpose' . . . shall include any discriminatory purpose." Accordingly, the test for discriminatory purpose under Section 5 is again the same as the constitutional test under the Fourteenth and Fifteenth Amendments, and is no longer restricted to the question of whether covered jurisdictions were motivated by a purpose to retrogress minority voting strength. The legislation also generally overrides the Supreme Court's recent re-interpretation of the Section 5 effect standard, in *Georgia v. Ashcroft*, by specifying that the question of retrogressive effect is to be analyzed by focusing on "the ability of [minority] citizens to elect their preferred candidates of choice." Accordingly, it appears that a voting change that retrogresses the opportunity of minority voters to elect their preferred candidates no longer can be justified by arguing that the change increased the number of minority "influence" districts and/or by arguing that the change increased the power of legislators aligned with minority legislators.[29]

As was also noted above, the reauthorization legislation does not override the Supreme Court's ruling in the 1997 *Bossier Parish* case that preclearance denials may not be based solely on violations of other provisions of the VRA, such as Section 2 or Section 203. Such an amendment was not proposed in Congress and was not sought by civil rights groups.

The Legislative Process

Initially, the reauthorization legislation had broad bipartisan support. After extensive oversight hearings were held in the fall of 2005 by a subcommittee of the House Judiciary Committee, the bill to reauthorize Section 5 (and reauthorize Sections 4(f) and 203, and the Attorney General's election-observer authority) was introduced in the House on May 2, 2006 by the Republican Chairman of the House Judiciary Committee, James Sensenbrenner. The bill gained 152 co-sponsors, including, most significantly, the Speaker of the House, Dennis Hastert, the Minority Leader, Nancy Pelosi, and the ranking minority member of the Judiciary Committee, John Conyers. The next day, an identical bill was introduced in the Senate by the Republican Chair of the Senate Judiciary Committee, Arlen Specter, and gained 57 co-sponsors, including the Majority Leader, Bill Frist, the Minority Leader, Harry Reid, and the ranking minority member of the Senate Judiciary Committee, Patrick Leahy. The legislation appeared to be on its way to almost certain enactment when, a few weeks thereafter, it was overwhelmingly approved by the House Judiciary Committee by a vote of 33 to one.

The legislative process, however, then became more complicated and the end result more uncertain. In late June, the House leadership sought to call the bill up for consideration on the House floor but a large group of Republican representatives revolted, expressing opposition to retention of the existing geographic coverage provisions of Section 5 and opposition to continuation of the bilingual balloting requirements of Sections 4(f)(4) and 203. As a result, the leadership reversed course and refused to bring the bill to the floor. This action raised a substantial question as to whether the leadership in the House or Senate would give either body the opportunity to vote on this legislation in 2006.

The legislative tide turned again, however, after several weeks of discussion, negotiation, and lobbying by outside groups, and the bill was finally brought to the House floor in mid-July. The House then defeated four amendments that would have altered and undermined the legislation, including amendments that sought to substantially restrict the geographic coverage of Section 5 and an amendment that would have deleted the extension of the bilingual balloting requirements. The latter proposal received the most support, being defeated by a vote of 185 to 238. The House then passed the legislation on July 13, 2006, by a vote of 390 to 33.

Almost immediately thereafter, the opponents of the bill in the Senate decided to forego any effort to defeat or significantly amend the legislation. The bill sped through the Senate Judiciary Committee (which previously had held several hearings on reauthorization) to the Senate floor, and on July 20, 2006, the Senate joined the House in approving the legislation by a vote of 98 to zero. The President signed the legislation on July 27, 2006.

During the legislative process, President Bush and the Justice Department expressed general support for an extension of Section 5 and strongly supported extension of the bilingual balloting provisions, but took a passive role in terms of obtaining congressional passage. The Justice Department's relative silence was particularly notable and of concern given its role as the principal draftsman of the VRA in 1965, and as the principal entity responsible for enforcing both Section 5 and the bilingual provisions. In reauthorizing Section 5 in the past, Congress always had looked to the Department to provide specific data about the nature and scope of the Department's preclearance decisions during the preceding authorization period and it had provided extensive data and otherwise participated in the legislative process. However, during the recent reauthorization process, the Department made a conscious decision in 2005 not to gather and prepare the necessary data, although the Department knew that it was reasonably likely that reauthorization would be considered by Congress in 2006. While the Department eventually did provide data to Congress once the hearings began, its initial decision resulted in its abandoning its historical position of playing a central role in the passage and reauthorization of the VRA and raised considerable concern among congressional proponents and civil rights groups as to what the Department's eventual position would be.

Challenges to the Constitutionality of Reauthorizing Section 5

Prior to Congress reauthorizing Section 5, there was a great deal of discussion among law professors and legal practitioners as to whether Congress possessed the authority under the Fourteenth and Fifteenth Amendments to extend the term of Section 5 beyond 2007. The Supreme Court has twice rejected broad challenges to the constitutionality of Section 5,[30] and rejected a third "as applied" constitutional challenge.[31] Nonetheless, there is a substantial question as to whether the Supreme Court would conclude that this fourth reauthorization of Section 5 satisfies the current test for assessing congressional authority to adopt civil rights legislation pursuant to the Civil War Amendments. This test specifies that Congress only may enact remedies that are "congruent and proportional" to the unconstitutional conduct that is to be prevented or remedied.[32] Precisely how this test applies to the reauthorization, rather than the original enactment, of a civil rights remedy, and, in particular, how this test applies to the reauthorization of Section 5, is not clear.

Shortly after the 2006 renewal, a lawsuit was filed challenging the constitutionality of the 2006 reauthorization. As required by Section 14(b) of the VRA, 42 U.S.C. § 1973l(b), the suit was filed in the District Court for the District of Columbia. At this time this case is pending before a three-judge court in that court.[33] Although Congress assembled a compelling factual record that fully supports the reauthorization of Section 5, the Justice Department's failure to make its best case for doing so during the legislative process is likely to haunt its efforts in defending this and other such challenges.

SECTION 2 OF THE VRA

Until the Bush administration, the investigation and prosecution of racially discriminatory election practices under Section 2 of the VRA was a priority of the Voting Section, especially after 1982, when Congress amended Section 2 to its current form. After six years in office, the Bush administration has brought fewer Section 2 cases, and brought them at a significantly lower rate, than any other administration since 1982. The fact that Section 2 enforcement has now come to a virtual standstill reflects a decision by the administration that developing these cases—and especially Section 2 cases on behalf of African American and American Indian voters—should not be a priority.

While Section 2 most often is thought of as applying to at-large elections systems or redistricting plans, it is applicable to a variety of election practices. For the Department of Justice, which cannot institute litigation based solely upon the Constitution, Section 2 provides the jurisdictional basis to challenge intentional racial discrimination in the voting process. Nevertheless, challenges based upon minority vote dilution have been the primary application of amended Section 2, and the Bush administration's Section 2 enforcement record has been the point of repeated criticism.

The Voting Section filed a total of 33 Section 2 cases (involving vote dilution and/or other types of claims) during the 77 months of the Reagan administration that followed the 1982 amendment of Section 2; eight were filed during the 48 months of the Bush I administration; 34 were filed during the 96 months of the Clinton administration; while ten were filed so far during the first six years of the Bush II administration.[36] Thus, the overall rate of Section 2 claims per year for the current administration is the lowest among any administration following the 1982 Amendments; in descending order they were Reagan: 5.1 per year; Clinton: 4.25 per year; Bush I: 2 per year; Bush II: 1.67 per year.

However, in considering the current administration's Section 2 record, the most relevant comparison is between the final six years of the Clinton administration and the six years elapsed to date in the Bush II administration.[37] This comparison shows a clear disparity between the number and types of Section 2 cases the Voting Section filed.

A total of 22 cases were filed under Section 2 during the final six years of the Clinton administration (a rate of 3.67 cases per year). Fourteen of those cases raised vote dilution claims: six on behalf of black citizens, four on behalf of Hispanic citizens and four on behalf of American Indian citizens.[38] Three of the eight cases raising other types of Section 2 claims involved Hispanics, two involved African Americans, two involved American Indians, one involved Asian Americans and one involved Arab Americans[39] (see Table 1).

TABLE 1: CLINTON ADMINISTRATION (JANUARY 1995 FORWARD)

	Cases	Hispanic Claims	African-American Claims	American Indian Claims	Asian Claims	Other Claims
Dilution	14	4	6	4	0	0
Other	8	3	2	2	1	1
Total[38]	22	7	8	6	1	1

The comparable data for the current administration show a total of 10 Section 2 cases of any type, only five of which involved vote dilution claims.[40] Three of those five vote dilution cases involved Hispanic voters, while the other two concerned African American voters. Among the current administration's five other cases invoking Section 2, four stated claims on behalf of Hispanic citizens, one raised a claim on behalf of Asian citizens and one was on behalf of white citizens[40] (see Table 2).

Furthermore, the statistics provided above are, if anything, overly charitable toward the Bush administration, because two of the four vote dilution cases filed during this administration in 2001 resulted from investigations during the Clinton administration. *United States v. Crockett County, Tennessee*, one of only two cases filed on behalf of African Americans since 2001, more fairly should be attributed to the Clinton administration because it was a case investigated and approved for pre-suit negotiations during the final months of the Clinton administration, with the complaint and completed consent decree then filed in April, 2001 shortly after the beginning of the Bush administration. Similarly, *United States v. Alamosa County, Colorado*, brought in 2001 on behalf of Hispanic voters, was like *Crockett County* fully investigated during the Clinton administration.[41]

These patterns clearly indicate that targeting Section 2 vote dilution violations has not been a priority for this administration. It is equally clear that Section 2 cases involving African American and American Indian citizens are not a priority for the current administration. Whereas eight of the 22 Section 2 cases filed in the last six years of the Clinton administration were on behalf of African American citizens, and six were on behalf of American Indians, only two Section 2 cases of any type have been filed by this administration on behalf of African American citizens and none has been filed on behalf of American Indian citizens.[42]

There are strong reasons for the Voting Section to continue to target, investigate and prosecute Section 2 violations, especially vote dilution violations. First, solely as a policy matter, the Department of Justice has been charged by Congress to enforce Section 2. While the Department has legitimate discretion to prioritize its efforts, it abuses that discretion if it chooses to disregard enforcement of major civil rights laws entrusted to it.

In addition, the Voting Section historically has had the resources and experience to pursue Section 2 cases based solely upon their merit.

Furthermore, there is no reason to be confident that jurisdictions that were in compliance with Section 2 in the past will necessarily stay that way. Fact patterns in jurisdictions often change over time, sometimes for the better, but in other cases giving rise to violations that were not previously evident. Demographic patterns obviously can change over time, in which case the first *Gingles* precondition—requiring proof that a majority-minority district can be drawn—may cease to be a barrier to establishing a Section 2 claim.[43] Moreover, increases in minority population and/or minority candidates unfortunately are often accompanied by increased racially polarized voting by members of the white community who feel threatened by such changes; this also would reinforce a Section 2 claim. For example, the Department's 2005 *Osceola County* case involved a jurisdiction in which the Hispanic population increased from twelve percent in 1990 to 29 percent in 2000; the lawsuit's claim of intentional discrimination was based upon the County's reversion from single-member districts to at-large elections for its county commission.

In other cases, minority groups that historically had only limited involvement in the electoral process may run into the barrier of racially polarized voting when they attempt to increase their participation. This often is the case with American Indians. Indeed, the Voting Section brought a series of Section 2 vote dilution cases involving American Indians in the late 1990s, including one which led to a major victory in Blaine County, Montana.[45] More recently, the ACLU has brought a series of Section 2 vote dilution cases on behalf of Indian voters, most recently against Fremont County, Wyoming.[46] Despite the very successful precedent of the *Blaine County* case, the Voting Section's efforts to investigate the Fremont County matter were rejected by political appointees.[47]

LANGUAGE MINORITY ENFORCEMENT

An analysis of cases demonstrates that the enforcement of the language minority requirements of the VRA has been by far the top priority of the Voting Section in the current administration.[48] Indeed, the number of language minority cases filed in recent years increased significantly, and officials of the Civil Rights Division invariably point to this record when other aspects of their enforcement activities are questioned.

The current administration has brought a total of 20 language minority cases, all but one of which followed the publication of the July 25, 2002 Section 203 language determinations.[49] All 20 cases involved Spanish-language claims; two cases included additional claims involving Asian-language groups.[50] Sixteen of these twenty cases raised claims under Section 203, 13 of which involved language groups that had been covered under Section 203 since at least 1992.[51] Two cases were brought against counties in Texas under Section 4(f)(4), under which the defendant jurisdictions had been covered since 1975.[52] Three cases brought language claims under Section 2.[53] Seven of these cases also included related claims under Section 208 of the VRA, which requires voting officials to permit voters who, among other things, do not have the ability to read or write (including read or write the English language) to have persons of their choice assist them when voting.

By contrast, the Clinton administration brought a total of seven language minority cases, three of which were brought during its final 65 months.[54] In all seven cases the language assistance claims were based upon Section 203. Three cases involved Spanish-language assistance, three involved Indian-language assistance and one involved Chinese-language assistance.

TABLE 2: BUSH II ADMINISTRATION

	Cases	Hispanic Claims	African-American Claims	American Indian Claims	Asian Claims	Other Claims
Dilution	5	3	2	0	0	0
Other	5	4	0	0	1	1
Total[44]	10	7	2	0	1	1

ENFORCEMENT OF OTHER VOTING LAWS

National Voter Registration Act

Since the effective date of the NVRA on January 1, 1995, the Voting Section has litigated several types of NVRA cases. The initial set of cases in 1994 and 1995 dealt primarily with constitutional challenges to the Act, which were resolved in favor of the NVRA's constitutionality.[55] Since this initial round of litigation, the Voting Section has brought a total of nine additional cases under the NVRA, one under the Clinton administration and the remainder under the current administration. Of the cases filed during the Bush administration, one dealt with the procedures for voter registration at Tennessee public assistance and driver licensing offices.[56] Two cases concerned the question of whether the NVRA's agency-based registration requirements applied to particular New York State agencies.[57]

The six remaining NVRA cases have been based upon Section 8 of the NVRA, which requires election officials to conduct a uniform general program to remove ineligible registered voters from the rolls.[58] The Voting Section's most recent NVRA cases—*United States v. New Jersey*, *United States v. Maine*, *United States v. State of Indiana* and *United States v. State of Missouri*—appear to establish a new direction in the Voting Section's NVRA enforcement. The complaints in these cases allege that these states have failed to comply with Section 8 of the NVRA because they have failed to take required steps to remove ineligible voters from the voter rolls in a number of counties. Unlike the Voting Section's two previous cases based upon Section 8 of the NVRA (*United States v. City of St. Louis* and *United States v. Pulaski County*), the *New Jersey*, *Maine*, *Indiana* and *Missouri* cases do not allege that the registration procedures at issue harmed the voting process by causing delay or confusion or by interfering with the ability to cast an effective ballot.[59] In short, the emphasis on enforcement of Section 8 of the NVRA is directed toward removing names from registration lists. This stems from a concern that failure to purge ineligible voters increases the potential for vote fraud. However, none of these cases alleges instances of vote fraud in the complaint.[60]

Help America Vote Act

The Help America Vote Act was enacted in the wake of the controversies following the 2000 general election. HAVA contained several provisions that are judicially enforceable, including requirements for the election day process (including the use of provisional ballots under certain circumstances, voter notices and voting machine requirements) and for election administration (in the form of a requirement for statewide voter registration databases).

The Voting Section has filed six cases containing HAVA claims,[61] and a seventh case was brought by the United States Attorney for the Southern District of New York.[62] In conjunction with language minority claims under Section 203 of the VRA, the *Cochise County*, *San Benito County* and *Westchester County* cases included claims that the defendants had not posted polling place signs advising voters of their rights and obligations as required by HAVA; the *San Benito County* case also included a claim that the County had failed to provide voters with a written description of the provisional ballot process.

The *New Jersey*, *Maine*, *New York* and *Alabama* cases all allege that the States have violated Section 303(a) of HAVA by failing to implement official statewide computerized voter registration lists.[63] The *New York* and *Maine* cases raise the additional claim that the State has failed to acquire new HAVA-compliant voting machines with federal funds it had received for that purpose, while the *Alabama* case alleges that the State also violated Section 303(b) of HAVA by failing to implement the required voter registration forms and matching procedures. In these cases there is no real dispute that the States have failed failure to implement the required statewide voter registration databases; the principal question appears to be how the Court will fashion remedies and how vigorous the Department will be in pursuing such relief.

The Department also filed several controversial *amicus curiae* briefs in HAVA cases that further indicate the politicization of decision-making on voting matters discussed above with respect to Section 5. In the weeks preceding the 2004 presidential election, the Civil Rights Division unsuccessfully argued in three *amicus* filings involving HAVA's provisional ballot requirement in Ohio, Florida and Michigan that private citizens could not enforce any rights under HAVA in the federal courts; that is, the Department took the position that it alone could enforce HAVA.[64]

These filings are extremely troubling. First, the Division historically has been in favor of private plaintiffs having access to the federal courts in order to vindicate their right to vote, and the Division's briefs went beyond the facts of these cases to attempt to restrict *any* private enforcement of the HAVA statute. Furthermore, while the Civil Rights

Division filed these briefs without an invitation from the Court, it can hardly be said that the Division had a compelling argument to interject into these cases: the Sixth Circuit utterly rejected DOJ's central argument that "a privately enforceable right may be conferred only with text that is 'clear and unambiguous.' HAVA comes nowhere near that high mark." (United States' Brief at 19), finding that "[t]he rights-creating language of HAVA § 302(a)(2) is unambiguous." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004)[55]

Second, the timing of these briefs so close to a major election on a highly charged partisan issue in states understood to hold the balance in the 2004 presidential election, and taking a position advocated by the Republican Party, all added to the perception that the Divison's voting rights decisions were driven by political considerations. Historically, the Department has avoided taking positions in politically charged voting matters so close to an election to avoid this message being sent.

Uniformed and Overseas Citizens Absentee Voting Act

The current administration has brought a total of seven cases under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)—two each in 2002, 2004 and three in 2006.[56] This is comparable to the record of the Clinton administration, which brought a total seven UOCAVA cases, five of which were filed during its last 65 months.[57]

Most states and jurisdictions have adjusted their election schedules and procedures so as to provide adequate time for overseas citizens to apply for, receive and return their absentee ballots in time to have them counted. Thus, many of the Voting Section's cases under UOCAVA have occurred under the deadline of approaching elections when it becomes apparent that special circumstances have delayed the mailing of absentee ballots. Nevertheless, the Voting Section's *North Carolina* suit in 2006 and its *Georgia* suit in 2005 concerned those States' general law provisions for federal primary elections.

CONCLUSION

The enforcement record of the Voting Section during the Bush administration is troubling for several reasons. First, partisan political factors have played a significant role in some of its most sensitive decisions. Over its 37-year history of the Voting Section, its career staff earned an outstanding reputation for professionalism and expertise in their enforcement of the VRA and other federal voting rights laws. Furthermore, the Section has developed procedures and processes that have been very successful in guarding against even the perception of political factors entering into enforcement decisions. This reputation has been severely damaged during this administration because of several controversial decisions and changes in traditional processes. The widespread perception and appearance of partisan favoritism has undercut the Division's credibility and threatens the long-term mission of the Voting Section.

Second, until this administration, elimination of discrimination against African Americans has always been the central priority of the Section's enforcement program. The VRA was passed to strengthen the federal government's role in fighting race discrimination against African Americans. Over the years, the mission of the Division expanded as the VRA was amended to protect other ethnic minorities and other voting rights laws were passed putting additional enforcement responsibilities on the Section. But, until this administration, combating discrimination against African Americans has remained a central priority of the Division through both Republican and Democratic administrations. The enforcement record of the Voting Section during the Bush administration indicates this traditional priority has been downgraded significantly, if not effectively ignored.

Third, enforcement of the primary nationwide anti-discrimination provision of the VRA—Section 2—has been significantly reduced. It certainly is appropriate for priority to be given to Section 203 enforcement, especially because the continued growth and increased civic involvement of language minority voting populations reinforce the need for an active program. But, it would be incorrect to argue that making Section 203 enforcement a priority requires a de-emphasis of Section 2 enforcement, especially to the extent that this has happened during this administration.

Congress has conducted only limited oversight of the Civil Rights Division's voting enforcement during the current administration. Given the concerns that surface when reviewing the Voting Section's enforcement record, increased congressional oversight now and in the future is crucial to restoring the appropriate role of the Department of Justice in the enforcement of federal voting rights laws.

ENDNOTES

1 U.S. Department of Justice, Civil Rights Division, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited January 2007).

2 Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. §§ 51.12, 51.13.

3 *Beer v. United States*, 425 U.S. 130, 141 (1976).

4 The "effects" standard has a further specialized meaning when applied to annexations. An annexation that significantly reduces the minority population percentage in the context of polarized voting violates Section 5 if the jurisdiction elects its governing body in a manner that does not fairly reflect minority voting strength. *City of Richmond v. United States*, 422 U.S. 358 (1975). Annexations that are denied preclearance on this basis subsequently may receive preclearance if the jurisdiction modifies its election method to satisfy the "fairly reflects" standard.

5 539 U.S. 461 (2003).

6 528 U.S. 320 (2000).

7 It has been suggested that an intent to cause retrogression in the future might be non-redundant, but this was not clearly established. The only other instance in which the "purpose to retrogress" standard could alter a preclearance determination is when the voting change is not retrogressive but the jurisdiction nonetheless intended that the change be retrogressive, i.e., when there is an "incompetent" retrogresser. But, in the over six years the Justice Department enforced the "purpose to retrogress" requirement no such incompetent retrogresser was identified.

8 *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *City of Richmond v. United States*, *supra*.

9 *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).

10 The objection data were obtained from data tables maintained by the Justice Department.

11 The objection figure for 1986–90 includes an objection in 1986 to 525 annexations by a single city, included in one submission.

12 Peyton McCrary, Christopher Seaman, & Richard Valelly, The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act, 11 MICH. J. RACE & L. 275, 297 (2006).

13 Mark A. Posner, The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous and Principled Enforcement, As Intended by Congress, 1 *Duke J. of Con. Law & Pub. Poly* 120, 152 (2006).

14 *Id.* at 153–54.

15 *Quiet Revolution in the South* (Chandler Davidson & Bernard Grofman, eds., 1994); Complete Listing of Objections Pursuant to Section 5 of the VRA available at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm.

16 *National Commission on the Voting Rights Act, Protecting Minority Voters, The Voting Rights Act at Work 1982–2005*, at 80 (2006).

17 James P. Turner, A Case-Specific Approach to Implementing the Voting Rights Act, in *Controversies in Minority Voting* 296 (Bernard Grofman & Chandler Davidson, eds., 1992).

18 It is true that the Republican plan did not provide any less electoral opportunity to minority voters than the State's plan, and thus the Justice Department's manipulation of the Section 5 process did not harm minority voters. This, however, does not alter the fact that the Section 5 process was abused to advance a partisan political end.

19 In *Branch v. Smith*, 538 U.S. 254, 263-64 (2003), the Supreme Court rejected a claim that this additional information request by the Justice Department was invalid. However, the claim rejected by the Court was that the Department lacked the legal authority to make this request, and the Court reached this conclusion by determining only that the information requested by the Department was facially relevant to the State's Section 5 submission. The Court did not examine the question whether, substantively, the Department's request made any sense.

20 At the time the Texas congressional redistricting plan was reviewed by the Justice Department, the Section 5 effect standard was governed by the analysis set forth by the Supreme Court in the *Georgia v. Ashcroft* case.

21 The staff memorandum, dated December 12, 2003, is available at www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf. Especially revealing is the fact that because of stated Section 5 concerns, the State legislature had initially approved plans less partisan than the plan that was eventually adopted by a legislative conference committee heavily influenced by DeLay staff members. Plans approved by the Texas House and Senate had left intact one longtime Democratic district with a majority of black and Hispanic voters, but when the final plan emerged from the conference committee, this district was obliterated and distributed to several surrounding districts. Prior to the conference, there were explicit concerns stated by Republican state legislators that the "cracking" of this district would violate Section 5. But, in the end, the plan approved by Texas was not only the most partisan, but also the one that raised the most serious Section 5 issues by eliminating this district. See Section 5 Recommendation Memorandum.

22 Subsequently, in *LULAC v. Perry*, 126 S. Ct. 2594 (2006), the Supreme Court ruled that the Texas redistricting plan diluted Hispanic voting strength in violation of Section 2 of the VRA. In a concurring and dissenting opinion, Justice Stevens took the unusual step of approvingly citing to the Justice Department Section 5 staff recommendation even though the recommendation was not in the record of the case. 126 S. Ct. at 2644–45.

23 See Section 5 Recommendation Memorandum, August 25, 2005, p.6, available at www.washingtonpost.com/wp-srv/nation/documents/texasDO-Jmemo.pdf.

24 A federal district court in Georgia subsequently issued a preliminary injunction preventing the State of Georgia from implementing the ID law that the Justice Department had precleared. The Court concluded that there was a substantial likelihood that the law violated the Constitution because it significantly burdened the right to vote guaranteed by the Fourteenth Amendment, and because it amounted to an unconstitutional poll tax, a technique used in the Jim Crow era to deny African Americans the right to vote. *Common Cause v. Billips*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). Thereafter, the State of Georgia enacted a similar photo ID law that omitted the provisions that prompted the district court to conclude that the first law was an unconstitutional poll tax. The Justice Department precleared this law, but the district court again issued a preliminary injunction. Common *Cause v. Billips*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006). A Georgia state trial court also invalidated the 2006 photo ID law on state constitutional grounds. That decision is on appeal to the state supreme court. *Lake v. Perdue*, No. 2006CV 119207 (Ga. Super. Ct. Sept. 19, 2006).

25 Dan Eggen, "Staff Opinions Banned in Voting Rights Cases," *The Washington Post*, December 10, 2005, p. A3.

26 *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002).

27 Section 5 originally was enacted in 1965 for a five-year term. It was extended in 1970 for five years and 1975 for seven years, prior to the twenty-five year extension enacted in 1982.

28 The legislation terminates the Attorney General's authority to send federal examiners to Section 5 jurisdictions to register persons to vote. This authority has rarely been utilized in recent years, and civil rights groups agreed that it no longer was needed.

29 The reauthorization legislation also slightly changes the language used to define the overall Section 5 nondiscrimination requirement. Under the pre-2006 version of Section 5, covered jurisdictions were required to demonstrate that a submitted voting change "does not have the purpose and will not have the effect" of discriminating. Under the reauthorization legislation, this part of Section 5 now reads "neither has the purpose nor will have the effect" of discriminating. It does not appear that this is a substantive change.

30 *City of Rome v. United States*, 446 U.S. 156, 173–80 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 329, 335 (1966).

31 *Lopez v. Monterey County*, 525 U.S. 266, 283–84 (1999).

32 *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

33 *Northwest Austin Municipal Utility District v. Gonzales, C.A.* No. 1-06CV01384 (D. D.C., filed August 4, 2006).

34 It would be misleading to suggest that the number of potential Section 2 cases has remained constant since the 1982 Amendments. Many jurisdictions with substantial minority populations and polarized voting abandoned at-large election systems in order to remedy or forestall Section 2 claims, and redistricting plans now usually are drawn so as to avoid Section 2 liability. Therefore, it is to be expected that the number of Section 2 cases will be lower than during the 1980s.

35 The first two years of the Bush II administration covered the post-2000 redistricting cycle, which required a substantial commitment of Voting Section resources, even at some cost to Section 2 enforcement. However, the Clinton Administration made a comparable commitment of resources during 1995 and 1996 to cases involving claims under the new doctrine of *Shaw v. Reno* and defense of the NVRA and so it is fair to compare these two time periods.

36 The six cases raising Section 2 vote dilution claims on behalf of African-American citizens were: *United States v. Lee County, Mississippi* (1995); *United States v. City of Baton Rouge, Louisiana* (1996); *United States v. City of New Roads, Louisiana* (1996); *United States v. Marion County, Georgia* (1999); *United States v. City of Morgan City, Louisiana* (2000); and *United States v. Charleston County, South Carolina* (2001). The four cases raising Section 2 vote dilution claims on behalf of Hispanic citizens were: *United States v. City of Lawrence, Massachusetts* (1998); *United States v. City of Passaic, New Jersey* (2000); *United States v. City of Santa Paula, California* (2000); and *United States v. Upper San Gabriel Valley Municipal Water District, California* (2000). The four cases raising Section 2 vote dilution claims on behalf of American Indian citizens were: *United States v. Blaine County, Montana* (1999); *United States v. Benson County, North Dakota* (2000); *United States v. Roosevelt County, Montana* (2000); and *United States v. State of South Dakota* (2000).

37 *United States v. Day County and Enemy Swim Sanitation District* (1999) raised claims of intentional discrimination against American Indians in the process of establishing the boundaries of a special purpose district. *United States v. Bernalillo County* (1998) involved claims of discrimination in the selection of American Indian poll workers, while *United States v. City of Passaic* (2000) raised similar claims with regard to Hispanic poll workers. *United States v. Board of Elections of City of New York* (1997) involved claims of discrimination against black and Hispanic voters by poll workers who helped coach white voters. *Grieg and United States v. City of St. Martinville* (2000) involved a cross-claim by the United States on behalf of black voters alleging that the City was denying the right to vote on account of race by failing to adopt a lawful redistricting plan and cancelling its elections. *United States v. City of Cicero* (2000) involved claims of intentional discrimination against Hispanic candidates. *United States v. Alameda County, California* (1995) concerned Asian American poll worker hiring; the case also raised a Section 203 claim. *United States v. City of Hamtramck* (2000) involved poll workers who participated in voter challenges to all Arab American citizens attempting to vote in a city election.

38 The total number of Section 2 cases filed was twenty-two; however, one case (*New York City Board of Elections*) stated Section 2 claims on behalf of both Hispanic and African-American citizens, and the total number of claims therefore is greater than the number of cases.

39 The three cases raising Section 2 vote dilution claims on behalf of Hispanic citizens were: *United States v. Alamosa County, Colorado* (2001); *United States v. Osceola County, Florida* (2005); and *United States v. Town of Port Chester, New York* (2006). The two cases raising Section 2 vote dilution claims on behalf of African-American citizens were: *United States v. Crockett County, Tennessee* (2001); and *United States v. City of Euclid, Ohio* (2006). The current Civil Rights Division press officers occasionally refer to Section 2 cases that the Division has "litigated"; this term appears to be intended to include cases filed in the previous Administration, such as *United States v. Charleston County, South Carolina*, which was filed at the end of the Clinton Administration. Given that the Charleston County case was exceptionally strong — as shown by the fact that the district court granted partial summary judgment to the United States on the three "*Gingles* preconditions", leaving only the totality of the circumstances for trial—it is good, but hardly remarkable, that the Administration allowed it to go forward.

40 Among the five cases raising other types of Section 2 claims, *United States v. Osceola County, Florida* (2002), *United States v. Berks County, Pennsylvania* (2003) and *United States v. City of Boston, Massachusetts* (2006), each included claims that the defendant jurisdictions (which were not otherwise covered under the language minority provisions of the VRA) violated Section 2 by failing to provide bilingual assistance: the *Osceola County* and *Berks County* cases stated claims on behalf of Hispanic citizens, while the Boston case raised Section 2 claims on behalf of Hispanic as well as Asian American citizens. These cases also identified the hostile treatment of voters as supporting their Section 2 claims. *United States v. Long County, Georgia* (2006) was based upon challenges to the eligibility of Spanish-surnamed voters. *United States v. Ike Brown and Newabee County, Mississippi* (2005), involved the claim that a black Democratic county chairman in Mississippi was targeting white voters for differential treatment; this was the first case brought by the Department of Justice alleging discrimination against white voters.

41 The only other Section 2 vote dilution case brought on behalf of African Americans by the Bush II Administration—*United States v. City of Euclid, Ohio*—was filed in July, 2006, only after significant adverse publicity about the Administration's voting rights enforcement record. *United States v. Osceola County, Florida*, which was brought in 2005 on behalf of Hispanic voters, was an especially strong case which included a claim of intentional discrimination as well as a results claim. The court in the *Osceola County* case initially granted the Department's motion for a preliminary injunction of at-large elections pending trial, and later issued final judgments in the Departments' favor on both liability and remedy in the fall of 2006.

42 Further highlighting the low priority given to cases to protect African-American voters is the *Newabee County, Mississippi*, Section 2 case filed in 2005 — the first case in which the Voting Section ever alleged discrimination against white voters. Regardless of the merits of the discrimination claims in Newabee County, it is ironic that at a time when no voting cases developed by the Bush Administration on behalf of African-American voters had been filed, the first case on behalf of white voters was filed in Mississippi.

43 In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court distilled the analysis of vote dilution claims under amended Section 2 to require that three initial conditions must be satisfied before a Court would be required to assess the totality of the circumstances. The first precondition requires that the minority population in a jurisdiction be sufficiently numerous that it can comprise a majority in a properly-apportioned single-member district. The second precondition requires proof of minority voter cohesion, and the third requires proof that white bloc voting usually leads to the defeat of minority voters' candidates of choice.

44 The total number of Section 2 cases filed was ten; however, one case (*City of Boston*) stated Section 2 claims on behalf of both Hispanic and Asian-American citizens, and the total number of claims therefore is greater than the number of cases.

45 United States v. Blaine County, Montana, 363 F.3d 897 (9th Cir. 2004). The current Administration pursued a vigorous defense of the district court judgment and the constitutionality of Section 2 as applied to Indians during the appeal of the case.

46 *Large v. Fremont County*, No. 2:05-cv-00270-ABJ (D. Wyo.).

47 Ironically, attorneys from the Civil Rights Division's Appellate Section intervened in the *Fremont County* case in 2006 on the limited issue of the constitutionality of Section 2.

48 In 2002 the Bureau of the Census released a new set of Section 203 covered jurisdictions as determined by the application of the statutory coverage formula to the 2000 Census data. The effort to ensure compliance with the new determinations was repeatedly identified as a high priority for the Voting Section.

49 The Voting Section has brought the following language minority cases during the current Administration: *United States v. City of Philadelphia, Pennsylvania* (2006); *United States v. City of Springfield, Massachusetts* (2006); *United States v. Brazos County, Texas* (2006); *United States v. Cochise County, Arizona* (2006); *United States v. Hale County, Texas* (2006); *United States v. Fetor County, Texas* (2005); *United States v. City of Boston, Massachusetts* (2005); *United States v. City of Azusa, California* (2005), *United States v. City of Paramount, California* (2005); *United States v. City of Rosemead, California* (2005); *United States v. Ventura County, California* (2004); *United States v. Yakima County, Washington* (2004); *United States v. Suffolk County, New York* (2004); *United States v. San Diego County, California* (2004); *United States v. San Benito County, California* (2004); *United States v. Brentwood Union Free School District, New York* (2003); *United States v. Berks County, Pennsylvania* (2003); *United States v. Orange County, Florida* (2002), and *United States v. Osceola County, Florida* (2002). In addition, the United States Attorney for the Southern District of New York brought *United States v. Westchester County, New York* (2005).

50 *United States v. San Diego County* included a Section 203 claim on behalf of Filipino voters; *United States v. City of Boston* included a Section 2 claim on behalf of Chinese and Vietnamese voters.

51 With regard to the *United States v. San Diego County* case, San Diego County had been covered for Spanish language since 1992 but was not covered for Filipino assistance until 2002. *United States v. Yakima County* involved a county that was not covered under Section 203 until 2002. *United States v. Cochise County* involves a county that was covered under Section 203 from 1975 until 1992, and then became covered again in 2002.

52 The *United States v. Boston County* and *United States v. Pator County* cases were brought under Section 4(f)(4).

53 *United States v. City of Boston* raised claims under Section 2 with regard to Chinese-language and Vietnamese-language assistance; *United States v. Berks County* and *United States v. Osceola County* both raised claims under Section 2 with regard to Spanish-language assistance.

54 *United States v. City of Lawrence, Massachusetts* (1998) (Spanish); *United States v. Passaic City and Passaic County, New Jersey* (1999) (Spanish); *United States v. Bernalillo County, New Mexico* (1998) (Indian); *United States v. Alameda County, California* (1999) (Chinese); *United States v. Socorro County, New Mexico* (1993) (American Indian); *United States v. Cibola County, New Mexico* (1993) (American Indian); *United States v. Metropolitan Dade County, Florida* (1993) (Spanish).

55 *United States v. State of Michigan* (1995); *Commonwealth of Virginia v. United States* (1995); *United States v. State of Mississippi* (1995); *United States v. Commonwealth of Pennsylvania* (1995); *United States v. State of Illinois* (1995); *Condon v. Reno* (1995); *Wilson v. United States* (1994).

56 *United States v. State of Tennessee* (2002).

57 *United States v. State of New York* (2004); *United States v. State of New York* (1996).

58 *United States v. State of New Jersey* (2006); *United States v. State of Maine* (2006); *United States v. State of Indiana* (2006); *United States v. State of Missouri* (2005); *United States v. Pulaski County, Arkansas* (2004); *United States v. City of St. Louis, Missouri* (2002).

59 The *St. Louis* and *Pulaski County* cases both concerned so-called "inactive voter" lists and the procedures that eligible voters had to follow in order to vote if their names appeared on the inactive list.

60 Because the district court in the *State of Missouri* case held that the Missouri Secretary of State was not a proper defendant for the claims in the case, it appears that if the case is to go forward it will require separate litigation against each of the counties. This would raise issues of whether significant Voting Section resources should be devoted to this type of litigation, where no specific harm has been alleged.

61 *United States v. State of New Jersey* (2006); *United States v. Cochise County, Arizona* (2006); *United States v. State of Maine* (2006); *United States v. State of Alabama* (2006); *United States v. New York State Board of Elections* (2006); *United States v. San Benito County, California* (2004).

62 *United States v. Westchester County, New York* (2005).

63 In November 2005 the Voting Section reached an out-of-court agreement under which the State of California agreed to implement a temporary plan and a long-term permanent plan to establish the computerized statewide voter registration list required by HAVA.

64 Memorandum By The United States As Amicus Curiae In Support Of Defendants' Motion To Dismiss And Brief In Support Thereof, *Bay County Democratic Party v. Land* (No. 04-10257-BC) and *Michigan State Conference Of NAACP Branches. v. Land* (No. 04-10267-BC) (E.D. Mich.); Memorandum Of The United States As Amicus Curiae In Support Of Defendant's Motion To Dismiss And Brief In Support Thereof, *Florida Democratic Party v. Glenda Hood* (No. 04:04cv395 RH) (N.D. Fla.); Brief For The United States As Amicus Curiae Supporting Appellant And Urging Reversal, *The Sandusky County Democratic Party v. J. Kenneth Blackwell* (Nos. 04-4265, 04-4266) (6th Cir.). These briefs are available at www.usdoj.gov/crt/voting/hava/hava.html.

65 Similarly, the District Court in the Florida case found that HAVA "clearly creates a federal right enforceable under §1983." *Florida Democratic Party v. Glenda Hood*, *supra*, slip op. at 10. And, in the Michigan case, the District Court found that HAVA §302(a)(2) "unambiguously creates in the voter the right to cast a provisional ballot under certain circumstances. *Bay County Democratic Party v. Land* and *Michigan State Conference Of NAACP Branches v. Land*, *supra*, slip op. at 28. These cases, of course, had very strong partisan overtones arising in the electorally-critical States of Ohio, Michigan and Florida—and the Division's position consistently was favorable to the Republican defendants.

66 *United States v. State of Connecticut* (2006); *U.S. v. State of North Carolina* (2006); *United States. v. State of Alabama* (2006); *United States v. State of Georgia* (2004); *United States v. Commonwealth of Pennsylvania* (2004); *United States v. Oklahoma* (2002); *United States. v. Texas* (2002).

67 *United States v. State of Michigan* (2000); *United States v. New York City Board of Elections* (1998); *United States v. State of Oklahoma* (1998); *United States v. State of Mississippi* (1996); *United States v. Orr* (1995); *United States v. State of New Jersey* (1994); *United States v. State of Michigan* (1993).

Mr. NADLER. Thank you, Mr. Taylor.
Mr. Rich?

TESTIMONY OF JOSEPH D. RICH, DIRECTOR, FAIR HOUSING COMMUNITY DEVELOPMENT PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. RICH. Mr. Chairman and Members of the Committee, I want to thank you for the opportunity to testify at this hearing.

Since its creation in 1957, the Civil Rights Division has been the primary guardian for protecting our citizens against legal, racial, ethnic, religious and gender discrimination.

Through both Republican and Democratic administrations, the Division has developed a well-earned reputation for expertise and professionalism in its civil rights enforcement efforts.

Partisan politics were rarely, if ever, injected into decision making, in large measure because decisions usually arose from career staff and were normally respected by political appointees.

Career staff play a central role in recommending new career hires, and those recommendations were almost always respected.

Unfortunately, since this Administration took office, that professionalism and non-partisan commitment to the historic mission of the Division has been replaced by unprecedented political decision-making.

The result is that the essential work of the Division to protect the civil rights of all Americans is not getting done.

Furthermore, the conscious effort to politicize the Division has depleted its institutional knowledge by driving away the talent and history of its career staff.

The political decision-making process that led to the questionable dismissal of 8 U.S. attorneys was standard practice in the Civil Rights Division before these revelations.

And even today, there is another story coming out of the Civil Division tobacco litigation that is similar to this. These connections should not be minimized.

It was evident in several ways: A hostility to career employees expressed as agreement with political appointees—or were perceived as disloyal was evident early on.

For example, during my tenure as section chief for the Voting Section, I was ordered to change standard performance evaluations of attorneys under my supervision to include critical comments of those who had made recommendations that were counter to the political will of the front office and to improve evaluations of those who were politically favored.

In my 32 years of management in the Division before this Administration, I was never asked to alter my performance evaluations.

Furthermore, four section chiefs, two deputy chiefs and a special counsel were either removed or marginalized because they were disfavored for political reasons or perceived as disloyal.

In past Administrations, the front office has only rarely weighed in on the fate of section chiefs and, to my knowledge, never weighed in on the fate of deputy chiefs. In fact, this hostility was not lost on career staff. For example, since I left the Voting Section,

approximately 55 percent to 60 percent of the attorney staff has left the department or transferred to other sections.

In the important section 5 Unit in the Voting Section, the deputy section chief for Section 5 Unit, with vast section 5 experience, was involuntarily transferred out of the section in 2006.

In addition, the number of civil rights analysts has been reduced from 26 in 2001 to 10 today, and attorneys who reviewed these submissions have been reduced from seven to two. This depletion of intellectual resources has the potential to be disastrous.

The drastic reduction in section 5 staff makes it virtually impossible for the section to meet its responsibilities and will be even more of an impediment to adequate voting rights enforcement as we move closer to the 2010 census.

The major exodus of career attorneys was accompanied by a major change in hiring policy in 2002, replacing a hiring process created in 1954 by the department to remove the perception of political favoritism and cronyism.

Involvement of career staff, which was central to the process for more than 35 years, completely ended and was replaced by exclusive control of political appointees making hiring decisions based not on the applicant's civil rights experience and commitment but on a demonstrated fidelity to the Republican partisan interests.

Politicization has affected Division enforcement record as well. For example, in a 5-year period, the department brought no voting cases and only one employment pattern and practice case on behalf of African-Americans and no voting cases on behalf of Native Americans.

At the same time, there were several reverse discrimination employment cases brought and the first case ever on behalf of White voters alleging discrimination against an African-American Democratic Party operative in Mississippi.

Most disturbing has been the brazen insertion of partisan politics into decision making under section 5. Section 5 decisions in Mississippi and Texas redistricting matters in 2002 and 2003 and the Georgia Voter I.D. matter in 2005 were made for clear partisan political reasons over strong recommendation.

I want to talk a little bit about Georgia, but I will leave that for questioning. Thank you.

[The prepared statement of Mr. Rich follows:]

PREPARED STATEMENT OF JOSEPH D. RICH

My name is Joe Rich. Since May, 2005 I have been Director of the Housing and Community Development Project at the Lawyers' Committee for Civil Rights Under Law. Previously I worked for the Department of Justice's Civil Rights Division for almost 37 years. The last six years—from 1999–2005—I was Chief of the Division's Voting Section. Prior to that, I served as Deputy Chief of the Housing and Civil Enforcement Section for twelve years and Deputy Chief for the Education Section for ten years. During my nearly 37 years in the Division, I served in Republican administrations for over 24 years and Democratic administrations for slightly over 12 years.

I want to thank the Committee for the opportunity to testify at this oversight hearing. Enforcement of our nation's civil rights laws is one of the Department of Justice's most important and sensitive responsibilities, and careful oversight of this work is crucial. For too long, there has been virtually no Congressional oversight during a time in which the Division has strayed seriously from its historic mission and traditions.

Since its creation as a Congressionally mandated unit of the Department of Justice in the Civil Rights Act of 1957, the Civil Rights Division has been the primary guardian protecting our citizens against illegal racial, ethnic, religious, and gender discrimination. Through both Republican and Democratic Administrations, the Division earned a reputation for expertise and professionalism in its civil rights enforcement efforts.

During much of the history of the Division, its civil rights enforcement work has been highly sensitive and politically controversial. It grew out of the tumultuous civil rights movement of the 1960's, a movement which generated great passion and conflict. Given the passions that civil rights enforcement generates, there has always been potential for conflict between political appointees of the incumbent administration, who are the ultimate decision makers within the Division and the Department, and the stable ranks of career attorneys who are the nation's front line enforcers of civil rights and whose loyalties are to the department where they work. Career attorneys in the Division have experienced inevitable conflicts with political appointees in both Republican and Democratic administrations. These conflicts were almost always resolved after vigorous debate between the career attorneys and political appointees, with both learning from the other. Partisan politics was rarely injected into decision-making, in large measure because decisions usually arose from career staff and, when involving the normal exercise of prosecutorial discretion, were generally respected by political appointees. In a similar fashion, the hiring process for new career employees began with the career staff, who made recommendations to the political appointees that were generally respected.

During the Bush Administration, dramatic change has taken place. Political appointees made it quite clear that they did not wish to draw on the expertise and institutional knowledge of career attorneys. Instead, there appeared to be a conscious effort to remake the Division's career staff. Political appointees often assumed an attitude of hostility toward career staff, exhibited a general distrust for recommendations made by them, and were very reluctant to meet with them to discuss their recommendations. The impact of this treatment on staff morale resulted in an alarming exodus of career attorneys—the longtime backbone of the Division that had historically maintained the institutional knowledge of how to enforce our civil rights laws tracing back to the passage of our modern civil rights statutes.

Compounding this problem was a major change in hiring procedures which virtually eliminated any career staff input into the hiring of career attorneys. This has led to the perception and reality of new staff attorneys having little if any experience in, or commitment to, the enforcement of civil rights laws and, more seriously, injecting political factors into the hiring of career attorneys. The overall damage caused by losing a large body of the committed career staff and replacing it with persons with little or no interest or experience in civil rights enforcement has been severe and will be difficult to overcome.

In August, 2005, the first article bringing to light the problems in the Civil Rights Division was written by William Yeomans for *Legal Affairs*.[1] Following this, there was a flurry of articles in many newspapers and broadcasts on NPR over a four month period revealing not only the change in personnel and hiring policies in the Division, but also, alarmingly, the crass politicization of decision-making. Constant oversight of the Division is necessary to address these very serious problems.

RELATIONSHIP OF POLITICAL APPOINTEES AND CAREER STAFF

Brian K. Landsberg was a career attorney in the Civil Rights Division from 1964–86 during which he was chief of the Education Section for five years and then chief of the Appellate Section for twelve years. He now is professor of law at McGeorge Law School. In 1997, he published *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (University Press of Kansas), a careful and scholarly analysis of the history and operation of the Division. Landsberg devoted a full chapter to the "Role of Civil Servants and Appointees." He summarizes the importance of the relationship between political appointees and career staff at page 156:

> Although the job of the Department of Justice is to enforce binding legal norms, three factors set up the potential for conflict between political appointees, who represent the policies of the administration then in power, and civil servants, whose tenure is not tied to an administration and whose loyalties are to the department where they work and the laws they enforce: the horizontal and vertical separation of powers; the indeterminacy of some legal norms; and the

[1] See "An Uncivil Division," *Legal Affairs,* (August-September, 2005). The author of this article, William Yeomans, was a 23 year career Civil Rights Division attorney who had served as Chief of Staff to Assistant Attorney General Bill Lann Lee from 1997 until 2000.

lack of a concrete client. The vertical separation of powers was designed to enable both civil service attorneys and political appointees to influence policy. *This design, as well as wise policy, requires cooperation between the two groups to achieve the proper balance between carrying out administration policy and carrying out core law enforcement duties. Where one group shuts itself out from influence by the other, the department's effectiveness suffers.* (emphasis added)

Rather than making efforts to cooperate with career staff, it became increasingly evident during the Bush Administration that political appointees in the Division were consciously walling themselves off from career staff. Indeed, on several occasions there was hostility from political appointees toward those who voiced disagreement with their decisions and policies or were perceived to be disloyal. This was apparent in many ways:

- Longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. In April, 2002, the employment section chief and a longtime deputy chief were summarily transferred to the Civil Division. Subsequently, a career special litigation counsel in the employment section was similarly transferred. In 2003, the chief of the housing section was demoted to a deputy chief position in another section and shortly thereafter retired. Also in 2003, the chief of the special litigation section was replaced. In the voting section, many of the enforcement responsibilities were taken away from the chief and given directly to supervisors or other attorneys in the section who were viewed as loyal to political appointees. In 2005, the chief of the criminal section was removed and given a job in a training program, and shortly after that, the deputy chief in the voting section for Section 5 of the Voting Rights Act was transferred to the same office. On only one occasion in the past had political appointees removed career section chiefs, and on that occasion it was on a more limited basis. In short, it is rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance. Never in the past had deputy section chiefs been removed by political appointees.
- Regular meetings of all of the career section chiefs together with the political leadership were virtually discontinued from the outset of the Administration. Such meetings had always been an important means of communication in an increasingly large Division that was physically separated in several different buildings.
- Communication between the direct supervisors of several sections at the deputy assistant attorney general level and section staff also was greatly limited. In the voting section, for instance, section management was initially able to take disagreements in decisions made at the Deputy Assistant Attorney General level to the Assistant Attorney General for resolution. But it became increasingly evident that such debate, which is so important to the healthy development of policy, was frowned on. In 2003, it was made very plain that efforts to raise with the Assistant Attorney General issues on which there was disagreement would be discouraged. In past administrations, section chiefs had open access to the Assistant Attorney General to raise issues of particular importance. Attempts to hold periodic management meetings with political appointees were also usually not acted upon. This resulted in political appointees not receiving the expertise and institutional knowledge of career staff on many matters. Indeed, a political special counsel in the front office was assigned to work solely on voting matters and often assumed many of the responsibilities of the chief of the section.
- Communication between sections was also discouraged. This was especially true when the appellate section was handling the appeals of trial section cases or amicus briefs on the subjects handled by a trial section. When drafting briefs in controversial areas, appellate staff was on several occasions instructed not to share their work with the trial sections until shortly before or when the brief was filed in court. This was extremely frustrating for career staff in both the trial and appellate sections and hindered the adequate development of briefs and full debate of issues in the briefs.
- Political appointees have inserted themselves into section administration to a far greater level than in the past. For example, on many occasions, assignments of cases and matters to section attorneys were made by political employees, something that was a rarity in the past. Moreover, assignment of work to sections and attorneys was done in a way that limited the civil rights work being done by career staff. This was especially true of attorneys in the

appellate section, where close to 40% of attorney time was devoted to deportation appeals during 2005.[2] Similarly, selected career attorneys in that Section were informed that they would no longer receive assignments to civil rights cases, and disfavored employees in other sections were assigned the deportation appeal cases. Political appointees also intruded into the attorney evaluation process in certain instances, something that did not happen in the past.

IMPACT ON MORALE OF CAREER EMPLOYEES

It is hard to overemphasize the negative impact that this type of administration of the Division has had on the morale of career staff. The best indicator of this impact is in the unprecedented turnover of career personnel. It should be noted that the impact has been greater in some sections than others, and often attorneys in the sections most directly affected by the hostility of political appointees transferred to other sections in which the impact was less. The sections most deeply affected have been voting, employment, appellate, and special litigation.

VOTING SECTION

- Based on a review of personnel rosters in the voting section, 20 of the 35 attorneys in the section (over 54%) have either left the Department, transferred to other sections (in some cases involuntarily), or gone on details since April 2005. During the same period, of the five persons in section leadership at the beginning of 2005 (the chief and four deputy chiefs), only one deputy chief remains in the section today.
- Equally disturbing is the decimation of voting section staff assigned to the important work required by Section 5 of the Voting Rights Act. Prior to the Bush Administration, Section 5 staff was uniformly strengthened, and by 2001—the year that the new round of redistricting submissions began—approximately 40% of Section staff was assigned to this work, including a Deputy Section Chief, Robert Berman, who oversaw the Section 5 work; 26 civil rights analysts (including 8 supervisory or senior analysts) responsible for reviewing, gathering facts, and making recommendations on over 4,000 Section 5 submissions received every year; and over six attorneys who spent their full-time reviewing the work of the analysts. Since then, and especially since the transfer of Deputy Chief Berman from the Section in late 2005, this staff dropped by almost two-thirds. There are now only ten civil rights analysts (none of whom hold supervisory jobs and only three of whom are senior) and two full-time attorney reviewers. During my tenure as Section Chief until 2005, I made several requests to fill civil rights analyst vacancies, but these requests were always rejected. It is difficult to understand how this Administration expects to fulfill its Section 5 responsibilities—especially the coming redistricting cycle—with such a reduced staff.

EMPLOYMENT SECTION

- Based on a review of personnel rosters in the employment section, the section chief and one of four deputy chiefs were involuntarily transferred to the Civil Division in April, 2002. Shortly after that, a special counsel was involuntarily transferred to the Civil Division. And, since then, two other deputy chiefs left the section or retired. Overall, since 2002, the section chief and three of the four deputy chiefs have been involuntarily reassigned or left the section. In addition, in that period, 21 of the 32 attorneys in the section in 2002 (over 65%) have either left the Division or transferred to other sections.
- Loss of paralegals in the employment section has also been significant. Twelve professionals have left, many with over 20 years of experience.
- In the appellate section, since 2005, six of the 12–14 line attorneys in the section transferred to other sections or left the Department. Two of the transfers were involuntary.

There has always been normal turnover of career staff in the Civil Rights Division, but it has never reached such extreme levels and never has it been so closely related to the manner in which political appointees have managed the personnel in

[2] See Confirmation Hearings for Wan Kim, October, 2005. Answer No. 12 to Written questions of senator Durbin ("According to available records, it is my understanding that during FY 2005, the Appellate Section filed 120 appellate briefs in the Office of Immigration Litigation, and that for the first three quarters of FY 2005 for which information is currently available, approximately 38.8% of attorney hours in the Appellate Section of the Civil Rights Division have been spent on cases regarding the Immigration and Nationality Act.

the Division. It has stripped the division of career staff at a level not experienced before.

HIRING PROCEDURES

Compounding the impact of the extraordinary loss of career staff in recent years has been a major change in the Division's hiring practices. Since 1954, the primary source of attorneys in all divisions in the Department has been the attorney general's honors program. This program was instituted by then Attorney General Herbert Brownell in order to end perceived personnel practices "marked by allegations of cronyism, favoritism, and graft."[3] Since its adoption, the honors program has been consistently successful in drawing top law school graduates to the Department.

Until 2002, career attorneys in the Civil Rights Division played the central role in the process followed in hiring attorneys through the honors program. Each year, career line attorneys from each section were appointed to an honors hiring committee which was responsible for traveling to law schools to interview law students who had applied for the program. Because of the tremendous number of applications for the honors program, committee members generally would limit their interviews to applicants who had listed the Civil Rights Division as their first choice when applying. The Civil Rights Division had earned a reputation as the most difficult of the Department's divisions to enter through the honors program because only a few positions were open each year and so many highly qualified law students desired to work in civil rights.

After interviewing was completed, the hiring committee would meet and recommend to the political appointees those who they considered the most qualified. Law school performance was undoubtedly a central factor, but a demonstrated interest and /or experience in civil rights enforcement and a commitment to the work of the Division were the qualities that interviewers sought in candidates selected to join the career staff of the Division. Political appointees rarely rejected these recommendations.

Hiring of experienced attorneys—so-called "lateral" hires—followed a similar process. Individual sections with attorney vacancies would review applications and select those to be interviewed. They would conduct initial interviews and the section chief would then recommend hires to Division leadership. Like recommendations for honors hires, these recommendations were almost always accepted by political appointees.

These procedures have been very successful over the years in maintaining an attorney staff of the highest quality—in Republican as well as Democratic administrations. A former Deputy Assistant Attorney General in the Reagan Administration, who was interviewed for a recent *Boston Globe* article about Division hiring practices, said that the system of hiring through committees of career professionals worked well. The article quoted him as saying: "There was obviously oversight from the front office, but I don't remember a time when an individual went through that process and was not accepted. I just don't think there was any quarrel with the quality of individuals who were being hired. And we certainly weren't placing any kind of litmus test on . . . the individuals who were ultimately determined to be best qualified."[4]

But, in 2002, these longstanding hiring procedures were abandoned. The honors hiring committee made up of career staff attorneys in the Civil Rights Division was disbanded and all interviewing and hiring decisions were made directly by political appointees with little or no input from career staff or management. As for "lateral" hires, the political appointees similarly took a much more proactive role in selecting those persons who received interviews, and almost always participated in the interviewing process. In my experience as chief of the voting section, section leadership had no input into interviewing or hiring decisions of experienced attorneys.

Not surprisingly, these new hiring procedures have resulted in the resurfacing of the perception of favoritism, cronyism, and political influence which the honors program had been designed to eliminate in 1954. Indeed, information that has come to light recently indicates that in many instances, this is more than perception. In July, 2006, a reporter for the *Boston Globe* obtained pursuant to the Freedom of Information Act the resumes and other hiring data of successful applicants to the voting, employment, and appellate sections from 2001–2006.[5] His analysis of this data indicated that:

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[3] Landsberg, *Enforcing Civil Rights* at p. 157.
[4] Charlie Savage, *Civil Rights Hiring Shifted in the Bush Era,* July 23, 2006 at A1.
[5] *Id.*

- "Hiring of applicants with civil rights backgrounds—either civil rights litigators or members of civil rights groups—have plunged. Only 19 of the 45 [42 percent] lawyers hired since 2003 in the [employment, appellate, and voting] sections were experienced in civil rights law, and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies." By contrast, "in the two years before the change, 77 percent of those who were hired had civil rights backgrounds."
- "Meanwhile, conservative credentials [of those hired] have risen sharply. Since 2003, the three sections have hired 11 lawyers who said they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns."

The reporter noted that current and former Division staffers "echoed to varying degrees" that this pattern was what they observed. For example, a former deputy chief in the Division who now teaches at the American University Law School testified at an American Constitution Society panel on December 14, 2005 that several of his students who had no interest in civil rights and who had applied to the Department with hopes of doing other kinds of work, were often referred to the Civil Rights Division. He said every one of these persons was a member of the Federalist Society.[6]

Early on in the Bush Administration, the hiring in the voting section was overtly political. In March, 2001, after the contested 2000 election, Attorney General Ashcroft announced a Voting Rights Initiative. An important part of this Initiative was the creation of a new political position—Senior Counsel for Voting Rights—to examine issues of election reform. Two voting section career attorney slots were filled as part of this initiative to help this appointee. The decision to create these new positions was made with no input from career staff and, once the new hires were on board, they operated separately from the voting section on election reform legislation. The person named as the Senior Counsel for Voting Rights was a defeated Republican candidate for Congress. The two line attorneys who filled career attorney slots assigned to the voting section were hired with no input from the section and had been active in the Republican party. One of those "career" attorneys, Hans von Spakovsky, was promoted to a political position in 2003—special counsel to the Assistant Attorney General. For the two and a half years that this attorney held this position, he spent virtually all his time reviewing voting section work and setting the substantive priorities for the section. Although he was clearly in a political supervisory position, he continued to be listed as a voting section line attorney and enjoyed career status until he received a recess appointment to the Federal Election Commission in December, 2005.

CONCLUSION

During the Bush Administration, there has been an unprecedented effort to change the make-up of the career staff at the Civil Rights Division. This has resulted in a major loss of career personnel with many years of experience in civil rights enforcement and in the invaluable institutional memory that had always been maintained in the Division until now—in both Republican and Democratic administrations. Replacement of this staff through a new hiring process resulted in the perception and reality of politicization of the Division, and high profile decisions in voting matters have added significantly to this. The overall impact has been a loss of public confidence in the fair and even-handed enforcement of civil rights laws by the Department of Justice.

The damage done to one of the federal government's most important law enforcement agencies is deep and will take time to overcome. Crucial to this effort is careful and continuous Congressional oversight, now and in the future. This is the first House Judiciary committee oversight hearing in at least three years, and until November, 2006 there had not been a Senate Judiciary Committee oversight hearing of the Civil Rights Division for over four years.

The recent revelations concerning the firing of eight United States Attorneys reflect the alarming practices of the Bush Administration's Department of Justice that first came to light in revelations about the Civil Rights Division. Vigilant oversight is an absolute necessity to restore the Civil Rights Division and the Department of

[6] American Constitution Society, *The Role of Political and Career Employees of the U.S. Department of Justice, Civil Rights Division,* December 14, 2005; video available at *www.acslaw.org.*

Justice to the historic role of leading the enforcement of civil rights laws and protection of equal justice under the law.

Mr. NADLER. Thank you.

The next witness is Mr. Clegg.

TESTIMONY OF ROGER CLEGG, PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY

Mr. CLEGG. Thank you very much, Mr. Chairman.

You know, with all respect, we are not hearing very much new today. This is very typical of what happens whenever we have oversight hearings like this.

There will be some Members who believe that—and there are some interest groups who think that—there are not enough cases being brought of the kind that they like. And there will be Members and interest groups who think that there are being too many cases being brought of the kinds that they don't like. And there will be an assertion that the department is being politicized in some way, that the Civil Rights Division in particular is being politicized. I am confident that there is nothing to these allegations, and I explain why in my written statement, which I won't rehash here.

I think that Mr. Kim gave a very good account of himself at these hearings this morning and at the Senate hearing that basically covered the same ground a few months ago.

You know, the fact of the matter is that the career staff in the Civil Rights Division tends to be made up of people who are left of center. And there is nothing wrong with that, but there will inevitably be friction in Republican administrations because Republican Political appointees tend to be right of center. Judges interpret the law differently. So do Government lawyers.

And wholly aside from that, changing times will mean that there will be differences in enforcement priorities. Congress passes new statutes. Those new statutes have to be enforced. That requires a reallocation of resources. The demographics of the country change. That means that more cases are going to be brought about discrimination against the groups that are growing. There is nothing sinister in any of that, either.

With respect to the report that the Citizens' Commission on Civil Rights has handed out, I am underwhelmed by it. I think if you all read it carefully, you will be underwhelmed by it, too.

For instance, look at the three chapters by career folks. One of them basically concludes that there is no problem at present—this is the chapter on the Criminal Section—just that there is the potential that if proactive steps aren't taken there will be a diminution in the number of traditional kinds of police brutality and involuntary servitude cases. But it says up front that that is not a problem right now, that the number of traditional police brutality cases and traditional involuntary servitude cases is about at the level that it has always been.

I also think that when you talk about the number of reverse discrimination employment cases, if you read the report carefully, this flood of reverse discrimination cases that is being asserted to amounts to two out of 32 ttle VII cases. That is hardly a flood.

I think that the Division is not being aggressive enough in challenging discrimination that is overtly and unapologetically dis-

criminatory against Caucasians in some cases, against Asians in other cases, against Arab-Americans in other cases, because such lawsuits are thought to be politically incorrect. I wish the department were doing more along those lines.

Finally, I want to just say that I think that the tone of these hearings is unfortunate. I thought that the tone was unfortunate in the Senate.

I think that there ought to be a great deal of respect when the head of an enforcement Division in a co-equal branch of Government is brought before you.

And I think that allegations like the one that Mr. Taylor just made, that the Administration is nominating judges "hostile to the enforcement of civil rights laws," is demagogic and irresponsible.

And I don't think that there is any place for that in civil political discourse or in hearings of this type. Thank you very much.

[The prepared statement of Mr. Clegg follows:]

PREPARED STATEMENT OF ROGER CLEGG

Thank you very much, Mr. Chairman, for the opportunity to testify today. My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Falls Church, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation.

I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991. My career at the Justice Department began, however, five years before that, when I was first hired to a nonpolitical slot there, in a different office. Then I held several positions as a political appointee, but I went back to nonpolitical status when I was Assistant to the Solicitor General. I finished my service at the Department as a political appointee, including my four years as a Deputy Assistant Attorney General in the Civil Rights Division.

Mr. Chairman, as you know, I have to submit my testimony—reasonably enough—in advance of when the head of the Civil Rights Division, Mr. Wan Kim, will be questioned by the Subcommittee, but I am going to assume—based on similar hearings before the Senate Judiciary Committee last November 16, news accounts, and my own experience in Washington, including my time at the Civil Rights Division—that the Division's record will be criticized in three basic ways. These are the same criticisms that are always made during oversight hearings of the Division.

First, some members of the subcommittee will say that the Division is not bringing enough of the kinds of cases they would like. Second, and conversely, some members will argue that the Division is bringing too many of the kinds of cases that they do not like. And, third, some members will say that the hiring process and other ways in which political appointees deal with career lawyers has become wrongly politicized.

Since Congress appropriates money for the Division and wants it to enforce the laws it has passed, it makes sense for the members to keep on eye on what sort of job the Division is doing—so long, of course, as the oversight process does not become so onerous that it actually prevents the Division from doing its job. If the members don't agree with the way the Division is interpreting the law, or doesn't like the enforcement priorities it has set, they can certainly argue with the Division leadership about these matters. But ultimately the call is, of course, the Executive Branch's.

And the questioning at hearings like these should be civil, as befits conversations between two coequal branches of government. There will inevitably be differences of opinion about how to interpret laws and what the Division's priorities ought to be. There is nothing sinister about this. I have to say, Mr. Chairman, that when I read the transcript of last fall's oversight hearings before the Senate Judiciary Committee, I discerned a distinct lack of civility in some Senators' questioning of Mr. Kim. I hope that this doesn't repeat itself at your hearings.

There will be legitimate differences of opinion—among members of the Subcommittee, between members and the administration, and between political and career lawyers in the Division—about how to interpret the civil rights laws. Judges

don't interpret the laws the same way; neither do government lawyers. And, of course, outside groups like mine will sometimes be critical of the Division. I have criticized the Division during the Clinton administration, and I have criticized it during the Bush administration. Many of you think the Division has been too conservative; well, I think it has not been conservative enough.

I am including with my statement today a paper that I delivered at a political science conference last year at the University of Virginia, comparing the enforcement policies of the employment antidiscrimination laws at the Civil Rights Division during the Clinton and Bush administrations, respectively. I noted there in particular differences I saw with respect to disparate impact lawsuits and challenges to what I call "affirmative discrimination"—a.k.a. reverse discrimination. The Clinton administration was more aggressive—so aggressive, for example, that it was fined over $1.7 million for overreaching in one matter—in bringing disparate impact cases (which is too bad, since such the theory on which such cases depend is misguided, and they often result in more rather than less discrimination), and with only one possible exception never challenged affirmative discrimination (which is also too bad, since the civil rights laws ought to be interpreted to protect all of us from discrimination on the basis of race, ethnicity, or sex). But the Bush administration has, nonetheless, brought and continued to litigate some disparate impact lawsuits, and it has not been terribly aggressive in challenging affirmative discrimination, so it has not been perfect either, at least by my lights.

There will also be differences of opinion—again, among members of the Subcommittee, between members and the administration, and between political and career lawyers in the Division—about how to set law-enforcement priorities. The lack of enthusiasm that the Clinton administration had for challenging affirmative discrimination had to do, I suspect, not only with a difference of opinion in how it read the law, but also with a belief—misguided in my opinion—that fighting such discrimination was just not as important as other items on its agenda. The Bush administration's greater care in bringing disparate impact cases may reflect, again, not just a difference in how it reads the statutes, but also in a belief that, say, human trafficking is a more pressing problem than, say, a fire department's alleged overemphasis on one kind or another of physical conditioning.

In addition, even without differences in law-enforcement philosophy, the Division's priorities will change over time. Congress will pass new laws. Lawbreaking will become more common in some areas, and less common in others.

For instance, the Bush administration has spent much time enforcing the Help America Vote Act, which was just passed in 2002. New statutes often require a great deal of enforcement attention, to educate those affected to its requirements. The administration has spent more time, proportionately, enforcing the foreign-language ballot provisions of the Voting Rights Act than the Division did several decades ago. This probably reflects the fact that we have many more jurisdictions and voters affected by those provisions now than we did back then, because of increases in immigration. I say this, by the way, even though in my opinion those provisions of the Voting Rights Act are misguided as a policy matter and unconstitutional as a matter of law. The Division is also spending a lot of time enforcing laws that prohibit discrimination against servicemen and servicewomen; this is also unsurprising, since there will probably be more such cases in a time of war than in a time of peace.

Some people have criticized the Division for concentrating proportionately fewer resources than in years past on bringing cases that allege discrimination against African Americans. But in assessing this criticism, one must bear in mind, first, that the Division now has many more laws to enforce, and, second, that discrimination against African Americans is less pervasive now than it was in 1964. To give just one example, we would hardly expect a southern city to discriminate to the same degree in its municipal hiring today—when African Americans have much more political power and may even constitute a majority of its city council and other municipal offices, including mayor—as when the government there was lily white and black people were disenfranchised. I'm not saying that antiblack discrimination has vanished; it hasn't, and there will always be bigots, of all colors, in a free society. But anyone who thinks that antiblack discrimination is the same problem in 2007 that it was in 1964 is delusional.

I hasten to add, Mr. Chairman, that of course none of this means that the Division is free to interpret the law in bad faith, or to set enforcement priorities, for partisan political purposes. But charges that the Division is doing so are serious indeed, and should not be made lightly. For Congress to do so, without strong evidence, is itself irresponsible, in addition to being demagogic. The examples that I've seen cited to date—mostly involving a handful of cases under the Voting Rights Act—are unpersuasive; the Senate hearings last fall, I think, showed as much

(Chairman Specter, who came into the hearings like a lion, seemed to me to go out like a lamb).

This brings us to, and overlaps with, the relationship between political appointees and career lawyers. Here, too, I think it ought to be easy to agree on some basic boundaries.

On the one hand, no career lawyer should be penalized for partisan political reasons. What's more, political appointees should be eager to draw upon the institutional memory and expertise of the career staff. I know that I always was.

On the other hand, our government is a democratic republic, and the Executive Branch is accountable to the American people. Elections have consequences. That means that the President and his appointees have the responsibility and the right to run the Executive Branch—to set its priorities, to make the call on how to interpret the law (consistent with decisions by the Judicial Branch, of course), and even to decide which lawyers will best serve the Division's interests by most intelligently, enthusiastically, and resourcefully litigating its cases.

The picture that is frequently painted, then, of political hacks (ignorant of the law and interested only in winning political elections) overruling disinterested, white-lab-coat-wearing career lawyers is, to put it mildly, misleading. Political appointees, in my experience, are frequently at least as knowledgeable about the law as the career people whom they supervise (and, again, I have been on either side of the table); conversely, the career lawyers are frequently at least as partisan and ideological in their orientation. When there is friction between the two, I would not jump to the conclusion that it is the fault of the political appointees, or that they are showing an unprofessional lack of respect to the career lawyers, rather than vice versa.

Thank you again, Mr. Chairman, for the opportunity to testify today. I would be happy to try to answer any questions the Subcommittee may have for me.

ATTACHMENT

EMPLOYMENT ANTIDISCRIMINATION POLICIES IN THE CLINTON AND BUSH ADMINISTRATIONS

by Roger Clegg [paper presented at the University of Virginia in June 2006]

Introduction and Scope

There are two federal agencies that enforce federal employment discrimination law through lawsuits. (In addition, the Department of Labor, pursuant to Executive Order 11,246, requires private companies contracting above a certain dollar amount with the federal government to refrain from discrimination and to have "affirmative action" programs.) The Justice Department's civil rights division brings lawsuits against public employers (state, county, and municipal governments and the like, including fire and police departments, for example); the Equal Employment Opportunity Commission brings lawsuits against private employers (so long as they have at least 15 employees).

This paper will focus on the civil rights division, since it is unclear whether there actually is a Bush administration EEOC. The EEOC considers itself a "quasi-independent agency," and, indeed, while the president does designate the chairman, he appoints commissioners only when their staggered five-year terms expire. The commissioners do not serve, then, at the pleasure of the president, and indeed by law no more than three of the five can be of the same political party. Accordingly, there need not be an immediate shift in the Commission's ideological orientation upon a change in administration. Furthermore, the Bush administration has been quite lackadaisical about filling Commission slots (and the slot for the Commission's general counsel). For all

these reasons, the EEOC does not appear to be a promising place to look for making administration-to-administration comparisons.

With regard to the civil rights division, its employment antidiscrimination duties involve principally Title VII of the 1964 Civil Rights Act, 42 U.S.C. sec. 2000e et seq. (supplemented by the Equal Protection Clause of the Fourteenth Amendment, since generally the division's targets are public employers), and Title I of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. (It should be noted that the employment section is one of the division's nine sections; the others enforce civil rights laws in various other areas, such a voting, education, housing, and so forth.) I am going to focus in this paper on Title VII, and I have good reasons for doing so, but it would be possible, I think, to do an interesting paper on differences between the Clinton and Bush administrations with respect to ADA employment discrimination cases. I think there have been differences; candidly, however, it would have doubled the length of this paper to have considered the ADA, too, and I felt I had to pick one or the other and--again, candidly--I personally have been more interested in Title VII cases (particularly the ones involving race and ethnicity), and I think the differences between the two administrations have been more clear-cut with respect to Title VII than with respect to the ADA.

Title VII forbids discrimination on the basis of "race, color, religion, sex, or national origin." Cases in employment about "color" per se are rare. Religion cases are more common, but, interestingly, I do not think there are dramatic differences in the two administrations in this area, since both have been fairly hospitable to ensuring that employers (a) refrain from outright disparate treatment on the basis of religion, and (b)

provide the "reasonable accommodation" that Title VII also requires employers to make for religious practice.

Most of the division's Title VII work, in any event, is about race, sex, and ethnicity. (The Supreme Court ruled early on that "national origin" means, essentially, ethnicity. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).)

One can classify the division's Title VII work further. There are "disparate treatment" cases and "disparate impact" cases, and there are "reverse discrimination" cases (i.e., those alleging discrimination against whites, or against males, or both) and "traditional" cases (alleging discrimination against minorities or women). Disparate treatment cases allege that the alleged victim was treated differently and worse because of his race, ethnicity, or sex. Disparate impact cases, on the other hand, attack an employment criterion of some sort (say, to give the classic instance, a high-school diploma) as having an unjustified and disproportionate result with respect to a protected category (say, African Americans)—and do not allege that the criterion is itself by its terms discriminatory, or was chosen in order to discriminate, or has not been applied evenhandedly to all groups.

Disparate treatment cases on behalf of women and minority groups carry no ideological baggage; there is no difference in the zeal with which they are pursued from administration to administration, nor should we expect there to be. To be sure, the remedies sought may vary (e.g., the use of quotas), and conservative administrations will be somewhat less willing to pursue exotic evidentiary theories. But no one has a problem with fighting actual discrimination against women and minorities, and any administration is only too happy to pursue such lawsuits.

This is not true, however, with respect to cases that allege discrimination against whites or males, and there is evidence—and one would suspect *a priori*—that this is also not true with respect to disparate impact cases. The disparate impact approach inevitably pushes employers to abandon perfectly legitimate selection criteria and to ensure against liability by "getting their numbers right"--i.e., employing surreptitious quotas. *See* Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire* (2001) (National Legal Center for the Public Interest monograph); Roger Clegg, "The Bad Law of 'Disparate Impact,'" *Public Interest* (Winter 2000). (This is so, by the way, not only in employment, but in other areas, such as housing.) Conservatives dislike these two consequences more than liberals do. Thus, as we shall see, the Clinton administration did not like to bring reverse discrimination cases, which the Bush administration was sometimes willing to bring; and the Clinton administration appeared to be more willing to bring disparate impact cases than the Bush administration has been.

A word on methodology. The author has kept careful tabs on the filings of the civil rights division from May 1997 until the present; he worked in the first Bush administration, and was actually in the civil rights division there until July 1991 (and he continued to work on some civil rights matters even after that); from January 1993 until May 1997, he followed the civil rights activities of the Clinton administration, although not as closely as before and after this period. Nonetheless, the paper will proceed in the most part anecdotally--or, if you will, qualitatively rather than quantitatively for its assessment--since numbers of filings alone would not be very illuminating (after all, times change, case law develops, not all cases are equal, and sometimes good results are achieved without a lawsuit).

Affirmative Discrimination Cases

I am going to label cases that challenge discrimination against nonminorities and men as "affirmative discrimination cases." They are frequently referred to as "reverse discrimination" cases, but I prefer the phrase coined by Nathan Glazer, because it is both more accurate and more stinging.

The Clinton administration's discomfort with such cases became apparent early on, in *Taxman v. Piscataway Township Board of Education.* The prior Bush administration had joined in a white female schoolteacher's lawsuit against her school board's decision to lay her off, rather than a black teacher, because of a desire to ensure greater faculty "diversity." The Clinton administration did not simply drop out of the case; it switched sides. For a discussion of the Piscataway case, see Terry Eastland, *Ending Affirmative Action: The Case for Colorblind Justice* 109-115 (1996).

The Piscataway flip-flop was dramatic and high-profile; usually the nudge toward quotas is much less overt. For instance, as I testified at division oversight hearings in 1998 (Testimony of Roger Clegg, Feb. 25, 1998 (emphasis in original), available at http://judiciary.house.gov/legacy/222323.htm.):

> probably few people noted that the Division signed a consent decree on April 14, 1997, which was filed in court on June 19, 1997, in its lawsuit against the Arkansas Department of Corrections (ADC) for sex discrimination in employment. Fewer still know about paragraph 5 of the consent decree, which requires the ADC to "seek in good faith to achieve the employment of women in correctional officer positions at correctional institutions housing male offenders *in numbers approximating their application for, and ability to qualify for, such positions. Absent explanation, the parties expect the ADC to hire women for entry-level [positions] ... at a rate that approximates the female applicant flow for such positions. ...It is also expected that the ADC will promote women ... at least in proportion to their representation in the class of qualified employees applying for promotion.*" Paragraph 6 then provides: "Failure to obtain a particular female applicant flow or hiring or promotion rate is not by itself a violation of this Decree, *but may prompt an inquiry by the United States.*" I suspect that no one

> has any doubt that these provisions are telling the ADC to meet its quota, or else. Assuming that it makes sense to have female prison guards in male prisons, there is still no justification for quota hiring. Incidentally, this case was pointed to by the administration's witness at your last oversight hearing as "[o]ne of the Division's most significant recent achievements …." Of course, the administration did not mention the quotas.

The civil rights division took at similar position in its brief to the U.S. Court of Appeals for the Fourth Circuit in *United States v. State of North Carolina* (filed July 14, 1998) (asking for an order that the state department of corrections "seek to hire and promote women roughly in proportion to their representation in the pool of applicants qualified for hire or promotion").

There are other examples. The Clinton administration supported an unsuccessful challenge to the constitutionality of Proposition 209, a California ballot-initiative that banned state preferences in employment and other areas based on race, ethnicity, or sex (see Bill Lann Lee's February 25, 1998 testimony before the House Judiciary Subcommittee on the Constitution).

In at least one instance, the Clinton administration refused to act on an affirmative discrimination case--involving the Howard County, Maryland, police department, which was accused of "applying a different, higher cut-off score to evaluations of white male applicants than it was to female and minority applicants"--that had been referred to it by the EEOC. In its referral, the Commission was quite clear that something was amiss: It found that Howard County "admits to having treated minority and female candidates more favorably than white male candidates," and that, based on "the evidence obtained," "there is reasonable cause to believe" that Howard County "has engaged in a pattern and practice of discrimination" against the complainant and "white males as a class." Howard County, the EEOC concluded, "has violated Title VII of the Civil Rights Act of 1964 by

giving impermissible consideration to applicants' race and sex in making police officer selection decisions." But the division deliberated for 10 months and then told the complainant, without giving any explanation why, that "we will not file suit." See Roger Clegg, "Leeway on Bias Cases," *Washington Times*, Nov. 28, 1999, page B3.

On August 12, 1998, the division filed a brief in the U.S. Court of Appeals for the Second Circuit in *Hayden v. County of Nassau*, arguing that it was not a violation of Title VII to redesign a test deliberately so that fewer whites and more blacks will pass it. For a collection of division affirmative discrimination--and disparate impact--cases, filed just in 1998, see Roger Clegg & Clint Bolick, *Defying the Rule of Law: A Report on the Tenure of Bill Lann Lee, "Acting" Assistant Attorney General for Civil Rights* (February 1999). Things did not improve in 1999. See Roger Clegg, "Lee's Record at Justice," *Washington Times*, August 24, 1999 (the division, in the first half of 1999, "[e]ntered a settlement agreement in United States v. New York City Board of Education that included this provision: 'If the aforementioned test preparation sessions are oversubscribed, preferences will be given to black, Hispanic, Asian and women applicants'"; the division also "[e]ntered an agreement requiring race-conscious recruiting, hiring, and retention policies in Lee vs. Elmore County Board of Education").

The Bush administration, on the other hand, has been willing to defend the Title VII rights of men and nonminorities. Just within the last year, in widely publicized cases, it has successfully challenged graduate fellowships at Southern Illinois University under Title VII, on the grounds that they excluded men and certain non-underrepresented (overrepresented?) ethnic groups (like whites and Asians); and Langston University's

policy of paying black professors more than nonblack professors (a white female professor was the complainant).

It has also moved to amend or dismiss old consent decrees that contained affirmatively discriminatory quotas. For instance, according to an April 9, 2002 article in the *Los Angeles Times* ("Firefighter Hiring Quotas Ended," by David Rosenzweig): "The Justice Department's civil rights division and the Los Angeles city attorney's office, parties to the 1974 agreement [that "require[ed] that half of all Los Angeles firefighters be hired from the ranks of blacks, Latinos and Asians to alleviate racial disparities"], filed briefs in March asking the judge to scrap the racial hiring quotas." The division made a similar filing last year with respect to the Indianapolis police and fire departments. Editorial, *Indianapolis Star*, October 13, 2005.

Other anti-affirmative discrimination actions by the civil rights division in the Bush administration include a July 26, 2005 challenge to fire department dual lists filed against the City of Pontiac, Michigan; a July 29, 2003 consent decree against Greenwood Community School Corp. in Indiana; and an October 1, 2001 consent decree against the City of Bastrop, Louisiana.

Additional evidence that there was a clear difference in enforcement philosophy in this area between the two administrations can be drawn from the nonemployment context--most dramatically, the University of Michigan cases involving affirmative discrimination in student admissions. The Clinton administration filed an amicus brief in the lower courts defending the university's discrimination; before the Supreme Court, the Bush administration took the position that the discrimination was illegal. (The Supreme

Court, of course, split the baby in two, upholding the law school's discrimination but striking down the undergraduate admissions policy.)

The Clinton administration also had defended the University of Washington law school's affirmative admissions discrimination in *Smith v. University of Washington Law School*, Nos. 99-35209 et seq. (filed in the U.S. Court of Appeals for the Ninth Circuit on Sept. 16, 1999), and supported race-based student assignments at the K-12 level (e.g., in amicus briefs filed on July 21, 1998 with the U.S. Court of Appeals for the Fourth Circuit in *Tuttle v. Arlington County School Board*; in 1999 in another Fourth Circuit case, this one in Maryland, *Eisenberg v. Montgomery County Public Schools*; and in the Second Circuit on April 22, 1999 (No. 99-7186) in *Brewer v. West Irondequoit Central School District*).

The Bush administration, on the other hand, has been willing to challenge antiwhite harassment under the Voting Rights Act (*United States v. Brown*, No. 4:05 CV 33 TSL-AGN (S.D. Miss. 2-17-05)).

As the careful reader may glean from the foregoing lists, it is not so much that the Bush administration has filed a large number of anti-affirmative action cases (in any context), but that at least it has been willing to file *some*, and has been unwilling to defend affirmative discrimination. I am aware of only one instance in which the Clinton administration filed a brief opposing affirmative discrimination; in the summer of 1998, it did so in Maryland federal district court, in *United States v. New Baltimore City*, on behalf of a white applicant for middle-school assistant principal; even here, however, it might have been motivated more out of a desire for racial homogeneity in the school system than simple nondiscrimination. (As noted above, however, my really close

monitoring of the division's filings in the Clinton administration did not begin until 1997, so it is possible that it defended a white or male or two before then.) And, of course, it was quite aggressive in defending such affirmative discrimination.

Disparate Impact Cases

As noted, we would expect there to be more enthusiasm in a liberal administration than in a conservative administration for disparate impact cases. And that is apparently the case.

The House Judiciary Committee's Subcommittee on the Constitution devoted a substantial part of two oversight hearings to testimony that the Clinton administration was bringing abusive disparate-impact employment cases. In May 1997, it heard testimony "about the Division's abuse of disparate impact theory in its challenges to the use of written exams by police and fire departments," focusing in particular on its lawsuit against the Torrance, California, police and fire departments. On February 25, 1998, there was similar testimony about the division's lawsuit against Garland, Texas. Testimony of Roger Clegg, Feb. 25, 1998, available at http://judiciary.house.gov/legacy/222323.htm.

Other examples of Clinton administration disparate-impact challenges include *United States v. New York City Board of Education* (E.D.N.Y. settlement agreement dated Feb. 11, 1999) (disparate-impact challenge to school-custodian test); *United States v. City of Belleville*, No. 93-CV-0799-PER (S.D. Ill. 1998) (disparate-impact challenge to written and physical tests for firefighters and police); *Pietras v. Board of Fire Commissioners of the Farmingville Fire Dist.*, No. 98-7334 (amicus brief filed in the U.S. Court of Appeals for the Second Circuit on Jan. 20, 1999) (challenging disparate-impact

on women of firefighter physical-fitness requirements). On the aggressive stance of the Clinton administration with respect to the disparate-impact approach generally (in employment and nonemployment contexts), see my *Public Interest* and NLCPI pieces, *supra*; and Roger Clegg, "Distorting 'Equal Opportunity,'" *Regulation*, Summer 2001, pp. 44-45.

The division was also criticized when it "sued the Philadelphia area's regional transit police for discriminating against female applicants by requiring them to be able to run 1.5 miles in less than 12 minutes." Testimony of Roger Clegg, Feb. 25, 1998, available at http://judiciary.house.gov/legacy/222323.htm. In this litigation, the division took the position that this requirement was "unrelated to job performance" and that there should be different standards for men and women. *Id.*

The division dropped out of this lawsuit during the first year of the Bush administration. The decision to do so, which was announced just after September 11, 2001, was made easier by the events of that day, which made it unappealing to argue that some minimum level of physical conditioning is desirable for police officers. A division spokesman said, "We feel it is critical to public safety that police and firefighters be able to run, climb up and down stairs to rescue people quickly under the most trying of circumstances." Quoted in Roger Clegg, "Tripped Up," *Legal Times*, February 18, 2002, page 36.

There have been, accordingly, fewer disparate-impact employment cases filed under the Bush administration (and, in the nonemployment context--in housing, for instance--it has also been less willing to push the outside of the disparate-impact envelope). This does not mean, however, that the Bush administration never brings

disparate-impact challenges, even to police and firefighter requirements. It recently won a case against Erie, Pennsylvania, in which it had claimed that the city's physical fitness test for police officers--in particular, the push-up and sit-up components to it--had an illegal disparate impact on women. Department of Justice press release, dated December 14, 2005, available at http://www.usdoj.gov/opa/pr/2005/December/05_crt_667.html.

Conclusion

I have noted in the past that there are four basic differences on principles and law that separate relatively liberal administrations (like Clinton's) and relatively conservative ones (like Bush's) when it comes to civil rights enforcement. Roger Clegg, "Do the Right Thing," *Legal Times*, February 19, 2001. I've discussed two of them here: Conservatives are more willing to challenge affirmative discrimination, but less enamored of disparate-impact lawsuits. The other two differences involve federalism and the free market: Conservatives are more sensitive to federal-versus-state divisions of power and competence, and more skeptical about the government second-guessing economic decisions made by the private sector.

I should conclude by saying that it is not necessarily a bad thing that enforcement policies should differ from administration to administration. The executive branch should not urge interpretations of the law that it does not itself believe are a fair reading of the underlying statutory or constitutional texts, and in particular it should not be influenced by simply small-p political considerations. But there are legitimate differences in how to interpret statutes among enforcement officials, just as there are among judges.

Moreover, even if two officials interpret a statute the same way, they might not be equally zealous in enforcing it. Law enforcement agencies have finite resources, and they must set priorities. Those priorities may change over time; antiblack discrimination might be a greater problem in 1964 than 2006, and anti-Muslim discrimination may be a bigger problem in 2006 than in 1964, for instance. Moreover, officials may just believe that certain kinds of discrimination threaten society more than others; one administration might be more upset about sex discrimination in the workplace, another by race discrimination in housing.

Elections have consequences, as they should. Roger Clegg, "Marching Orders," *Legal Times*, April 29, 2002.

Roger Clegg is president and general counsel of the Center for Equal Opportunity in Sterling, Virginia. From 1982 to 1993, he served in the U.S. Department of Justice, including four years (from May 1987 through July 1991) as a deputy in the civil rights division. He is a graduate of Rice University and Yale Law School.

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Mr. NADLER. Thank you.

And I will commend the witness for coming in under 5 minutes. Mr. Henderson, Wade Henderson?

TESTIMONY OF WADE HENDERSON, PRESIDENT AND CEO, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. HENDERSON. Good morning, Mr. Chairman. And thank you, Members of the Subcommittee, for the opportunity to appear before you. Indeed, my name is Wade Henderson. I am president of the Leadership Conference on Civil Rights.

The Leadership Conference is the Nation's premier civil and human rights coalition, with approximately 200 national organizations working to build an America as good as its ideals.

The Leadership Conference has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957, including the work to pass the historic 1957 Civil Rights Act, which created the Civil Rights Division 50 years ago this year.

Now, the recent allegations that eight U.S. attorneys were fired to further a political agenda were surprising to many. To those of us who have been watching the Civil Rights Division over the past several years, it was not.

Over the last 6 years, we have seen politics trump substance and alter the prosecution of our Nation's civil rights laws in many parts of the Division.

We have seen career civil rights Division employees—section chiefs, deputy chiefs and line lawyers—forced out of their jobs in order to drive political agendas. We have seen whole categories of cases not being brought, and the bar made unreachably high for bringing suit in other cases.

We have seen some outright overruling of career prosecutors for political reasons, and also many cases being slow-walked to death. For example, in the Housing Section alone, the total number of cases filed has fallen 42 percent since 2001, while the number of cases involving allegations of race discrimination has gone down by 60 percent from 20 in 2001 to eight in 2006.

Changes in Administration have often brought changes in priorities within the Division, but these changes have never before challenged the core function of the Division.

And never before has there been such a concerted effort to structurally change the Division by focusing on personnel changes at every level.

The Division's record on every score has undermined effective enforcement of our Nation's civil rights laws, but it is the personnel changes to the career staff that are in many ways most disturbing, for it is the staff that builds trust with communities, develops the cases, negotiates effective remedies.

Career staff has always been soul of the Division, and it is under attack. The blueprint for this attack appeared in an article in National Review in 2002.

The article entitled, "Fort Liberalism: Can Justice's Civil Rights Division be Bushified," argued that previous Republican administrations were not successful in stopping the Civil Rights Division from engaging in aggressive civil rights enforcement because of the entrenched career staff.

The article proposed that "the administration should permanently replace those section chiefs it believes it can't trust and, further, that Republican political appointees should seize control of the hiring process, rather than leave it to career civil servants," a radical change in policy.

It seems that those running the Division, however, did get the message. To date, four career section chiefs have been forced out of their jobs, along with two deputy chiefs, including the long-serving veteran who was responsible for overseeing enforcement of section 5 of the Voting Rights Act.

The amount of expertise in civil rights enforcement that has been driven out of the Division will be difficult to recapture.

Fifty years ago, the attempt to integrate Little Rock High School demonstrated the need for the Federal Government to finally say, "Enough." Enough of allowing the States to defy the U.S. Constitution and the courts. Enough of Congress and the executive branch sitting idly by while millions of Americans were denied their basic rights of citizenship."

The 1957 act and the creation of the Civil Rights Division were the first steps in responding to a growing need. Now, for years, we in the civil rights community have looked to the Department of Justice as a leader in the fight for civil rights.

In the 1960's and 1970's, it was the Civil Rights Division that played a significant role in desegregating schools in the old South.

In the 1970's and 1980's, it was the Division that required police and fire departments across the country to open their ranks to racial and ethnic minorities and women.

It was the Civil Rights Division that forced counties to give up election systems that locked out minority voters.

And it was the Civil Rights Division that prosecuted hate crimes when no local authority had the will.

Members of the Committee, today you begin a process that is long overdue, a process that will help us to understand the extent of the damage that has been done to the Civil Rights Division and hopefully a road map for our way back to vigorous enforcement, integrity and justice, and to a Civil Rights Division the Nation can again be proud of.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Henderson follows:]

PREPARED STATEMENT OF WADE HENDERSON

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National Council of La Raza
Ralph G. Neas
People For the American Way
Debra Ness
National Partnership for Women and Families
David Saperstein
Union for Reform Judaism
Theodore M. Shaw
NAACP Legal Defense & Educational Fund, Inc.
Shanna L. Smith
National Fair Housing Alliance
Joe Solmonese
Human Rights Campaign
Andrew L. Stern
Service Employees International Union
John Trasviña
Mexican American Legal Defense and Educational Fund
Reg Weaver
National Education Association
Michele Wheldale Wellstone
American Association of University Women
Mary G. Wilson
League of Women Voters of the United States
Richard Womack
AFL-CIO

COMPLIANCE/ENFORCEMENT COMMITTEE CHAIRPERSON
Kiran K. Narasaki
Asian American Justice Center

PRESIDENT & CEO
Wade J. Henderson

Testimony of

Wade Henderson
President and CEO
Leadership Conference on Civil Rights

before the

House Judiciary Committee

Oversight of the Civil Rights Division

March 22, 2007

Good Morning. My name is Wade Henderson and I am the President and CEO of the Leadership Conference on Civil Rights. The Leadership Conference is the nation's premier civil and human rights coalition, and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957, including the work to pass the historic 1957 Civil Rights Act which created the Civil Rights Division 50 years ago this fall. The Leadership Conference's almost 200 member organizations represent persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. It's a privilege to represent the civil rights community in addressing the Committee today.

Revelations indicating that the U.S. Department of Justice may have fired eight U.S. U.S. Attorneys to further a political agenda[1] were surprising to many; to those of us who have been watching the Civil Rights Division, they were not. Over the last six years, we have seen politics trump substance and alter the prosecution of our nation's civil rights laws in many parts of the Division. We have seen career civil rights division employees – section chiefs, deputy chiefs, and line lawyers -- forced out of their jobs in order to drive political agendas.[2] We have seen whole categories of cases not being brought, and the bar made unreachably high for bringing suit

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[1] Lipton, Eric and David Johnston. "Gonzales's Critics See Lasting, Improper Ties to White House." The New York Times. 15 March 2007. <http://www.nytimes.com/2007/03/15/washington/15justice.html>

Eggen, Dan and John Solomon. "Firings Had Genesis in White House: Ex-Counsel Miers First Suggested Dismissing Prosecutors 2 Years Ago, Documents Show." The Washington Post. 13 March 2007: A01.

Johnston, David. "Justice Dept. Names New Prosecutors, Forcing Some Out." The New York Times. 17 January 2007. <http://www.nytimes.com/2007/01/17/washington/17justice.html?ex=1174536000&en=585b767248eb6b75&ei=5070>

[2] Savage, Charlie. "Civil Rights Hiring Shifted in Bush Era: Conservative leanings stressed." Boston Globe. 23 July 2006.

in other cases. We have seen some outright overruling of career prosecutors for political reasons,[3] and also many cases being "slow walked," to death.

Recently, the Leadership Conference released a report entitled "The Bush Administration Takes Aim: Civil Rights Under Attack," which catalogued many examples of the Bush Administration undermining civil rights and labor enforcement. A copy of that report is attached.

And the problem continues.

This year, to commemorate the 50th anniversary of the creation of the Civil Rights Division, the Leadership Conference on Civil Rights Education Fund plans to issue a comprehensive report on the work of the Division over the past ten years. This report is being developed in conjunction with many of our member organizations, including the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, People for the American Way, Mexican American Legal Defense and Educational Fund, Asian American Justice Center, NAACP, National Partnership for Women and Families, National Fair Housing Alliance, American Association of Persons with Disabilities, National Disability Rights Network, American Civil Liberties Union, Anti-Defamation League, National Council of La Raza and many others. The following is a brief description of some of the report's preliminary findings.

In general, the concerns that we have with the enforcement within the Civil Rights Division fall into three broad categories: (1) a significant drop off in the number of cases brought overall; (2) a shifting of priorities away from traditional enforcement areas, where the

[3] Eggen, Dan. "Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination." The Washington Post. 17 November 2005: A01; Eggen, Dan. "Justice Staff Saw Texas Districting As Illegal: Voting Rights Finding On Map Pushed by DeLay Was Overruled." The Washington Post. 2 December 2005: A01.

Division has long played a unique and significant role, and (3) politicization of personnel decisions and substantive decision-making within the Division.

Reduced Level of Enforcement

Over the last six years, the Civil Rights Division has brought fewer cases across the board. In the area of employment, since January 20, 2001, the Bush Administration has filed just 35 Title VII cases, or an average of approximately six cases per year. This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York (using its own resources). By comparison, the Clinton Administration filed 34 cases in its first two years in office. By the end of its term in office, the Clinton Administration had filed 92 complaints of employment discrimination or more than eleven cases per year.

Similar trends can be seen in the work of the Housing and Civil Enforcement Section. Since 2001, the number of cases the Section has filed overall has fallen precipitously from 53 in 2001 to 31 in 2006. One major drop off in case handling has been with cases involving allegations of race discrimination. Since 2001, the number of race cases the Section has filed has fallen by 60 percent (from 20 to 8). There has also been a precipitous decline in the number of testing cases filed in the past four years especially.

Shifting Priorities

On the issue of priorities, the Employment Litigation Section has filed few cases on behalf of African Americans in recent years. In fact, the Section has directed a portion of its precious resources to "reverse discrimination" cases on behalf of white individuals. In other cases, the Section abandoned well-established government positions. In two recent Supreme Court cases, the Solicitor General refused to defend the longstanding legal positions of the Equal

Employment Opportunity Commission, opting instead for a more restrictive reading of Title VII. In these cases, the Employment Section either failed to advocate for the EEOC's position or was ineffective in attempting to direct policy toward aggressive enforcement.

In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination (HUD HUB Directors' meeting Rhode Island 2003). DOJ's decision was a sharp break from DOJ's decades-long, bipartisan policy to aggressively litigate these cases.

Disparate impact cases are crucial in the fight against housing discrimination. Many rental, sales, insurance, and related policies are not discriminatory on their face, but have a disparate impact on members of protected classes. Among those that are more subtly discriminatory, some have a discriminatory *intent* and others have a discriminatory *impact*. Even though there may not be any intent in the policy, it can have just as detrimental an effect on individuals and families trying to find housing. Examples of disparate impact include: (1) a limit on the number of persons per bedroom to one, which has a disparate impact against families with children, and (2) a minimum loan or insurance amount, which has a disparate impact against properties in minority neighborhoods. The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints.

The Voting Section did not file any cases on behalf of African American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration. In addition, during the same five-year period, the Department only filed one case alleging minority vote dilution in violation of Section 2 of the Act. Section 2 vote dilution cases are particularly important because the end result – an election system that enables minority voters to have an equal opportunity to elect its candidates of choice – has a significant positive impact on minority voters.

Recently, the Civil Rights Division has come under intense scrutiny from civil rights organizations and community leaders regarding cases that have been filed that appear to extend beyond the Division's historical mandate. Perhaps the most scrutinized of these cases was the Voting Section's recent litigation on behalf of white voters in Noxubee, Mississippi. This case recently went to trial and a decision is pending. However, the Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities.

Furthermore, the Department has gone out of its way to take legal positions that have restricted civil rights. For example, the Division filed an *amicus curiae* brief in a 2004 Michigan case involving provisional ballots where the government argued that the Help America Vote Act permitted states to reject provisional ballots solely on the basis that the voter did not cast the ballot in the proper precinct.

In the employment context, the Division unsuccessfully sought to dismiss a case in the middle of litigation, which would have permitted the employer to use a discriminatory and invalid selection test.[4]

These filings, and many others, illustrate hostility toward the goals of effective civil rights enforcement.

Politicization of the Division

In the Voting Section, several decisions appear to have been made in which political considerations trumped the Civil Rights Division's obligation to enforce the Voting Rights Act. These decisions also suggest that the Division is no longer following its own guidance regarding the manner for making Section 5 preclearance determinations. In 2002, the administration intentionally delayed making a determination on a Mississippi Congressional plan drawn by a

[4] *United States v. Buffalo Police Department*, No. 73 CV-414 (W.D.N.Y.).

state appellate court so that a plan that favored Republicans drawn by federal judges would be used instead.[5] In 2003, the political appointees disregarded a recommendation that a Texas Congressional redistricting plan be objected to because it resulted in the retrogression of minority voting strength.[6] That plan was later struck down, on other grounds, by the Supreme Court.[7] In 2005, the administration precleared Georgia's government-issued photo identification law despite numerous comment letters outlining the impact that the law would have on minority voters and over the recommendation of an objection from the majority of the staff who worked on it.[8] The law was later found unconstitutional by a state and federal courts.[9]

Compounding all of these problems are the major changes in personnel across the Division that have resulted in the loss of dedicated career staff, low morale, and a decrease in productivity.

Changes in Administration have often brought changes in priorities within the Division, but these changes have never before challenged the core functions of the Division. And never before has there been such a concerted effort to structurally change the Division by focusing on personnel changes at every level.

The Division's record on every score has undermined effective enforcement of our

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[5] Rosenbaum, David E. "Justice Dept. Accused of Politics in Redistricting." The New York Times. 31 May 2002: A14.
[6] Eggen, Dan. "Justice Staff Saw Texas Districting As Illegal: Voting Rights Finding On Map Pushed by DeLay Was Overruled." The Washington Post. 2 December 2005: A01;
Section 5 Recommendation Memorandum, December 12, 2003 re: House Bill 3 (Congressional Redistricting Plan Enacted by the Texas Legislature) (2003-3885) and House Bill 1 (Extension of congressional candidates filing period, moving primary election date, procedures for canvassing, late counting of ballots) (2003-3917). http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf, last viewed March 20, 2007.
[7] *League of United Latin American Citizens v. Perry*, 547 U.S. (2006)
[8] Section 5 Recommendation Memorandum, August 25, 2005 re: Act No. 53 (H.B. 244) (2005). http://www.washingtonpost.com/wp-srv/politics/documents/dojgadocs1_11.pdf last viewed March 20, 2007.
[9] *Common Cause of Georgia v. Billups*, No. 4:05-CV-0201-HLM (N.D. Ga. Oct. 18, 2005)

nation's civil rights laws, but it is the personnel changes to career staff that are, in many ways, most disturbing. For it is the staff that builds trust with communities, develops the cases, and negotiates effective remedies. Career staff has always been the soul of the Division, and it is under attack.

The Blueprint for this attack appeared in an article in National Review in 2002. The article, "Fort Liberalism: Can Justice's civil rights division be Bushified,"[10] argued that previous Republican administrations were not successful in stopping the civil rights division from engaging in aggressive civil rights enforcement because of the "entrenched" career staff. The article proposed that "the administration should permanently replace those [section chiefs] it believes it can't trust," and further, that "Republican political appointees should seize control of the hiring process," rather than leave it to career civil servants – a radical change in policy. It seems that those running the Division got the message.

To date, four career section chiefs have been forced out of their jobs, along with two deputy chiefs, including the long serving veteran who was responsible for overseeing enforcement of section 5 of the Voting Rights Act.

And, according to a July 2006 article in the *Boston Globe*, "[h]ires with traditional civil rights backgrounds – either civil rights litigators or members of civil rights groups – have plunged. Only 19 of the 45 lawyers [42 percent] hired since 2003 in [the employment, appellate, and voting] sections were experienced in civil rights law and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies." By contrast, "in the two years before the change, 77 percent of those who were hired had civil rights backgrounds." And "[m]eanwhile, conservative credentials [of

[10] Miller, John J. "Fort Liberalism: Can Justice's civil rights division be Bushified?" National Review. 6 May 2002.

those hired] have risen sharply. Since 2003, the three sections have hired 11 lawyers who said they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns."

The reporter noted that current and former Division staffers "echoed to varying degrees" that this pattern was what they observed.

The amount of expertise in civil rights enforcement that has been driven out of the Division will be difficult to recapture.

Fifty years ago, the attempt to integrate Little Rock High School demonstrated the need for the federal government to finally say "enough." Enough of allowing the states to defy the U.S. Constitution and the courts. Enough of Congress and the Executive Branch sitting idly by while millions of Americans were denied their basic rights of citizenship. The 1957 Act and the creation of the Civil Rights Division were first steps in responding to a growing need.

For years, we in the civil rights community have looked to the Department of Justice as a leader in the fight for civil rights. In the 1960s and 1970s, it was the Civil Rights Division that played a significant role in desegregating schools in the old South. In the 1970s and 1980s, it was the Civil Rights Division that required police and fire departments across the country to open their ranks to racial and ethnic minorities and women. It was the Civil Rights Division that forced counties to give up election systems that locked out minority voters. And it was the civil rights division that prosecuted hate crimes when no local authority had the will.

Members of the Committee, today you begin a process that is long overdue. A process that will help us to understand the extent of the damage that has been done to the Civil Rights Division, and – hopefully – a roadmap for our way back to vigorous enforcement, integrity, and

justice. And a Civil Rights Division the nation can again be proud of.

Thank you.

The Record of the Employment Litigation Section under the Bush Administration

Since its creation fifty years ago, the Employment Litigation Section of the Department of Justice's Civil Rights Division has been at the forefront in protecting our citizens against illegal employment discrimination. For decades and through various administrations, the Employment Section was viewed as an aggressive and effective enforcer of Title VII. Under the current Administration, vigorous enforcement of equal employment opportunity laws has suffered. The Department of Justice has strayed from its historic mission and traditions. As such, careful oversight of its work is particularly critical at this time.

The Employment Litigation Section of the Civil Rights Division is tasked with an important role. The Section is responsible for aggressively enforcing the provisions of Title VII of the Civil Rights Act of 1964 against state and local government employers.[11] Title VII prohibits discrimination in employment based upon race, sex, religion and national origin. The enforcement authority of the Employment Section derives from sections 706 and 707 of Title VII.[12] Section 706 of Title VII authorizes the Attorney General to file a suit against a state or local government employer based upon an *individual* charge of discrimination that has been referred to the Department of Justice by the EEOC. Section 707 authorizes the Attorney General to bring suit against a state or local government employer where there is reason to believe that a "*pattern or practice*" of employment discrimination exists. These are cases that seek broad systemic reform of a selection practice that adversely impacts upon the job opportunities for a protected group.

The importance of the Department of Justice to the effective enforcement of Title VII cannot be overstated. It is the organization with the prestige, expertise, and financial and personnel resources to challenge discriminatory employment practices of state and local government employers. As a general rule, private attorneys and public interest organizations lack the financial and personnel resources to act as private "Attorneys General" in the Title VII enforcement scheme.

Unfortunately, since assuming office, the Bush Administration has cut back radically on its enforcement efforts. It has not filed Title VII lawsuits in substantial numbers and it appears to have abandoned serious Title VII enforcement on behalf of African-Americans. It is vital that the Department of Justice become more vigorous and out-spoken in the effort to address employment discrimination.

DOJ has failed to vigorously enforce the equal employment opportunity laws uuder this Administration.

A review of enforcement activity since 2001 reveals that the Employment Section has

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[11] 42 U.S.C. § 2000e *et seq.*
[12] 42 U.S.C. §§ 2000e-5 & 6.

failed to fulfill its mission under this Administration.[13] The number of Title VII lawsuits filed by the Section is down considerably from prior Administrations – both Republican and Democrat.

Since January 20, 2001, the Bush Administration filed just 35 Title VII cases, or an average of approximately **six** cases per year. This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York (using its own resources). By comparison, the Clinton Administration filed 34 cases in its first two years in office. By the end of its term in office, the Clinton Administration had filed 92 complaints of employment discrimination or more than **eleven** cases per year. Standing alone, the lack of Title VII enforcement by the Employment Section is grave cause for concern.

Furthermore, the mix of cases filed also has changed. The Section has filed few cases on behalf of African Americans. In fact, the Section has directed a portion of its precious resources to "reverse discrimination" cases on behalf of white individuals. In other cases, the Section abandoned well-established government positions. In two recent Supreme Court cases, the Solicitor General refused to defend the longstanding legal positions of the Equal Employment Opportunity Commission, opting instead for a more restrictive reading of Title VII. In these cases, the Employment Section either failed to advocate for the EEOC's position or was ineffective in attempting to direct policy toward aggressive enforcement. Compounding these problems are major changes in personnel that have resulted in the loss of dedicated career staff, low morale, and a decrease in productivity. Each of the concerns is addressed in more detail below.

DOJ has failed to enforce Title VII vigorously to address discrimination against individuals.

DOJ has the authority to bring suit on behalf of individual plaintiffs under section 706 of Title VII. Individuals who believe they are the victims of employment discrimination may file a charge of discrimination with the Equal Employment Opportunity Commission. If the charge of discrimination is against a state or local government employer, the EEOC may refer the charge to the DOJ following a determination that the charge has merit and efforts to resolve the matter voluntarily have failed.

DOJ receives more than 500 of these referrals from the EEOC each year. Even though cases brought pursuant to section 706 referrals do not affect large numbers of employees or may not establish new law, they are nevertheless important enforcement vehicles. Among others, these cases often address unique issues of intentional or purposeful discrimination or address issues that members of the private bar might not be qualified or able to handle. In smaller communities, members of the private bar might not be willing to represent an individual in a suit against the local government for fear of retaliation.

Since the year 2000, the EEOC referred over **3,000** individual charges of discrimination to the Employment Section, but the Section has filed just **25** individual cases since 2001. Thus,

[13] Information about the Employment Litigation Section's complaints, court approved consent decrees and judgments, and out-of-court settlements can be found at http://www.usdoj.gov/crt/emp/papers.html.

the Employment Section filed suit in **less than one percent** of the individual cases referred by the EEOC. By contrast, the Employment Section filed **73** individual cases during the previous Administration. At this rate, the Bush Administration will have filed **less than half** the number of individual Title VII cases that were filed during the previous Administration.

DOJ also has failed to vigorously enforce Title VII to address systemic discrimination in pattern or practice cases.

Pattern or practice Title VII cases are the most important and significant cases because they have greatest impact. Not only do pattern or practice cases affect a large number of employees, they often break new legal ground. These pattern or practice cases can eliminate employment and selection practices that have the purpose or effect of discriminating on the basis of race, sex, religion, and national origin. Pattern or practice suits are critically important vehicles for meaningful and far reaching reform of employment practices that unjustifiably limit employment opportunities for minorities and women -- and the DOJ is uniquely equipped to bring them. Pattern or practice suits are expensive and require substantial expertise. Few private parties or organizations have the expertise or resources to bring these suits. Thus, there is nobody to fill the void if the DOJ fails to bring such suits. Unfortunately, the number of pattern or practice cases filed during this Administration reveals that DOJ is not actively enforcing equal employment opportunity laws.

The number of pattern or practice cases is a strong indicator to the employer community as to whether the DOJ is actively enforcing Title VII. Unlike section 706 Title VII cases, section 707 pattern or practice cases are not dependent upon the referral of a charge of employment discrimination from the EEOC. Under section 707, the Attorney General has "self-starting" authority to initiate pattern or practice discrimination investigations and cases against public employers. Over the past **six years**, the Employment Section has filed just **10** pattern or practice cases. By comparison, in just the first **two years** of the Clinton Administration, the Employment Section filed **13** pattern or practice cases. A closer look behind these statistics reveals further evidence of DOJ's disturbing departure from vigorous enforcement of Title VII.

DOJ has filed few cases on behalf of African-Americans.

Traditionally, combating racial discrimination has been a core mission of the Employment Section. The Civil Rights Division was formed to eradicate race discrimination against African-Americans and, for most of its first fifteen years, it devoted all its resources to this goal. Over the years, the mission of the Division expanded as new civil rights laws were passed and new areas of civil rights enforcement were pursued by a variety of groups and organizations. But historically, combating discrimination against African-Americans has remained a central priority of the Division through both Republican and Democratic administrations. However, it is clear from the record of this Administration that race discrimination against African-Americans is a very low enforcement priority.

Of the 25 individual employment discrimination cases filed by this Administration, only **six** cases involved allegations of race discrimination. Under the Clinton Administration, the Employment Section filed **twelve** individual race discrimination cases.

The Bush Administration has also filed few pattern or practice cases on behalf of African Americans. Over the past six years, the Employment Section has filed just **six** pattern or practice cases alleging race discrimination. By comparison, the previous Administration filed **eight** pattern or practice cases alleging race discrimination **in its first two years**. Two of the systemic race discrimination cases filed during this Administration actually allege discrimination against whites.[14] Another case alleges discrimination against Native Americans[15] and another case was initially filed by the U.S. Attorney's Office for the Southern District of New York.[16] Thus, the ELS can lay claim to filing **two** pattern or practice cases in six years that allege race discrimination against African-Americans.[17] Furthermore, these two cases were not filed until 2006, more than five years into the Bush Administration.[18]

These statistics demonstrate that the current Administration has devoted fewer resources to addressing employment discrimination against African Americans. At the same time, the Administration has devoted increased resources to "reverse discrimination" cases.

DOJ has devoted significant resources to "reverse discrimination" cases alleging discrimination against whites.

Instead of devoting its resources to address discrimination against racial minorities, the Administration has directed significant resources to bring a number of "reverse discrimination" cases on behalf of white individuals.

In July 2005, the Employment Section filed a reverse discrimination suit on behalf of white males.[19] Ignoring decades of institutional discrimination against minorities by the City of Pontiac, the Employment Section alleged that a 1984 Collective Bargaining Agreement "creat[ed] and maintain[ed] a dual system for hire and promotion …which constitute[d] a pattern or practice of [discriminating against non-minorities and men]" in violation of Title VII.

In February 2006, the Employment Section filed another reverse discrimination case. In this case, the Employment Section attacked minority and women graduate fellowship programs at Southern Illinois University.[20] DOJ alleged that the fellowship program discriminated against whites and men. The fellowships at issue were aimed at increasing the minority enrollment in graduate programs at Southern Illinois University, where Blacks and Hispanics constituted less than 8% of the University's 5,500 graduate students. These fellowships had assisted 129 students with a combined annual budget of $200,000 which was a drop in the bucket compared to the approximate $12 million dollars in fellowship assistance flowing to the predominantly white graduate fellows. As a result of the suit, the university abandoned its fellowship program

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[14] *United States v. Board of Trustees of Southern Illinois University*, CA 06-4037 (S.D. Ill. filed Feb. 8, 2006); *United States v. Pontiac, Michigan Fire Department*, No. 2:05-CV-72913 (E.D. Mich. filed Jul. 27, 2005).
[15] *United States v. City of Gallup, NM*, CIV 04-1108 (D.N.M. filed Sept. 29, 2004).
[16] *United States v. City of New York and New York City Housing Authority*, 1:02-cv-044699-DC-MHD (S.D.N.Y. filed June 19, 2002)
[17] *United States v. Virginia Beach Police Dept.*, (E.D. Va. filed Feb. 7, 2006); *United States v. Chesapeake City*, (E.D. Va. filed July 24, 2006).
[18] *United States v. Virginia Beach Police Department*, 06cv189 (E.D. Va. filed Feb. 7, 2006).
[19] *United States v. City of Pontiac, Michigan*, No. 2:05-CV-72913 (E.D. Mich. filed July 26, 2005).
[20] *United States v. Southern Illinois University*, CA 06-4037 (S.D. Ill. filed Feb. 8, 2006).

for minorities and women.

While all citizens are entitled to the protections of our civil rights laws, African Americans have historically been and remain the primary victims of race discrimination on the job. For that reason, the Department has always placed high priority on fighting race-based discrimination against African Americans. In redirecting precious resources to these "reverse discrimination" cases, this Administration has signaled a shift away from fulfilling its core mission.

In recent Supreme Court cases, DOJ has endorsed restrictive interpretations of Title VII.

In two recent Supreme Court cases, the Bush Administration endorsed restrictive interpretations of Title VII's anti-discrimination and anti-retaliation protections. In both of these cases, the Solicitor General expressly rejected EEOC's well-established position. In these cases, the Employment Litigation Section either agreed with the Solicitor General's restrictive interpretations, or the Employment Section was ineffective in urging the Solicitor General to aggressively enforce the protections of Title VII. Regardless, the Administration should be vigorously enforcing Title VII, rather than seeking to limit the scope of its protections.

In an amicus curiae brief filed in *Burlington Northern and Santa Fe Railway Co. v. White*,[21] the Solicitor General advocated unsuccessfully for a narrow interpretation of Title VII's anti-retaliation provision.[22] The Solicitor General refused to advocate the EEOC's well-established guidance that established broad protection for employees. Instead, the Solicitor General joined with the employer, arguing that the anti-retaliation provision only prohibits retaliation that affects the terms and conditions of employment, but not retaliation that takes place outside of the workplace. Ultimately, in a unanimous decision (with Justice Alito concurring in the judgment), the Supreme Court expressly rejected DOJ's watered-down position and endorsed the longstanding EEOC standard. Even conservative Justice Scalia stated that the EEOC standard deserved deference. The Court held that the Solicitor General's narrow interpretation was inconsistent with the language of Title VII and inconsistent with the primary objective of the anti-retaliation provision: to provide broad protection to employees who seek to enforce the protections of Title VII.

More recently, in the pending Supreme Court case of *Ledbetter v. Goodyear*,[23] the Solicitor General again failed to advocate for longstanding EEOC regulations, and the civil rights community again was forced to make those arguments in its place. *Ledbetter* presents a statute of limitations question in the pay discrimination context. Specifically, the question is whether a Title VII plaintiff may recover when disparate pay is received during the statutory limitations period, but is the result of intentional discriminatory decisions made outside the limitations period. The Solicitor General again sided with the employer, arguing that the employee cannot recover if the disparate pay is the result of a decision outside of the 180 day limitations period. In support of the Title VII plaintiff employee, the civil rights community advocated for deference to the EEOC's well-established position that every paycheck that compensates an employee less

[21] 126 S. Ct. 2405 (2006).
[22] 42 U.S.C. § 2000e-3(a).
[23] 421 F.3d 1169 (11th Cir. 2005), cert. granted, 126 S. Ct. 2965 (2006).

than a similarly-situated employee because of sex constitutes a new violation of Title VII. The Supreme Court has yet to issue its opinion in *Ledbetter.*

DOJ has abandoned established positions in ongoing cases.

DOJ also has abandoned long-standing positions in ongoing litigation and settled on appeal for a fraction of the amount awarded in an administrative hearing.

In one such case, the Employment Section unsuccessfully sought to dismiss a case in the middle of litigation, which would have permitted the employer to use a discriminatory and invalid selection test. The Employment Section first sued the City of Buffalo's police department in 1974, alleging that it had engaged in a pattern and practice of employment discrimination against African Americans, Hispanics, and women, in violation of Title VII and the Fourteenth Amendment.[24] After prevailing on the merits, a Final Decree and Order was entered in 1979, which ordered, among other things, interim hiring goals for minorities in the police department. In over two decades, the City never fully complied with the terms of this court-ordered settlement. Yet in 2002, the Employment Section dramatically reversed its position by offering to dismiss the case, arguing that the relief being provided minorities under the agreement constituted unconstitutional race-conscious relief, despite the fact that the selection procedure in place at the time had not been validated as required by Title VII. The Employment Section proposed that the City be permitted to use a discriminatory and invalid selection examination despite the fact that the City had failed for 24 years to comply with a court order to create a fair and non-discriminatory test. DOJ's arguments were expressly rejected by the court.

In a sex discrimination case against a textile manufacturer, the Employment Section settled on appeal for a fraction of the amount that had been awarded to victims of discrimination in the decision below.[25] The case originated when the Department of Labor's Office of Federal Contract Compliance Programs began an investigation of Greenwood Mills, a federal contractor, pursuant to its authority under Executive Order 11246. The investigation revealed that Greenwood Mills had hired just one woman and thirty men for entry-level jobs in its textile plant, despite the fact that significant numbers of women had applied. In 2002, the Administrative Review Board of the Department of Labor issued a decision granting nearly $400,000 in back pay and interest to be divided among the female applicants who had been rejected for these entry level jobs. When Greenwood Mills appealed this decision, the Employment Section settled the case for $56,000, rather than defend the judgment issued by the Department of Labor.

These cases provide further examples of the ways in which DOJ has abandoned its role as a vigorous enforcer of Title VII.

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[24] *United States v. Buffalo Police Department,* No. 73 CV-414 (W.D.N.Y.).
[25] *Greenwood Mills v. Chao,* C.A. No. 8:95-40004-20 (D.S.C.).

DOJ has reassigned dedicated career lawyers, morale has plummeted, productivity has lowered, and civil rights enforcement has suffered.

During the Bush Administration, the Employment Section has lost significant numbers of dedicated career lawyers. Under the new leadership, morale among career attorneys has plummeted, productivity has lowered, and civil rights enforcement has slowed. The political nature of this deterioration has been the subject of numerous articles.[26] There has always been normal turnover in career staff in the Civil Rights Division, but it has never reached such extreme levels and never has it been so closely related to the manner in which political appointees have administered the Division. It has stripped the division of career staff at a level not experienced before.

In the past, it was rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance, and political appointees never removed deputy section chiefs. However, shortly after the new Administration took office, longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. The Employment Section chief and one of four deputy chiefs were involuntarily transferred in April 2002. Shortly after that, a special counsel was involuntarily transferred. Since then, two other deputy chiefs left the section or retired. Overall, since 2002, the section chief and three of the four deputy chiefs have been involuntarily reassigned or left the section.

This type of administration has had an extremely negative impact on the morale of career staff. The best indicator of this impact is in the unprecedented turnover of career personnel. Twenty-one of the 32 attorneys in the Section -- **over 65%** -- have either left the Division or transferred to other sections. Additionally, loss of professional paralegals and civil rights analysts had been significant. Twelve professionals have left the Employment Section, many with over 20 years of experience. These employees were instrumental in building and maintaining an aggressive Title VII enforcement unit.

The Employment Section became top heavy with management, which is likely to be part of the reason its productivity is way down. The Employment Section has a staff of approximately 60, of which seven are managers, 25 are line attorneys, twelve are paralegals, one is a trained statistician, and the remaining staff provides administrative support. Until 2001, the Section's management team consisted of a section chief and three and occasionally four deputy section chiefs. Today, there is one section chief and six deputy section chiefs. This means that there is approximately one supervisor for every three high-level line attorneys. The inexplicable increase in the Employment Section management team means that there are fewer attorneys available to tend to the Section's Title VII enforcement responsibilities.

Compounding the impact of the extraordinary loss of career staff in recent years has been a major change in the Division's hiring practices. The new hiring procedures virtually eliminated career staff input from the hiring of career attorneys. This has led to the perception and reality of new staff attorneys having little if any experience in or commitment to the enforcement of civil rights laws and, more seriously, injecting political factors into the hiring of

[26] *See* http://www.washingtonpost.com, 11/17/05., "Legal Affairs," September/October 2005.

career attorneys. The overall damage caused by losing a large body of the committed career staff and replacing it with persons with little or no interest or experience in civil rights enforcement has been severe and will be difficult to overcome.

Since 1954, the primary source of attorneys in all divisions in the Department has been the attorney general's honors program. This program was instituted by then Attorney General Herbert Brownell in order to end perceived personnel practices "marked by allegations of cronyism, favoritism and graft." Since its adoption, the honors program has been consistently successful in drawing the top law school graduates to the Department.

Until 2002, career attorneys in the Civil Rights Division played a central role in the process followed in hiring attorneys through the honors program. Each year career line attorneys from each section were appointed to an honors hiring committee which was responsible for traveling to law schools to interview law students who had applied for the program. Because of the tremendous number of applications for the honors program, committee members generally would limit their interviews to applicants who had listed the Civil Rights Division as their first choice when applying. The Civil Rights Division had earned a reputation as the most difficult of the Department's divisions to enter through the honors program because only a few positions were open each year and so many highly qualified law students desired to work in civil rights.

After interviewing was completed, the hiring committee would meet and recommend to the political appointees those whom they considered the most qualified. Law school performance was undoubtedly a central factor, but a demonstrated interest and/or experience in civil rights enforcement and a commitment to the work of the Division were also key qualities that interviewers sought in candidates selected to join the career staff of the Division. Political appointees rarely rejected these recommendations.

Hiring of experienced attorneys followed a similar process. Individual sections with attorney vacancies would review applications and select those to be interviewed. They would conduct initial interviews and the section chief would then recommend hires to Division leadership. Like recommendations for honors hires, these recommendations were almost always accepted by political appointees.

These procedures have been very successful over the years in maintaining an attorney staff that was of the highest quality – in Republican as well as Democratic administrations. A former Deputy Assistant Attorney General in the Reagan Administration, who was interviewed for a recent *Boston Globe* article about Division hiring practices, said that the system of hiring through committees of career professionals worked well. The article quoted him as saying: "There was obviously oversight from the front office, but I don't remember a time when an individual went through that process and was not accepted. I just don't think there was any quarrel with the quality of individuals who were being hired. And we certainly weren't placing any kind of litmus test on . . . the individuals who were ultimately determined to be best qualified."[27]

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[27] Charlie Savage, *Civil Rights Hiring Shifted in Bush Era; Conservative Leanings Stressed*, BOSTON GLOBE, July 23, 2006, at A1.

But, in 2002, these longstanding hiring procedures were abandoned, not only in the Civil Rights Division but throughout the Department. The honors hiring committee in the Division was disbanded and all interviewing and hiring decisions were made directly by political appointees with no input from career staff or management. As for non-honors hires, the political appointees similarly took a much more active roll in selecting those persons who received interviews, and almost always participated in the interviewing process.

Not surprisingly, these new hiring procedures have resulted in the resurfacing of the perception of favoritism, cronyism, and political influence that the honors program had been designed to eliminate in 1954. Indeed, information that has come to light recently indicates that in many instances, this is more than perception. In July 2006, a reporter for the *Boston Globe* obtained pursuant to the Freedom of Information Act the resumes and other hiring data of successful applicants to the voting, employment, and appellate sections from 2001-2006. His analysis of this data indicated that:

- "Hires with traditional civil rights backgrounds – either civil rights litigators or members of civil rights groups – have plunged. Only 19 of the 45 [42 percent] lawyers hired since 2003 in those [the employment, appellate, and voting] sections were experienced in civil rights law, and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies." By contrast, "in the two years before the change, 77 percent of those who were hired had civil rights backgrounds."

- "Meanwhile, conservative credentials [of those hired] have risen sharply. Since 2003, the three sections have hired 11 lawyers who said they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns."

The reporter noted that current and former Division staffers "echoed to varying degrees" that this pattern was what they observed. For example, a former deputy chief in the Division who now teaches at the American University Law School testified at an American Constitution Society panel on December 14, 2005 that several of his students who had no interest in civil rights and who had applied to the Department with hopes of doing other kinds of work were often referred to the Civil Rights Division. He said every one of these persons was a member of the Federalist Society.

In addition to these personnel changes, the decision making process has changed. Political appointees in the Division have closed themselves off from career staff. Regular meetings of all of the career section chiefs together with the political leadership were discontinued from the outset of this Administration. Such meetings had always been an important means of communication in an increasingly large Division that was physically separated in several different buildings. This lack of cooperation between political appointees and career staff has caused vigorous enforcement of the law to suffer. One former Civil Rights Division attorney described the importance of including career attorneys in the decision making process:

> [S]eparation of powers was designed to enable both civil service attorneys and political appointees to influence policy. This design, as well as wise policy, requires cooperation between the two groups to achieve the proper balance between carrying out administration policy and carrying out core law enforcement duties. Where one group shuts itself out from influence by the other, the department's effectiveness suffers.[28]

During the Bush Administration, there has been a conscious effort to attack and change career staff. This has resulted in a major loss of career personnel with many years of experience in civil rights enforcement and in the valuable institutional memory that had always been maintained in the Division until now – in both Republican and Democratic administrations. Replacement of this staff through a new hiring process has resulted in the perception and reality of politicization of the Division. The overall impact has been a loss of public confidence in fair and even-handed enforcement of civil rights laws by the Department of Justice.

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[28] Brian K. Landsberg, "Role of Civil Servants and Appointees," *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (University Press of Kansas 1997) at 156. Landsberg was a career attorney in the Civil Rights Division from 1964-86 during which he was chief of the Education Section for five years and then chief of the Appellate Section for twelve years. He now is professor of law at McGeorge Law School.

The Employment Litigation Section by the Numbers

Total Title VII cases:

- The Employment Section has filed **35** Title VII cases filed over 6 years, or **6** cases per year on average.
- This is about half the rate of the previous Administration, which filed a total of **92** Title VII cases, an average of more than **11** cases per year.

Individual Title VII cases:

- Over the past six years, the EEOC has referred over **3,000** individual charges of discrimination to the Employment Litigation Section.
- The Section has filed just **25** individual cases since 2001, or an average of about **4** cases per year.
- This is about half the rate of the previous Administration, which filed a total of **73** individual cases, an average of about **9** cases per year.

Pattern or practice Title VII cases:

- Over the past six years, the Employment Section has filed just **10** pattern or practice cases.
- By comparison, the previous Administration filed **13** pattern or practice cases in the first two years alone.

Race discrimination cases:

- Only **6** of the **25** individual Title VII cases involve allegations of race discrimination; by contrast, the previous Administration filed **12** individual race discrimination cases.
- The Employment Section has filed **6** pattern or practice race discrimination cases since 2001; by contrast, the previous Administration filed **8** pattern or practice race discrimination cases **in its first two years**.
- The Employment Section can lay claim to filing just **2** pattern or practice cases that allege race discrimination against African Americans.
- The Employment Section has filed **2** "reverse discrimination" pattern or practice cases alleging discrimination against white males.

Sex discrimination cases:

- The Employment Section has filed just **1** pattern or practice sex discrimination case on behalf of women.

Staff reassignment and attrition:

- Under this Administration, the section chief and **3** of the 4 deputy chiefs have been involuntarily reassigned or left the section.
- **21** of the 32 attorneys in the Section have left the Civil Rights Division or transferred to other sections.

The Record of the Housing and Civil Enforcement Section under the Bush Administration[29]

The Housing and Civil Enforcement Section enforces: the Fair Housing Act, which prohibits discrimination in housing; the Equal Credit Opportunity Act, which prohibits discrimination in credit; Title II of the Civil Rights Act of 1964, which prohibits discrimination in certain places of public accommodation, such as hotels, restaurants, nightclubs and theaters; the Religious Land Use and Institutionalized Persons Act, which prohibits local governments from adopting or enforcing land use regulations that discriminate against religious assemblies and institutions or which unjustifiably burden religious exercise; and the Service-members Civil Relief Act, which provides for the temporary suspension of judicial and administrative proceedings and civil protections in areas such as housing, credit and taxes for military personnel while they are on active duty. [30]

The Department has the capacity as a federal government agency to subpoena where private groups do not and to launch large investigations. The public depends on the department to step in where individuals and private organization do not have the ability to do so.

Although the Housing and Civil Enforcement Section covers an array of laws, its primary focus is housing. Out of the 297 cases on the Section's website (i.e. cases resolved between 1993 and 2007), 275 were housing-related cases.

<u>How the Housing and Civil Enforcement Section Gets Cases</u>

According to the DOJ's website:

> Under the Fair Housing Act, the Department of Justice may start a lawsuit where it has reason to believe that a person or entity is engaged in a "pattern or practice" of discrimination or where a denial of rights to a group of persons raises an issue of general public importance. Through these lawsuits, the Department can obtain money damages, both actual and punitive damages, for those individuals harmed by a defendant's discriminatory actions as well as preventing any further discriminatory conduct. The defendant may also be required to pay money penalties to the United States.
>
> The Department of Housing and Urban Development (HUD) investigates individual cases of discrimination in housing. If HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, then either the complainant or the respondent may elect to have the case heard in federal court. In those instances, the Department of Justice will bring the case on behalf of the individual complainant.
>
> In addition, where force or a threat of force is used to deny or interfere with fair housing rights, the Department of Justice may begin criminal proceedings. Finally, in cases

[29] The LCCR Housing Task force is chaired by the National Fair Housing Alliance and the NAACP Legal Defense and Educational Fund
[30] http://www.usdoj.gov/crt/housing/housing_main.htm

involving discrimination in home mortgage loans or home improvement loans, the Department may file suit under both the Fair Housing Act and the Equal Credit Opportunity Act.[31]

Issues of Concern

Decreasing Number of Cases and Changes in Priorities

In the past four years, the number of cases the Section has filed overall has precipitously decreased (by 29%).

TOTAL CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
48	45	53	49	29	38	42	31

One major drop off in case handling has been with race cases. In the past four years, the number of race cases the Section has filed has fallen drastically (by 43%).

RACE CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
16	21	20	19	7	8	10	8

By contrast, disability cases have retained their numbers, even though the overall number of cases filed by DOJ has decreased by 29%, as mentioned above. (The number of cases filed in the first four years [FY99 – FY02] is 73 cases, compared to the second four years [FY03 – FY06], which is 74 cases.)

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
16	12	24	21	16	23	21	14

Low Number of Testing Cases

In 1992, the Section began its own testing program. As of 2005, 1,000 employees from various Department components nationwide have been trained as testers.

There has been a precipitous decline in the number of testing cases filed in the past 4 years especially. Only 31 cases involving testing have been filed in the past eight years (FY99 – FY06). Of particular note, only 7 of those cases were brought in the last four years.

[31] http://www.usdoj.gov/crt/housing/faq.htm#enforce

TESTING CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
10	5	5	4	2	1	1	3

Low Number of Lending Cases

Only five fair lending cases have been filed in the past four years. This is in spite of the fact that numerous studies have shown the link between predatory and subprime lending and race. Here are three such studies, just to name a few:

Bosian, Debbie; Ersnst, Keith; Li, Wei. "Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages," Center for Responsible Lending. May 31, 2006.

Wyly, Atia, Foxcroft, Hammel, Phillips-Watts, "American Home: Predatory Mortgage Capital and Neighborhood Spaces of Race and Class Exploitation in the United States", Geografiska Annales 88B, 2006.

Turner, Margaret Austin, et al., All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions, The Urban Institute, April 2002.

With the ballooning sub-prime market over the years, one would have expected to see an increase in these cases by DOJ.

Loss of Qualified Staff

As with many other sections of the Department, qualified staff have left and/or been pushed out by this administration. Many of these staff people would be available to speak to committee staff and many may be able to testify.

With the loss of qualified staff there is a loss of institutional memory, a loss of individuals familiar with the Fair Housing Act and other laws covered by the section.

Refusal to Take Disparate Impact Cases

In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination (HUD HUB Directors' meeting Rhode Island 2003). DOJ's decision was a sharp break from DOJ's decades-long, bipartisan policy to aggressively litigate these cases.

Disparate impact cases are crucial in the fight against housing discrimination. Many rental, sales, insurance, and related policies are not discriminatory on their face, but have a disparate impact on members of protected classes. Among those that are more subtly discriminatory, some have a discriminatory *intent* and others have a discriminatory *impact*. Even though there may not be any intent in the policy, it can have just as detrimental an effect on individuals and families trying to find housing. Examples of disparate impact include (1) a limit

on the number of persons per bedroom to one has a disparate impact against families with children and (2) a minimum loan or insurance amount has a disparate impact against properties in minority neighborhoods. The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints.

Refusal to Take HUD Election Cases

In addition, as mentioned on DOJ's own website (as cited above), DOJ is to bring cases referred by HUD on behalf of a complainant. Unfortunately, DOJ has failed to file "election" cases (cases in which a party to a HUD complaint that has been charged has elected to have the case heard in federal court, rather than before a HUD Administrative Law Judge) in a timely manner. They have also dragged out cases much longer than required, requiring more and more investigations.

The Fair Housing Act as Amended (1988) clearly states that DOJ must pursue cases charged by HUD. DOJ has recently taken the stance that it is not required to file these cases but that it may instead perform additional investigations, thereby prolonging and duplicating the process. DOJ has even stated that this provision of the fair housing law is unconstitutional.

There is a case out of Chicago in which DOJ refused to file a federal suit after HUD referred the case. The back and forth went on with DOJ so long, eventually involving Representative Jesse Jackson, Jr.'s request to DOJ to investigate the case. The case eventually settled – but the DOJ's actions served to undercut the relief provided to the complainants in the case.

Poor Case Work

Another case out of Chicago demonstrates DOJ's poor case work. Initially, DOJ would not take the case; the Illinois attorney general had to file a motion to get DOJ to do something. Once DOJ got involved, a settlement was reached between DOJ and the respondent. The housing provider was prepared to include $100,000 in the settlement that would fund programs at the local school for the children against whom the provider had discriminated. The DOJ refused to accept the $100,000 on behalf of the children saying that education had nothing to do with housing. (Fortunately, the complainant was able to settle independently with the housing provider for the additional funding on behalf of the children.

The Record of the Voting Section under the Bush Administration[32]

Enforcement of Section 5 of the Voting Rights Act.

Section 5 of the Voting Rights Act, which was part of the original Act and was reauthorized most recently last year for 25 years, requires jurisdictions with a history of discrimination to demonstrate to the Justice Department or the District Court of the District of Columbia that any voting changes they make do not have a discriminatory purpose or effect. Section 5 is arguably the most influential provision of the Act.

Problems relating to this administration's enforcement of Section 5 are illustrative of the issues in the Voting Section. Many of the Section 5 Unit's most experienced staff members -- the Deputy Chief in charge of Section 5, attorney reviewers, and civil rights analysts – have left the Section in the last 2-3 years. In several instances, particular lawyers were assigned to work on immigration matters and these lawyers left the Section not long after. The turnover in personnel is especially disconcerting as we get closer to the 2010 Census, when the Voting Section's workload expands dramatically as thousands of jurisdictions that are subject to Section 5 engage in their decennial redistricting.

Several decisions have been made where it appears that political considerations may have trumped the Civil Rights Division's obligation to enforce the Voting Rights Act. These decisions also suggest that the Division is no longer following its own Guidance regarding the manner for making Section 5 preclearance determinations. In 2002, the administration intentionally delayed making a determination on a Mississippi Congressional plan drawn by a state appellate court so that a plan that favored Republicans drawn by federal judges would be used instead. In 2003, the political appointees disregarded a recommendation that a Texas Congressional redistricting plan be objected to because it resulted in the retrogression of minority voting strength. That plan was later struck down, on other grounds, by the Supreme Court. In 2005, the administration precleared Georgia's government-issued photo identification law despite numerous comment letters outlining the impact that the law would have on minority voters and over the recommendation of an objection from the majority of the staff who worked on it. The law was later found unconstitutional by both state and federal courts.

Election observing and monitoring

Given Assistant Attorney General Wan Kim's recent acknowledgement of the intimidating effect that prosecutors can have on voters, there is a need to clearly define the contours of the relationship between the Department of Justice and U.S. Attorney's Offices in the execution of the Division's attorney monitoring of elections. In many recent elections, the Division has relied on personnel from U.S. Attorney's Offices to carry out its attorney monitoring program in jurisdictions throughout the country. The use of federal prosecutors inside polling places has blurred the line of separation that has long been maintained between the civil rights and criminal enforcement units of the Department of Justice. Moreover, federal

[32] The LCCR Voting Rights Task Force is co-chaired by the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund.

prosecutors inside polling places can have an intimidating effect on minority voters.

Although the Department of Justice has both civil rights and criminal enforcement responsibilities with respect to voting, traditionally, the Civil Rights Division has focused on non-criminal aspects of the electoral process. Though the Civil Rights Division and Criminal Division communicate and coordinate, prior to the current administration there was a clear separation. The Civil Rights Division was engaged in extensive pre-election and Election Day observing and monitoring activities. The Criminal Division, on the other hand, is to steer clear of Election Day activity and prosecute, where appropriate, after elections.

Under this administration, the lines have been blurred. In 2002, Attorney General Ashcroft created a Voting Integrity Program that combined the civil rights and criminal efforts for Election Day observing and monitoring. Since then, in many jurisdictions, career prosecutors in the United States Attorneys' Office have played critical roles in the observing and monitoring of elections. This has resulted in the erosion of trust of the Justice Department in many minority communities who are more comfortable working with civil rights lawyers on election issues.

Departure from traditional mission of the Voting Section/Allocation of resources

A major issue throughout the Civil Rights Division in the current administration has been how resources have been allocated. There has been a noticeable decrease in emphasis on bringing cases on behalf of racial minorities. The record of the Voting Section is consistent in departing from the Voting Section's traditional mission.

The Voting Section did not file any cases on behalf of African American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration. In addition, during the same five-year period, the Department only filed one case alleging minority vote dilution in violation of Section 2 of the Act. Section 2 vote dilution cases are particularly important because the end result – an election system that enables minority voters to have an equal opportunity to elect its candidates of choice – has a significant positive impact on minority voters. The administration rejected several recommendations from the Voting Section to bring particular cases. Conversely, in 2004, the Section brought a case on behalf of white voters in Mississippi.

Furthermore, the Department has gone out of its way to take legal positions that have restricted the franchise, such as filing an *amicus curiae* brief in a 2004 Michigan case involving provisional ballots where the government argued that the Help America Vote Act permitted states to reject provisional ballots solely on the basis that the voter did not cast the ballot in the proper precinct.

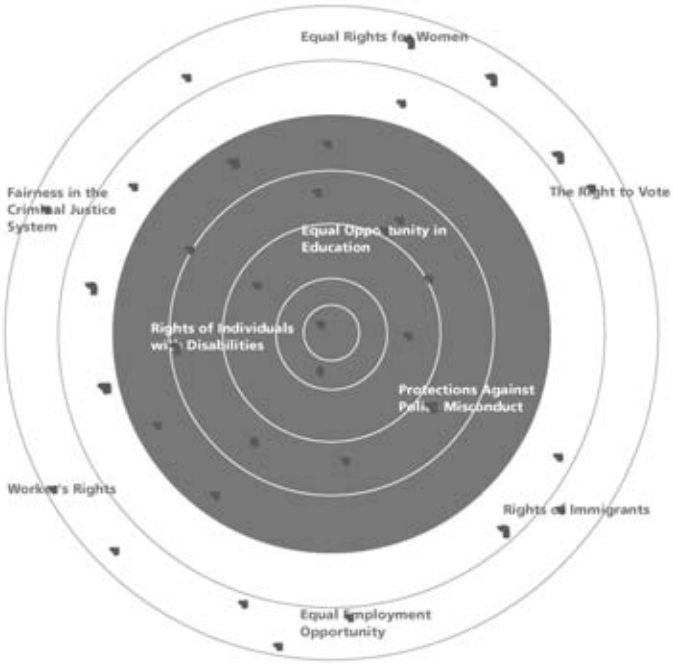
Loss of confidence in the Voting Section in the civil rights community

Recently, the Civil Rights Division has come under intense scrutiny from civil rights organizations and community leaders regarding cases that have been filed that appear to extend beyond the Division's historical mandate. Perhaps the most scrutinized of these cases was the Voting Section's recent litigation on behalf of white voters in Noxubee, Mississippi. This case

recently went to trial and a decision is pending. However, the Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities. Restoring these ties to the community is essential to the Division's ability to effectively carry out its work. Community contacts have played and continue to play an important role in the Division's ability to effectively investigate and enforce federal civil rights statutes. This is especially important to the work of the Voting Section where Section 5 preclearance determinations are based, in part, on Comments typically provided by local community contacts.

ATTACHMENT

The Bush Administration Takes Aim:
Civil Rights Under Attack



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www.civilrights.org

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The purpose behind release of this report is to highlight some of the ways in which the Bush administration is systematically impeding civil rights progress. While each of these actions by the administration may have received some attention by the media, the trend has not garnered sufficient public attention, both because national security dominates the headlines and because regulation, litigation, and funding often make only a faint impression on the public consciousness. We think it is imperative that attention be paid to these efforts which taken together represent a disturbing trend that must be addressed.

The author and publisher are solely responsible for the accuracy of statements and interpretations contained in this publication.

Karen McGill Lawson, Executive Director
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Executive Summary

Civil rights remains the unfinished business of America. Yet progress in the nation's historic march toward equality has slowed over the first two years of the Bush administration. This report catalogues the ways in which the administration has reversed longstanding civil rights policies and has impeded civil rights progress.

Over the last fifty years, there has been a bipartisan national consensus on the need to remedy past and present discrimination through the establishment of strong federal protections. But today, the national bipartisan consensus in favor of a federal role in protecting fundamental civil rights is beginning to fray.

President Bush and many of his appointees and congressional allies are using the rhetoric of the so-called "states' rights" movement to undermine Congress' ability to promote progress on civil rights issues. These right-wing policies and constitutional theories undermine the foundation on which federal civil rights protections stand. If Congress lacks the authority to remedy discrimination, if states cannot be sued in federal court when they discriminate, and if federal agencies do not vigorously enforce the landmark laws of the 1960s, then civil rights protections lack the federal guarantee promised in the 14th and 15th Amendments.

The bipartisan civil rights consensus also has unraveled in Congress. There are a number of long-pending civil rights measures that represent a natural progression from the landmark laws of the 1960s: the Employment Non-Discrimination Act would extend workplace anti-bias protections to gays and lesbians; the End Racial Profiling Act would provide remedies for discriminatory policing; the Local Law Enforcement Enhancement Act would bolster federal authority to prosecute hate crimes. While no movement is afoot to repeal civil rights laws already on the books, President Bush and his congressional allies have refused to support these next-generation protections.

Meanwhile, the country finds itself in a war against global terrorism. The government's response to that assault itself challenges American values, including the value of equal rights.

The possibility of another terrorist attack and ongoing hostilities with Iraq have combined to shift the public's attention away from domestic matters, including civil rights enforcement. During this time, the Bush administration has made far-reaching but low-visibility civil rights policy decisions through regulation, litigation, and budgetary activity. In the aggregate, these policy decisions illustrate a pattern of hostility toward core civil rights values and signal a diminished commitment to the ideal of non-discrimination.

Chapter One of the Report details regulatory threats to civil rights. The current administration has been especially adept at quietly wielding its regulatory powers to achieve far-reaching policy objectives. In the area of civil rights, regulation has been used to undermine bedrock protections against discrimination. This chapter explores, for example:

- New regulations that weaken the civil rights of American workers;
- Threats to education equity for women and girls through new Title IX policies and other initiatives;
- The rejection of regulatory changes to address racial disparities in federal sentencing rules; and
- A number of anti-terrorism measures that adversely affect civil rights.

Chapter Two of the Report analyzes the Bush administration's reversal of civil rights policies through litigation. The Ashcroft Justice Department has abandoned long-held positions in key cases such as:

The University of Michigan affirmative action cases, in which the Bush administration filed *amicus* briefs in the Supreme Court that declare the university's policies unconstitutional;

- The New York City custodian case in which the Department of Justice — after over 10 years of support for the plaintiffs — unexpectedly abandoned the claims of the female and minority custodians and refused to defend the previously agreed to settlement against a challenge from White male custodians;
- The Pittsburgh Police consent decree, in which the Department of Justice abruptly joined with the defendants in asking the court to lift the consent decree, despite strong evidence of continuing problems.

Chapter Three of the Report describes how the current administration is undercutting the anti-discrimination agenda through its budgetary decisions. Key civil rights initiatives have been underfunded over the past year, and budgetary constraints are likely to worsen. While enforcement of existing civil rights laws is one important funding priority, more funding is also needed for social programs that advance the overarching civil rights goal of equal opportunity. Federal programs in the fields of education, housing, and health care are targeted at the low-income communities in which minorities disproportionately live. But the

Bush tax cuts and multi-billion dollar increases for the Pentagon have squeezed resources for these domestic priorities.

The Report offers a series of recommendations to combat these trends:

1. The Bush administration should demonstrate renewed commitment to the fifty year-old bipartisan consensus on civil rights progress.

2. Congress should fulfill its constitutional role of overseeing the administration's civil rights activities and should consider how it can address regulatory actions inconsistent with the purpose of the 1960s' civil rights laws.

3. Congress should provide adequate funding for important civil rights programs;

4. Congress should consider seriously the need for new laws protecting gays and lesbians against employment discrimination, strengthening federal hate crime law, and ending the discredited practice of racial profiling;

5. The civil rights community must remain vigilant in monitoring the state of civil rights.

Individuals and organizations concerned about civil rights must be ever vigilant against backsliding in the nation's civil rights policies. This Report is the first step in a long-term effort to monitor regulations, litigation positions, and funding decisions that affect the state of civil rights in America. The Bush administration's decisions that make up its civil rights policy will remain below the radar screen unless advocates work to bring this pattern of hostility to civil rights progress to the attention of the public.

For defenders of civil rights, this is a perilous time. Leading advocates in the new states' rights movement now control or dominate all three branches of the federal government. They are prepared to move forward toward their extremist goals, even though those goals cannot be reconciled with the bipartisan civil rights consensus of the past fifty years.

I. Introduction

As Trent Lott recently demonstrated, civil rights remains the unfinished business of America. The nation's historic march toward equality is not completed.

Indeed, over the past two years, civil rights progress has faltered. With the American people understandably focused on the threat of terrorism, the Bush administration has quietly engineered a pattern of civil rights policy reversals through low-visibility regulations, litigation activity, and funding decisions. Meanwhile, the war on terrorism itself threatens the principle of equal protection.

It is unsurprising that civil rights remains a present day challenge, because government-sanctioned discrimination was pervasive in the United States until relatively recent times:

- Only 150 years ago, human beings from Africa were sold and possessed as chattel in half of the country;
- Only 100 years ago, Mexican Americans and Puerto Ricans were regarded as "conquered peoples" and were frequently denied property, voting, education, and employment rights;
- Only 90 years ago, women were denied the right to vote or own property in many regions of the country;
- Only 80 years ago, Native Americans whose ancestors had inhabited this land for 50,000 years were still denied citizenship in the United States;
- Only 70 years ago, job advertisements in Boston and other northeastern cities routinely declared: "No Irish Need Apply";
- Only 60 years ago, thousands of loyal Japanese-Americans were rounded up from their homes and businesses and held in relocation camps throughout World War II;
- Only 50 years ago, schools, restaurants, public bathrooms, and even drinking fountains were strictly segregated through much of the South;
- Only 15 years ago, it was legal in most states to fire an otherwise qualified employee solely because he became sick or disabled.

Significant progress has been made to address these injustices. Following the Civil War, Congress passed and the states ratified amendments to the Constitution entitling all Americans equal protection of the laws and the privileges and immunities of citizenship. That promise went unfulfilled for many years, but in 1954, the Supreme Court renewed the promise by striking down school segregation laws in *Brown v. Board of Education*. In the 1960s, a series of landmark federal laws was enacted to make real the constitutional commitment of equal protection. The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendments of 1972, the Americans with Disabilities Act of 1990, and other important federal laws outlaw discrimination and provide recourse when it occurs.

Despite these laws and despite all the progress that has been made, discrimination remains a stubborn feature of American life. Laws mandating school segregation are gone, but segregation persists in practice. No federal law prevents companies from refusing to hire an individual because of his or her sexual orientation. Unwarranted racial and ethnic disparities pervade the criminal justice system. Organized lynching is history, but the hate crimes committed against James Byrd and Matthew Shepard are current events.

And old attitudes die hard. Just recently, the former majority leader of the U.S. Senate declared on national television that if Strom Thurmond had been elected President in 1948, when he ran as the head of the pro-segregation Dixiecrat Party, the country "wouldn't have had all these problems over the years."

So while much has been accomplished to remove the stains of slavery and eradicate the legacy of Jim Crow laws and all the other laws and practices that relegated women and minorities to second-class citizenship, much remains to be done. This is not yet the nation that Dr. Martin Luther King dreamt of, a nation in which children are judged "not by the color of their skin but by the content of their character."

Civil rights progress in the last half century has been fueled by a bipartisan national consensus on the need to remedy past and present discrimination through the establishment of strong federal protections. To be sure, that bipartisan consensus was not as strong at the outset of the civil rights movement as it became later. In the early 1960s, Southern Democratic senators and some like-minded Republicans launched lengthy filibusters against civil rights bills. But bipartisan majorities eventually silenced those voices of resistance. Later, the Voting Rights Act Extension of 1982 and the Americans with Disabilities Act were enacted with overwhelming bipartisan support.

Opponents of the 1964 Civil Rights Act rallied under a banner of "states' rights." But the Republicans and Democrats who joined together to pass that law recognized that "states' rights" was a code phrase for racial segregation.

There is indeed a legitimate role for states as sovereign bodies and policy laboratories in our system of federalism, but when it comes to discrimination there is no room for experimentation. Residents of Mississippi or South Carolina are entitled to the same fundamental civil rights as residents of Maine or Wisconsin. The federal government - that is, Congress, the federal courts and, if necessary, federal marshals dispatched by the President of the United States - stands as the ultimate guarantor of federal constitutional and statutory rights.

Today, the national bipartisan consensus in favor of a federal role in protecting fundamental civil rights is beginning to fray. President Bush and many of his appointees and congressional allies subscribe to a radical view of the Constitution in which states' rights are paramount. They are deeply suspicious of federal activities beyond national defense; transparently, the administration's tax policies are designed to starve the federal government of resources to fund domestic programs. Meanwhile, the White House has sought to pack the federal appellate courts with right-wing ideologues. Many of these nominees have advocated previously far-fetched constitutional doctrines that would immunize states from federal lawsuits and invalidate assertions of congressional power to protect rights.

These right-wing policies and constitutional theories undermine the foundation on which federal civil rights protections stand. If Congress lacks the authority to remedy discrimination, if states cannot be sued in federal court when they discriminate, and if federal agencies do not vigorously enforce the landmark laws of the 1960s, then civil rights lack the federal guarantee promised in the 14th and 15th Amendments. Suddenly the right of an American to be free from public or private discrimination may vary as he or she travels across a state border.

The current advocates of states' rights, unlike their Jim Crow-era predecessors, do not deliberately utilize racial code words to mask racist intent. Nevertheless, their cramped conception of the federal government's role in our constitutional scheme is at odds with the civil rights movement of the past fifty years, a movement that conservative columnist Charles Krauthammer has rightly called "the most important political phenomenon of the past half-century of American history."[1]

Our nation's bipartisan civil rights consensus faced a challenge early in the new administration when President Bush nominated defeated Missouri senator John Ashcroft to serve as his attorney general. Throughout his public career, Ashcroft had demonstrated extraordinary insensitivity towards civil rights. As Attorney General and governor of his state, he resisted court-ordered integration of the public schools. As a senator, he twisted facts and used veiled racial appeals to defeat federal judicial nominee Ronnie White, the first African-American to sit on the Missouri Supreme Court. Ashcroft was narrowly confirmed, but only after many Senators explained that his undistinguished record on civil rights made him ill-suited to head the agency with primary responsibility for civil rights policy and enforcement.

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President Bush's appointments to sub-Cabinet agencies responsible for civil rights enforcement consisted mostly of individuals who lacked experience enforcing civil rights laws, including his appointment of Ralph J. Boyd, Jr. to head the flagship Civil Rights Division at the Justice Department. Assistant Attorney General Boyd is responsible for numerous decisions reversing long-standing litigation positions taken by the Civil Rights Division that have resulted in the erosion of civil rights protections for women, minorities, individuals with disabilities, and many others. In addition, he has acted to remove career staff from positions of influence and replaced them either with right-wing political appointees or by less experienced career lawyers.[2]

The bipartisan civil rights consensus also has unraveled in Congress. There are a number of long-pending civil rights measures that represent a natural progression from the landmark laws of the 1960s: the Employment Non-Discrimination Act would extend workplace anti-bias protections to gays and lesbians; the End Racial Profiling Act would provide remedies for discriminatory policing; the Local Law Enforcement Enhancement Act would bolster federal authority to prosecute hate crimes. While no movement is afoot to repeal civil rights laws already on the books, President Bush and his congressional allies have refused to support these next-generation protections.

Meanwhile, the country finds itself in a war against global terrorism. It is ironic that the states' rights movement should achieve its ascendancy at a moment in history when overseas forces have targeted American values and interests. The terrorists who killed almost 3,000 Americans with hijacked planes on September 11 had no particular quarrel with the sovereign states of New York, Virginia, or Pennsylvania; they launched an assault on the United States of America. Yet the government's response to that assault itself challenges American values, including the value of equal rights.

Naturally, the public's perception of the Bush administration has been shaped by national security concerns. The possibility of another terrorist attack and imminent hostilities with Iraq has combined to shift the public's attention away from domestic matters, including civil rights enforcement. During this time, the Bush administration has undertaken a series of low-visibility actions through regulation, litigation, and budgetary policy that illustrate a pattern of hostility toward core civil rights values and signal a diminished commitment to the ideal of non-discrimination.

This report catalogues some of the ways in which the administration is systematically impeding civil rights progress. While each of these actions by the Bush administration may have received some attention by the media, the trend has not garnered sufficient public attention, both because national security dominates the headlines and because regulation, litigation, and funding often make only a faint impression on the public consciousness.

But attention must be paid: this nation was founded on the principle of equal rights. That promise was ignored for far too long, and we have come too far in the last half-century to tolerate backsliding toward policies that even Senator Lott now acknowledges were wicked and immoral. At a time when the United States is aggressively promoting the ideals of democracy and protection of civil and human rights throughout the world, it is imperative that we remain a shining example of a society that fully protects those rights.

For defenders of civil rights, this is a perilous time. Leading advocates in the new states' rights movement now control or dominate all three branches of the federal government. They are prepared to move forward toward their extremist goals, even though those goals cannot be reconciled with the bipartisan civil rights consensus of the past fifty years.

II. Undermining Civil Rights Through Regulation

The day-to-day work of government is carried out in the agencies of the executive branch. Long after a President has signed a law in the spotlight of the Oval Office or the bright sunshine of the Rose Garden, the success or failure of the law hinges on the little-noticed promulgation of regulations by the agency responsible for enforcement of the law.

Regulation is one of the least visible manifestations of government. While all proposed regulations must be published in the Federal Register, this dense publication is hardly recreational reading for most Americans. And while Cabinet secretaries may seek media attention for some regulatory actions, most are carried out with little fanfare and less press interest.

The current administration has been especially adept at quietly wielding its regulatory powers to achieve far-reaching policy objectives. In the area of civil rights, regulation has been used to undermine bedrock protections against discrimination.

Weakening the Civil Rights of American Workers

The Bush administration's uneasy relationship with labor unions is well known. Less widely publicized are the regulatory measures undertaken by this administration to impair the civil rights of American workers.

For example, after an extensive public process, including two rounds of public notice and comment on its proposals, the Clinton administration established an important set of protections for American workers known as the "Responsible Contractor" rules. The regulations implemented measures to help ensure that federal contracts are only awarded to companies that demonstrate compliance with civil rights laws and other legal requirements related to worker safety, the environment, and consumer protection.[3] This common sense accountability measure strengthened the rights of American workers by creating a strong economic incentive for companies to respect civil rights and other basic workplace laws.

The rules vindicate an important principle — government contracts should only be awarded to responsible companies that respect their obligations under the law, not to corporations that violate their employees' civil rights or flout other important laws. The federal government should not use tax dollars to subsidize lawbreakers, but that is what was happening before these rules went into effect. The congressional General Accounting Office found hundreds of instances over a two-year period in which lucrative federal contracts were awarded to companies that had violated labor or workplace safety laws.[4]

Almost immediately after assuming office, President Bush began the process of dismantling these rules. First, his Civilian Agency Acquisition Council authorized agencies to issue a "deviation" from the new contractor responsibility rules. This low visibility maneuver created a gigantic loophole in the rules that the new President's appointees in several agencies quickly utilized. Then the President's Federal Acquisition Regulations (FAR) Council initiated the regulatory process to suspend and ultimately repeal these rules. Despite opposition from the Leadership Conference on Civil Rights and other groups concerned about worker protections, the rules were repealed on December 27, 2001.[5]

The timing of this regulatory activity is suspicious. By taking final action during the holiday season between Christmas and New Year's, the administration plainly sought to limit public scrutiny of this controversial move.

Additional evidence of the Bush administration's retreat on civil rights enforcement, particularly in the context of federal contracts, can be found in its work through the Office of Federal Contract Compliance Programs (OFCCP). OFCCP is a little-publicized agency within the Department of Labor that plays a critical, central role overseeing federal contractors and their compliance with important civil rights obligations. In particular, OFCCP enforces Executive Order 11246, which requires federal contractors to ensure nondiscrimination within their workforce and to take affirmative action to correct any workforce disparities. It is this unique enforcement responsibility, particularly its monitoring of affirmative action compliance, which has made OFCCP a frequent target of those seeking to shield contractors from vigorous civil rights enforcement.

Shortly after coming into office, the administration publicly and privately signaled a shift in its OFCCP enforcement efforts. The result has been a 25% drop in OFCCP resources for enforcement, redirecting monies instead for technical assistance to federal contractors. Equally troubling are the most recent OFCCP numbers for Fiscal Year 2002 that reflect a wholesale deterioration in almost every enforcement category: a sizable decline in the number of reviews conducted to ensure contractor compliance with their nondiscrimination and affirmative action obligations; a 25 percent to 50 percent drop in the percentage of compliance reviews where violations are found (39 percent in FY02 compared to 54 percent to 77 percent over the history of the program), a decline in the number of conciliation agreements, and a more than 20 percent reduction in the percentage of violations resolved with conciliation agreements (56 percent in FY02 compared to an average of 72 percent over the history of the program). These distressing numbers, combined with a small but persistent backlog of administrative complaints in the Office of the Solicitor, paint a bleak picture of the administration's overall commitment to ensuring that companies receiving millions of dollars in federal contracts comply with their civil rights obligations.

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In addition to stark drops in enforcement numbers, OFCCP also has taken steps to roll back important enforcement gains. One notable target has been the Equal Opportunity Survey (EO Survey) — a data collection instrument finalized in November 2000 that requires federal contractors to provide data on the demographic composition of their workforce, including data on compensation practices broken down by sex and race. The EO Survey was a groundbreaking achievement, intended to help OFCCP better target their reviews of federal contractors and identify potential violations. Of particular significance, it requires contractors for the first time to submit data about their pay practices on a regular basis. Such information is critical to uncovering illegal pay disparities and remedying wage discrimination.

The EO Survey was the product of more than twenty years of debate and consultation between OFCCP, contractors, and advocates, but it continues to face stiff opposition from federal contractors, many of whom undoubtedly seek to avoid such regular scrutiny. More troubling, however, has been the current OFCCP's failure to fully implement the EO Survey. Although the first surveys were sent to 50,000 contractors in early 2001, two years later OFCCP has yet to use that information target reviews of contractors. The agency then delayed for more than a year before sending out the second round of surveys in December 2002. Even then, the surveys were sent out to only 10,000 contractors rather than the 50,000 originally intended — an 80 percent reduction in the number of contractors asked to comply with the regulations. Although the administration has not moved to rescind the EO Survey, its quiet inaction has effectively achieved the same result - its failure to use the information collected in any meaningful way has reduced the promise of the EO Survey to little more than a shell of its original goal. Authorization for the EO Survey expires in March 2003 and the OFCCP has requested a limited, two-year extension authorizing 10,000 surveys per year.

In another early move to undercut the civil rights of American workers, the administration spearheaded repeal of the ergonomics rule promulgated by the Occupational Safety and Health Administration (OSHA) in November 2000. This vital regulation, preceded by years of deliberation and public comment, would have prevented hundreds of thousands of workplace injuries each year. The Bush administration's substitute plan, announced in April 2002, is nothing more than a collection of vague, voluntary measures providing no real protection for workers.

Ergonomics is a civil rights issue for several reasons. First, workers' rights are civil rights; the labor movement's historic struggle for fair treatment in the workplace is intertwined with the civil rights movement of the past half-century. More specifically, ergonomic injuries disproportionately affect women. Based on Bureau of Labor Statistics data, the AFL-CIO has found that women suffer 64 percent of repetitive motion injuries and 68 percent of the carpal tunnel syndrome injuries that result in lost worktime, despite the fact that women make up approximately 44 percent of the workforce.[6]

A number of the administration's anti-labor policies have had an especially devastating impact on minorities. For example, a federal judge recently struck down a practice by President Bush's Department of Labor that severely disadvantaged low-wage farm workers, the overwhelming majority of whom are of Mexican descent or belong to other minority groups.

Under the H-2A guest worker program, employers are permitted to hire temporary foreign workers based on the claim that there are an insufficient number of qualified U.S. farm workers. Employers participating in the program must offer wages that will not "adversely affect" the wages of U.S. farm workers. Near the beginning of each year, the Department of Labor is supposed to publish an "adverse effect wage rate" for each state, and H-2A employers may not pay their employees less than that hourly rate. But in each of the last two years, Labor Secretary Chao delayed publication of the wage rate, asserting the authority to withhold issuance until December 31 of the year. She apparently acted at the request of employers, who of course preferred to pay the lower wage rates from the previous year. As a result, tens of thousands of workers were underpaid.

The United Farmworkers of America and others sued the Labor Department. On September 10, 2002, Judge Gladys Kessler of the U.S. District Court for the District of Columbia ruled that the Department had violated its own regulations and the federal Administrative Procedure Act.[7] As a result, some 48,000 workers around the country will be paid at the proper rates in 2003 and future years. Still, H-2A employers are demanding that Secretary Chao lower these wage rates, so continued vigilance is warranted.

Eliminating Non-Discrimination Obligations for Recipients of Federal Funds

In 1965, President Lyndon B. Johnson issued Executive Order ("EO") 11246, a cornerstone of civil rights law that prohibits discrimination on the basis of race, color, religion, sex, or national origin by recipients of federal funds. Additionally, EO 11246 contains important record keeping and affirmative action requirements to ensure that workplaces funded by federal tax dollars are free of discrimination.

The Community Development Block Grant ("CDBG") program was established by Congress in 1975 to promote healthy communities "by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). The Department of Housing and Urban Development awards grants to entities that improve community services and carry out a wide range of economic development activities. The President's 2004 budget allocates more than $4.4 billion to the CDBG program.

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Since 1975, HUD regulations have mandated that CDBG "[g]rantees shall comply with EO 11246." 24 C.F.R. § 570.607. However, under a new rule proposed by the Bush administration, recipients of CDBG funds would no longer be required to abide by federal non-discrimination requirements. This is a monumental change to HUD's current regulations and contradicts a fundamental principle of civil rights policy — that federal funds should never be used to discriminate in any manner. Repeal of a regulation that ensures equal opportunity as a condition of $4 billion in federal taxpayer money is an outright attack on civil rights laws.

Threats to Educational Equity for Women and Girls

Title IX of the Education Amendments of 1972 prohibits sex discrimination in education programs that receive federal financial assistance. The law covers approximately 16,000 local school districts, 3,200 colleges and universities, 5,000 for-profit schools, state education and vocational rehabilitation agencies, and numerous libraries and museums. Since its enactment, Title IX has immeasurably improved educational opportunities for women and girls, and lifted glass ceilings that kept women from reaching the highest ranks of academia.

The extent of blatant discrimination against female students prior to the enactment of this landmark law cannot be overstated. In many schools, girls were routinely required to take home economics and were excluded from classes that might lead to "non-traditional" career paths. Many colleges and universities — both public and private — either excluded female students altogether or enforced strict quotas for their admission. Athletic opportunities for girls and young women were scarce or non-existent.

Thankfully, the days of *de jure* discrimination in education are over. As then-Education Secretary Richard Riley said in marking the 25th anniversary of Title IX in 1997, "America is a more equal, more educated, and more prosperous nation because of the far-reaching effects of this legislation."

But while there has been substantial progress in addressing sex discrimination in schools over the last 30 years, there is much to be done before true gender equity in education is achieved. For example, female students are still underrepresented in math, science, and high technology programs. There is still *de facto* segregation in many vocational education programs, with female students placed in "traditional" classes that lead to low wage jobs. Female students are still excluded from many opportunities to compete in athletics. There is still rampant sexual harassment in schools. And discrimination against pregnant and parenting young women, combined with wholly inadequate educational opportunities, exacerbates high dropout rates and fosters economic dependence.

Vigorous enforcement of Title IX is an essential element of the ongoing campaign for gender equity in education. And the roadmap for Title IX enforcement is found in the long-standing agency regulations and policies interpreting the requirements of the law. For 27 years, state education agencies and school districts have relied upon the specific guidance in the regulations to ensure compliance with civil rights requirements and to provide needed protections for female students and school employees.

So it was more than slightly unsettling when, on May 8, 2002, the Department of Education published a Notice of Intent to Regulate (NOIR) expressing the Secretary's intent to amend the Title IX regulations "to provide more flexibility for educators to establish single-sex classes and schools at the elementary and secondary levels."[6] The NOIR set off alarm bells because of the troubled history of single-sex education and because it raised the specter of broader changes to these venerable regulations.

While Title IX generally prohibits single-sex education in vocational, professional, and graduate schools, the statute does not explicitly cover admissions policies in non-vocational elementary and secondary schools — at least those that were single-sex before Title IX was enacted. Congress was mindful of the record of single-sex education, a record permeated by harmful stereotypes that tended to limit opportunities for young women. So-called "parallel programs" for girls have often been distinctly unequal in scope and resources.

The Title IX regulations carry forward Congress' concerns about single-sex education. The regulations allow for the creation of single-sex classrooms in specific circumstances, such as physical education classes or activities involving contact sports, competitive athletics, human sexuality, and choirs. Single-sex classes and schools can also be created for compensatory purposes to allow girls and women to overcome barriers to equal education.

Where single-sex education is utilized, Title IX safeguards ensure that such programming serves, and does not undermine, equality of educational opportunity. The Title IX regulations provide ample flexibility for educators to establish single-sex programming at the elementary and secondary level, while simultaneously providing strong legal protections against programs that would reinforce stereotypes or subject students to discrimination in the educational opportunities they receive. The proposed regulatory action threatens those very safeguards.

Indeed, the Department of Education has received no mandate from Congress to amend Title IX regulations in the name of increased flexibility for single-sex education. The No Child Left Behind Act of 2001(NCLBA) allows local education agencies to use innovative program funding "to provide same-gender schools and

classrooms," but only to the extent that they are "consistent with applicable law."[9] That bill did not call for opening the Title IX regulations. Rather, the NCLBA only required the Department of Education to issue guidelines on applicable law to schools seeking the new funding. The Office for Civil Rights at the Department of Education (OCR) fulfilled this requirement through guidance issued on May 8, 2002.

Only one month after publication of the May 2000 NOIR, Education Secretary Roderick Paige intensified concern among Title IX supporters by establishing a Commission on Opportunity in Athletics to recommend changes in the application of Title IX to school sports programs. The secretary's appointments to this commission betray the administration's agenda — ten of the fifteen members are from Division IA schools. These schools, which have large football and men's basketball programs, have the greatest institutional interest in weakening the regulations to which they are subject.

Moreover, in coordinating the work of the commission, the Department of Education has exhibited hostility towards Title IX in various ways. According to the National Women's Law Center, witnesses selected by the Department of Education testified two-to-one against current policies. Other expert testimony that was requested by commissioners was not provided. The recommendations advanced by the commission would seriously weaken Title IX protections and result in significant losses in participation opportunities and scholarships from those to which women and girls are entitled under current law.

Two commission members (Olympic champion Donna de Varona and Julie Foudy, captain of the U.S. National Women's Soccer Team) dissented from the commission's final report and issued a Minority Report that objects to certain recommendations and takes issue with the ambiguous wording of others.[10] Secretary Paige refused to include the Minority Report in the record, and while he said he would move forward only with the so-called "unanimous" recommendations in the final report, he refused to consider specific objections of de Varona and Foudy to recommendations he termed unanimous.

Much has been accomplished in the classroom and on the playing field due to Title IX. Women have entered the medical and legal professions in record numbers and there has been a fourfold increase in women's participation in intercollegiate athletics. In 1971, only 18 percent of American women had completed four or more years of college, compared to 26 percent of men. This gap has been closed — women now make up the majority of students in America's colleges and universities and are the majority of recipients of master's degrees (although women remain concentrated in fields such as teaching and nursing and comprise only a small percentage of professionals in the fields of engineering and physics). But discrimination persists and backsliding can occur. Now is not the time to reverse course.

Regulatory Reversal of Asylum Policy on Battered Women

The Justice Department recently proposed a regulation that would undermine the ability of women to receive protection under U.S. asylum laws. It is disturbing that the administration would seek to reverse current policy, which appropriately provides women who have fled violence with a safe haven once they have satisfied the rigorous requirements of asylum.

In *Matter of R-A-*, the Board of Immigration Appeals (BIA) ruled that Ms. Rodi Alvarado, a Guatemalan woman who had suffered ten years of horrific domestic violence and whose government would not protect her, could not seek refuge under U.S. asylum laws. Former Attorney General Janet Reno vacated the BIA's decision, and the INS shortly thereafter issued a proposed rule that clarified that domestic violence and other forms of gender-related persecution could in fact form the basis of an asylum claim.

But the Justice Department reportedly plans to issue a final rule that would reinstate the BIA's original denial of asylum to Ms. Alvarado. Such a rule would limit the ability of women and girls to seek protection from trafficking, sexual slavery, honor killings, domestic violence, and other gross human rights violations whenever such abuses have been perpetrated by non-state actors. In addition, such a rule would contravene established principles of international law including United Nations High Commissioner for Refugees (UNHCR) guidelines on gender persecution and would be out of step with the policies of countries such as the United Kingdom, Australia, and Canada, which recognize that government-tolerated violence based on gender can form the basis for asylum.

Rejection of Regulatory Changes to Address Racial Disparities in Federal Sentencing Rules

While progress has been made in recent decades to address racial disparities in employment, housing and other aspects of American life, racial inequality in the criminal justice system is growing, not receding. A primary cause and visible manifestation of that inequality is the well-known 100-to-1 ratio in federal law that dictates widely divergent sentences for crack cocaine and powder cocaine offenses. African-Americans feel the sting of this irrational policy since they are almost exclusively targeted for federal crack cocaine prosecutions.

There is bipartisan agreement in Congress on the need to confront this problem, and the independent U.S. Sentencing Commission has attempted to do so through regulation. But the Bush administration has actively thwarted any effort to redress this injustice. In other policy areas discussed in this report, the administration has used regulation to weaken civil rights protections. In this area, the administration has used its muscle in the regulatory process to block civil rights progress.

The Bush Adminstration Takes Aim

Beginning in the mid-1980s, Congress enacted a series of laws designed to combat the sale and use of certain drugs. While the goal was laudable, the means often were not. A prominent feature of the so-called "war on drugs" has been mandatory minimum sentencing laws for drug offenses. These laws, enacted by Congress in a wave of racially tinged media hysteria, have led to profound injustices.

Mandatory sentencing laws deprive judges of their traditional discretion to tailor a sentence based on the culpability of the defendant and the seriousness of the crime. The sentences imposed under these laws are not truly mandatory because prosecutors (but not judges) may grant exceptions. Prosecutors can choose to charge particular defendants with offenses that do not carry mandatory penalties or they can agree to a plea agreement in which the charges carrying mandatory penalties will be dismissed. Also, under federal law, only the prosecutor may grant a departure from mandatory penalties by offering the subjective assertion that the defendant has provided "substantial assistance" to law enforcement.

When mandatory sentencing laws for drug crimes were enacted in the mid 1980s, race was a subtext of the congressional debate, especially in the uniquely harsh penalties assigned to crack cocaine. Federal law imposes a mandatory five-year federal prison sentence on anyone convicted of selling 500 grams or more of powder cocaine but the same mandatory five-year sentence applies to a defendant convicted of selling only five grams (the weight of a few sugar packets) of crack cocaine. A 10-year mandatory sentence is dictated for 5000 grams of powder but only 50 grams of crack. Meanwhile, federal law dictates a five-year minimum sentence for possession of crack cocaine, while the *maximum* sentence for possession of all other drugs is one year.

These rules are not only irrational on their face — they are also implemented in an outrageously discriminatory fashion, since over 90 percent of federal crack defendants are African-American. This facially neutral law in fact produces severe racial disparities in the criminal justice system as a whole.

Recent statistics compiled by the U.S. Sentencing Commission show that the problem relates not just to the unjustified differences between crack and powder cocaine penalties. Rather, minorities are now disproportionately subject to the harsh penalties for both types of cocaine. The issue is no longer just the "ratio" between crack and powder, although that remains a serious concern. The issue is that minorities are almost exclusively targeted for all federal cocaine arrests, and then find themselves in a mechanical sentencing system that results in unacceptably high minority incarceration rates.

In fiscal year 2000, Blacks and Hispanics made up 93.7 percent of those convicted for federal crack distribution offenses, while Whites made up only 5.6 percent. That

shocking figure has not changed much over the past decade. But the racial makeup of powder cocaine defendants has shifted in recent years. In 1992, Whites constituted almost one third (32 percent) of those convicted of federal powder cocaine distribution offenses, while Blacks made up 27 percent and Hispanics 39 percent. By 2000, the percentage of White powder cocaine defendants had dropped to 17.8 percent while the percentage of Black powder cocaine defendants had increased to 30.5 percent and the percentage of Hispanic powder cocaine defendants had increased to 50.8 percent. *In sum, minorities made up 81 percent of the federal powder cocaine defendants that year.*

Thus, the problem of racial disparity has worsened and become more deeply ingrained since the early 1990s. The unjustifiably harsh penalties for crack offenses still fall disproportionately — indeed almost exclusively — on Black defendants. But now, unlike ten years ago, the somewhat more moderate but still very harsh penalties for powder cocaine offenses fall disproportionately on minority defendants (both Black and Hispanic) as well. So the massive weight of federal enforcement against cocaine distribution falls almost exclusively on minorities: 93 percent of all crack defendants and 81 percent of all powder defendants.

Such an imbalanced focus on minorities is not justified by what is known about the racial make-up of cocaine users or cocaine sellers. In fact, even though Blacks and Hispanics are targeted at a higher rate for drug investigations, they have been found to commit drug offenses at a slightly lower rate proportionally to their percentage of the U.S. population. African-Americans represented approximately 12 percent of the U.S. population in 2000 and were 11 percent of all illicit drug users. While Hispanics constitute about 13 percent of the population, they were 10 percent of illicit drug users. In addition, for the past two decades, drug use among Black youths has been consistently lower per capita than among White youths.

Thus, the disturbing statistics regarding racial disparities in the "war on drugs" result from racially disparate enforcement strategies and charging decisions in cocaine cases. Minorities are disproportionately arrested for cocaine offenses, disproportionately charged in federal court, and then sentenced under especially harsh statutes and guidelines. These policies result in unhealthy rates of minority incarceration with untold adverse consequences for minority families and communities.

The U.S. Sentencing Commission is an independent bipartisan agency in the judicial branch of the federal government with responsibility for writing federal sentencing rules. In 1995, the commission recommended to Congress that the drug statutes and sentencing guidelines be altered to eliminate the differences between crack and cocaine sentencing thresholds.[11] Congress rejected that approach, but directed the commission to formulate a new recommendation between the discredited 100 to 1 ratio and the rejected 1 to 1 ratio.

The Bush Adminstration Takes Aim

In early 2002, the commission again considered changes to the rules governing federal cocaine sentences. The commission heard testimony from noted scientists and criminologists and found no scientific evidence to justify treating crack as though it were 100 times more dangerous than powder cocaine. For example, at the commission's public hearing on February 25, 2002, Dr. Glenn Hanson, Director of the National Institute on Drug Abuse, was asked: "Is crack significantly more harmful to the individual in terms of its pharmacological effects than regular powder cocaine?" He answered: "I would say in general no; that they would be very similar."[12]

Nor is there anything special about the crack cocaine market to justify these differences. Rates of crack use, which have never exceeded rates of powder cocaine use, have remained stable for more than a decade. At the same time, the number of street level crack dealers charged in federal court has climbed from 48 percent to 66 percent of all crack defendants while the number of importers, leaders, and supervisors has fallen. According to U.S. Sentencing Commission statistics, the crack market is decidedly less violent than it was several years ago — well less than half of the crack cases involved a weapon and only 8 percent of the cases involved actual violence.

Whatever anecdotes and stereotypes caused Congress to treat crack cases so harshly in 1986 are no longer valid, if they ever were. Violent crack dealers should be punished for their violence; non-violent crack dealers should not be punished on the false assumption that all crack dealers are violent.

Congress itself, in rejecting the commission's 1995 proposal, directed the commission to "propose revision of the drug quantity ratio of crack cocaine to powder cocaine" (Pub. L. 104-38). And the record of the House and Senate Judiciary Committee hearings that year is replete with statements from Republicans, Democrats, and representatives of the Reno Justice Department condemning the 100 to 1 ratio and promising eventual change. Attorney General Reno and General Barry McCaffrey, then-Director of the Office of National Drug Control Policy, eventually proposed a 10 to 1 ratio. At that time no one defended the 100 to 1 ratio.

That has changed with the Bush/Ashcroft Justice Department. On March 19, 2002, Deputy Attorney General Larry Thompson testified before the commission, endorsed the 100 to 1 disparity in current law, and said any change in the ratio should be accomplished by raising powder cocaine penalties. Indeed, Deputy AG Thompson described the current penalty structure as "proper."

Notwithstanding this suggestion, increasing powder sentences would not be a constructive way to redress the 100 to 1 disparity. First, no one seriously believes that current powder cocaine sentences are insufficient to fulfill the purposes of

punishment. Deputy AG Thompson conceded to the commission that there is "no evidence that existing powder penalties are too low." Second, lowering the powder threshold would subject more low-level powder defendants to harsh mandatory sentences; by definition, lowering the threshold affects low-level defendants. Third, raising powder sentences would have a disproportionate impact on Hispanics, who make up more than 50 percent of powder cocaine defendants. Now that more than 80 percent of those charged with powder cocaine offenses are minorities, it would only exacerbate the overall racial disparity if powder sentences were raised.

Deputy AG Thompson argued that lowering crack penalties would send the "wrong message." But it is current law, based as it is on the scientifically indefensible and racially disparate 100 to 1 ratio, which sends the wrong message: that the criminal law is unfair. Changes to make these laws fair and rational would finally send the right message, not the wrong message.

The Bush administration's position on this crucial issue contradicts the President's earlier public statements. In January 2001, President Bush said: "I think a lot of people are coming to the realization that maybe long minimum sentences for the first-time users may not be the best way to occupy jail space and/or heal people from their disease. And I'm willing to look at that." He then expressed support for "making sure the powder-cocaine and the crack-cocaine penalties are the same. I don't believe we ought to be discriminatory."[13]

The Bush administration's rejection of regulatory changes in federal sentencing rules results in perpetuation of a sentencing structure that every objective observer believes is irrational, and that many minorities view as racist. Few policies have contributed more to minority cynicism about law enforcement. If anti-drug efforts are to have any credibility, especially in minority communities, these penalties must be significantly revised.

Expanding the Federal Death Penalty

The Bush administration has also been oblivious to civil rights concerns about capital punishment. The Leadership Conference on Civil Rights flatly opposes capital punishment, a view President Bush does not share. But one might hope that widespread outrage about flaws in the administration of capital punishment (as evidenced by more than 100 death row exonerations, many from the President's home state of Texas), would lead his administration to exercise increased care in federal death penalty cases. Instead, the Bush/Ashcroft Justice Department has displayed unseemly enthusiasm for capital punishment.

Attorney General Ashcroft has ordered U.S. Attorneys to seek the death penalty in at least 19 cases where the U.S. Attorney in charge of the case recommended against it. That amounts to one in every three death penalty cases brought in

federal court since he took office. By contrast, Attorney General Janet Reno overruled her prosecutors less than half as often in cases where the death penalty was not initially sought.[14] Mr. Ashcroft has even ordered federal prosecutors in New York to seek the death penalty for a murder suspect who had agreed to testify against others tied to a deadly drug ring in exchange for a life sentence.[15]

Moreover, Attorney General Ashcroft has altered existing DOJ policies to make it easier for the Justice Department to override state prerogatives and invoke federal jurisdiction over capital cases. On June 7, 2001, the Department of Justice protocol governing invocation of the federal death penalty was revised. Previously, the absence of a death penalty statute in a given state did not by itself establish a sufficient federal interest for capital prosecution. That guiding principle was removed from the protocol, and the availability of "appropriate punishment upon conviction" in the state system has been added as a consideration.[16]

In other words, according to Mr. Ashcroft, the considered wisdom of the citizens of Michigan, Vermont, and the other 12 states that do not authorize capital punishment is not a reason to refrain from seeking the federal death penalty in those states; indeed, it is now a reason to seek death. This perspective is all the more bizarre coming from an administration purportedly committed to "states' rights."

This same disrespect for states' rights was on public display in the aftermath of the Washington-area sniper attacks. Mr. Ashcroft presided over the ghoulish spectacle of neighboring prosecutors competing with each other for the right to bring capital charges against the sniper suspects, including 17-year-old John Lee Malvo. The attorney general awarded the "prize" to two Virginia counties that had each been the scene of one shooting. He explicitly declined to permit the case to go forward in Montgomery County, MD, where six citizens had been shot, because Maryland does not authorize imposition of the death penalty on juveniles and in general, carries out capital punishment with greater restraint than Virginia.

Mr. Ashcroft's aggressive pursuit of capital punishment has been marred by the same racial disparities that have always characterized the death penalty. Since he became attorney general, the Justice Department has been three times more likely to seek death for Black defendants accused of killing Whites than for Blacks accused of killing non-Whites, according to the Federal Death Penalty Resource Counsel Project, a court-established monitoring effort.[17]

The influence of race as a factor in the imposition of capital punishment is well documented. First, the evidence reveals disparity in the application of the death penalty depending on the race of the victim. Individuals charged with killing White victims are significantly more likely to receive the death penalty than individuals charged with killing non-White victims. Of numerous studies of death penalty

outcomes reviewed by the congressional General Accounting Office (GAO), 82 percent found that imposition of the death penalty was more likely in the case of a White victim than in the case of a Black victim.[18]

The race of the defendant, when combined with the race of the victim, also yields significant disparities. In a case that reached the Supreme Court, the defendant demonstrated that Georgia prosecutors sought the death penalty in 70 percent of the cases involving Black defendants and White victims, while seeking the death penalty in only 19 percent of the cases involving White defendants and Black victims, and only 15 percent of the cases involving Black defendants and Black victims.[19]

Statistics on the imposition of the federal death penalty are similarly disturbing. In 1988, Congress enacted a law authorizing capital punishment for murders committed in the course of drug trafficking. From 1988 to 1994, Whites made up 75 percent of those convicted under that statute, but of those targeted for the death penalty under the law in the same period, Hispanics or Blacks were 89 percent (33 out of 37) and Whites were only 11 percent (four out of 37).[20] A study published by the Justice Department in September 2000 found that minorities were 80 percent of the 682 defendants who faced federal capital charges since 1995.[21]

The Bush administration's reversal of the presumption against use of the federal death penalty in non-death penalty states illustrates its freewheeling use of executive power to carry out its substantive goals. Meanwhile, Attorney General Ashcroft's application of the new protocol in individual cases illustrates another phenomenon: use of the government's broad litigation authority to undermine civil rights concerns. The chapter that follows demonstrates that the administration's litigators, like its regulators, have embarked on a systematic course to reverse the country's historic progress on civil rights.

Regulatory Activity in the War on Terrorism

A number of anti-terror tactics put in place by the Bush administration pose a direct threat to civil rights, including the widespread detention of non-citizens long after they had ceased to be terrorism suspects; dragnet questioning of immigrants without particularized suspicion; and priority deportations based on national origin. Even former FBI officials have questioned the effectiveness of a strategy so dependent on national origin profiling.[22]

Among the panoply of anti-terror measures, there are several that were implemented without fanfare and have attracted little attention. More comprehensive critiques of the administration's tactics in the war on terror and their effect on civil

liberties appear elsewhere.[23] But two aspects of the war on terror are themselves below the radar of public awareness and therefore merit inclusion here.

First, the administration has altered longstanding guidelines that constrained the FBI from conducting surveillance of religious and political organizations in the United States. The so-called "Levi guidelines," established by President Gerald Ford's Attorney General Edward H. Levi, were a response to public disclosure of outrageous domestic surveillance tactics being utilized by the FBI, under the code name Cointelpro, to disrupt peaceful domestic political movements. Martin Luther King, Jr. and other Black leaders, for example, were wiretapped, photographed, and generally hounded by J. Edgar Hoover's FBI as these leaders pursued their non-violent campaign for civil rights and human dignity.

Now, Attorney General Ashcroft is revising the Levi guidelines in a manner that leaves racial and religious minorities at risk of 1960s style harassment.[24] The civil rights movement itself was targeted by such tactics, and remains especially vulnerable to law enforcement abuses.

Second, the administration has used terrorism as a pretext to undermine the work of federal unions. For example, several months after the September 11 attacks, the White House issued an Executive Order stripping employees in four Department of Justice subdivisions of their right to union representation.[25] In a related vein, the administration pushed hard for language in the new Homeland Security legislation to establish a process by which the administration can bar airport screeners and many other federal workers from joining a union.[26] And early this year, the Director of the National Imagery and Mapping Agency invoked the September 11 attacks as he summarily terminated the collective bargaining rights of 1, 322 workers at that agency. Federal employee union head Bobby Harnage decried the administration's attempt to "cloak this union busting with a respectable cover."[27]

The horrific attacks on the World Trade Center and the Pentagon in September 2001 have challenged the nation in unprecedented ways. Americans are united in the goal of homeland security, yet generally recognize the need to protect public safety in a manner that respects the principles upon which our nation was founded. The United States should respond to the narrow-minded religious intolerance of its enemies with policies that are true to constitutional principles, including the principle of equal protection under law. Now, more than ever, the nation's laws must be enforced without resort to discrimination.

III. Undermining Civil Rights through Litigation

Over the past two years, the outlines of the Bush administration's civil rights litigation strategy have begun to emerge. In several important cases, the Civil Rights Division at the Ashcroft Justice Department, led by Assistant Attorney General Ralph J. Boyd, Jr., has shifted course from the position espoused by the Reno Justice Department, signaling several worrisome trends.

Impeding Equal Opportunity in Education: the University of Michigan Affirmative Action Cases

This year, the Supreme Court will decide consider two cases challenging the affirmative action policies at the University of Michigan — one involving the law school, the other involving the undergraduate program.[28] At issue is the university's consideration of race as one of many factors designed to ensure diversity in admissions.

University administrators value diversity because the different perspectives and experiences of a diverse student body enrich classroom discussions and campus life. Racial diversity in colleges and professional schools also advances the longstanding goal of equal economic opportunity. Unlike the discredited practice of considering race to exclude minorities, the consideration of race to encourage minority admissions serves legitimate government interests: it remedies historical discrimination, promotes educational values of diversity, and enhances civil rights. Affirmative action of this nature was upheld by a divided Supreme Court in the 1978 case of *Regents of the University of California v. Bakke*,[29] but has been under attack in recent years.

Recognizing the important societal goals served by diversity in higher education, the Clinton administration filed an *amicus curiae* brief in support of the University of Michigan in the district court, and had filed briefs in other courts in support of similar admissions policies. But the Bush administration has shifted course. On January 16, 2003, the administration filed *amicus* briefs in the Supreme Court, which declare the university's policies unconstitutional and say racial diversity may only be achieved through racially neutral means. The two highest-ranking African-Americans in the Administration - Secretary of State Colin Powell and National Security Advisor Condoleezza Rice - subsequently distanced themselves from the Bush administration brief.

Critics pointed out that President Bush's position is hypocritical – why is it permissible to use ostensibly racially neutral means to achieve the racially conscious goal of diversity?[30] Why are "percentage plans" an acceptable alternative when they rely on continued segregation of high schools? The President's condemnation of the system that *Bakke* endorsed, namely the benign consideration of race as one

admission factor among many, calls into question his commitment to longstanding civil rights goals.

This shift reveals President Bush's contradictory views on the role of states in determining social policy. On the one hand, this administration champions "states' rights" and supports judicial nominees committed to limiting the ability of Congress to enact civil rights laws applicable to states. Yet administration officials assert federal authority when they want to stop states from enacting civil rights policies with which they disagree. Here, the state of Michigan has decided that the narrowly tailored use of race is necessary to achieve a diverse student body at state universities. The Bush administration disagrees with that policy and relies on federal supremacy to overturn it.

President Bush's willingness to reverse the federal government's position in this highly visible pending civil rights litigation has inflamed rather than soothed racial tensions.

Failing to Defend the Rights of Victims of Employment Discrimination: the New York City Custodian Case

In 1992, during the administration of President George H.W. Bush, the Justice Department began to investigate the dramatic under-representation of women and minorities among school custodians hired by the New York City Board of Education. By 1993, DOJ had filed suit, alleging in its pleadings that on a staff of 865 custodians, Whites made up 92 percent and males made up 98.5 percent, despite the availability of many qualified women and minorities. In essence, custodian jobs in New York were awarded within an "old boys" network that is plainly unacceptable under the Constitution and Title VII of the Civil Rights Act.

The suit was settled three years ago by means of a court-approved consent decree. But litigation over the consent decree continues, and the underlying problem has not been solved. Today, some 96 percent of the custodians are men, and very few of them are minorities.

Female and minority custodians received awards under the settlement with the support of the plaintiff Justice Department, but the seniority rights of those employees have been challenged by a group of White male custodians. Last April, the Civil Rights Division at DOJ abruptly abandoned the claims of the female and minority custodians and refused to defend the settlement against the challenge from White male custodians.

The American Civil Liberties Union has intervened in the case to assume defense of those claims, but DOJ's shift in position continues to reverberate. In a letter to the

court, lawyers for New York City — who had initially defended against the lawsuit — complained that the Justice Department had "abruptly refused to be bound by the settlement agreement that it proposed, signed, moved this court to approve and defended on appeal."[31]

Undermining Equal Employment Opportunity for Women: the SEPTA Case

The Civil Rights Division at DOJ spent four years in litigation to overturn discriminatory hiring criteria used by the Southeastern Pennsylvania Transportation Authority (SEPTA). But in late 2001, on the very day an appellate brief in the case was due, the Department abruptly dropped the civil rights suit altogether.

The case focused on an aerobic capacity test that SEPTA administered to job applicants. SEPTA set the pass-rate for the test at a level that caused 93% of female applicants to fail. But the SEPTA standard was stricter than the standard used by the FBI, the Secret Service, and the New York City police and fire departments. Prior to the Bush administration's reversal of position, the Justice Department had long contended that the SEPTA standard was unnecessarily strict and therefore impermissibly discriminated against women.

The litigation continues without federal involvement, but the female plaintiffs in the case are bitter about the Bush administration's reversal. Terry Fromson, managing attorney of the Women's Law Project, criticized, the Justice Department for "backing out on a commitment to defends equal rights for women in a highly visible case." Another lawyer for the plaintiffs said: "This is politics. They are willing to turn their backs on women despite their pledge to enforce civil rights laws."[32]

Retreating on Racially Discriminatory Hiring Tests: the Buffalo Police Case

The Buffalo Police Department has a long history of employment discrimination. Blacks, Hispanics, and women were systematically excluded from becoming police officers by means of employment tests that bore little or no relation to law enforcement skills. In 1973, the city was sued under Title VII of the Civil Rights Act and found liable at trial. The Civil Rights Division played an important role in the case from its earliest days; a 1978 court order drafted by Justice Department has been the standard by which the city is judged in its efforts to achieve compliance with federal law.

In the intervening years, under court supervision, the city has made great strides in remedying past discrimination. But the job is not finished. Even today, the city has proposed employment tests of questionable validity that have an adverse effect on minority applicants. As recently as June 2001 — in the early months of the Bush

administration — the Justice Department opposed such tests. But one year later the Department adopted a completely different position and insisted that the same career lawyer who had worked for years opposing the tests take the opposite position in court.

Paul C. Saunders, an attorney at the prestigious firm of Cravath, Swaine & Moore, which has long represented African-American police officers in the case, wrote a letter to the career government lawyer that aptly summarizes the Department's reversal:

To say that I was shocked and surprised by your new draft of the settlement agreement and proposed order would be an understatement of the first order. It represents such a dramatic departure from the Department of Justice's earlier positions that I can only conclude that it was imposed on you by the 'front office' [i.e., the political appointees] of the Civil Rights Division. Whether or not it was, however, the difference between the position now reflected in your proposal and the positions that the Department was taking less than a year ago is nothing short of breathtaking.[33]

Interestingly, the current reversal echoes the government's earlier embarrassing turnaround in the case. During the Reagan administration, then-Civil Rights Division head William Bradford Reynolds sought to overturn the 1978 order that his Justice Department predecessors had drafted, arguing that such a "race-conscious" remedy order was illegal, even in the face of massive prior race discrimination. The Second Circuit affirmed the order and helped discredit Mr. Reynolds' extreme legal theories.[34]

Undermining the Rights of Individuals with Disabilities

President Bush's father signed the Americans with Disabilities Act of 1990 (ADA) into law with great fanfare. The ADA offered the promise of equal, effective and meaningful opportunities for individuals with disabilities to participate in society. But the ADA is under attack in the courts. Employers have argued for narrow interpretations of key provisions in the ADA, interpretations that limit the number of Americans covered by the ADA and the scope of remedies available to them.

The Clinton administration frequently litigated in favor of a broad understanding of the ADA. Under Attorney General Reno, the Civil Rights Division vigorously enforced the Act, and the solicitor general filed briefs in support of litigants seeking protection. The current Bush administration has taken the opposite approach. In at least two ADA cases decided by the Supreme Court last term, Solicitor General Ted Olsen filed *amicus* briefs in favor of the employer, arguing for narrowing the scope of the ADA.[35]

In an important Third Circuit case called *Frederick L. v. Department of Public Welfare*,[36] the Justice Department recently failed to file an *amicus* brief in support of the rights of individuals with disabilities. *Frederick L.* involves the implementation of *Olmstead v. L.C.*, a 1999 ADA case in which the Supreme Court held that individuals with disabilities must be moved from state institutions to community settings when clinically appropriate.[37] The central issue in *Frederick L.* is whether a state is excused from that responsibility if doing so would require the expenditure of additional funds, even if the state will later reap significant savings. The Clinton administration, which had filed a brief in *Olmstead* and advanced *Olmstead* claims in lower courts, surely would have recognized the national implications of *Frederick L.* and filed an *amicus* brief in support of the plaintiff. DOJ's absence from the case speaks volumes about the administration's lukewarm support for this very important civil rights statute.

Retreating from Enforcement of Civil Rights in Public Accommodations: the Adams Mark Case

Racial discrimination in providing hotel accommodations has been unlawful since the enactment of the Civil Rights Act of 1964 and the great majority of hotels have long since complied. However, allegations of serious problems with the treatment of African-Americans at the Adams Mark Hotel chain led the Clinton administration to investigate and ultimately enter into a consent decree with Adams Mark in March 2000 that required it, among other things, to implement non-discrimination policies and procedures in all of its hotels. While the decree was set to remain in effect for four years, less than two years after its adoption by the court, the Ashcroft Justice Department proposed ending the consent decree prematurely.

According to the original complaint, African-American guests attending an April 1999 Black College Reunion were systematically charged more than White guests for similar or inferior accommodations, offered restricted services, and singled out with a requirement to wear neon orange wristbands. Under a settlement with the Justice Department and the state of Florida, the company agreed to a series of reporting, training and advertising requirements that would remain in place until November 2004.

However, in February 2002, Assistant Attorney General Boyd told hotel officials that he might agree to modify the agreement to shorten the enforcement period. News accounts revealed that the company's president, a contributor to Attorney General Ashcroft's political campaigns, had requested such relief.[38] After a storm of protest, Mr. Boyd backed away from the possibility of ending the agreement prematurely.

Restricting the Franchise: the Florida Voting Rights Case

Perhaps the most precious of the civil rights victories is the right to vote. The franchise is the fundamental engine of change in our democracy, and the primary means of ensuring the responsiveness of elected officials to public concerns. Yet one of the consequences of pervasive racial disparities in the criminal justice system[39] is the massive disenfranchisement of African-American men, especially in Southern states.

In 14 states, persons who have been convicted of a felony are prohibited from voting for life. Even individuals convicted of non-violent crimes who resume a law-abiding life remain permanently ostracized from civic life in this fashion. As a consequence of disenfranchisement laws, 1.4 million Black men — 13 percent of the entire adult Black male population — are denied the right to vote. In two states, Florida and Alabama, approximately 31 percent of all Black men are permanently disenfranchised.[40]

The Brennan Center for Justice at New York University filed suit against Florida under Section 2 of the Voting Rights Act of 1965, which prohibits states from maintaining practices that deny or abridge the right to vote on account of race. The Florida law not only has the effect of denying thousands of African-Americans the franchise, there is also powerful evidence that it was originally enacted in 1868 with racial *animus*. One proponent of the law asserted that the disenfranchisement law would keep Florida from becoming "niggerized."[41]

Fourteen former law enforcement and senior Department of Justice officials, including former Deputy Attorney General Eric Holder and former Solicitor General Seth Waxman, have filed an *amicus* brief in support of the plaintiffs in the case, Johnson v. Bush. But the current Justice Department has taken precisely the opposite position, filing an *amicus* brief in support of the offensive Florida law. Tellingly, Florida is represented by some of the same Washington lawyers who represented then-candidate George W. Bush in Florida following the 2000 election, an election in which felon disenfranchisement probably ensured Bush's disputed margin of victory.

Rolling Back Protections Against Police Misconduct: the Pittsburgh Police Consent Decree

In 1994, Congress gave the Department of Justice important new authority to investigate troubled police departments and to remedy abuses that constitute a "pattern or practice" of police misconduct. One of the most successful invocations of that authority occurred in Pittsburgh, where in 1997, the Justice Department intervened

in a civil rights lawsuit against the local police department and played a key role in shaping systemic reforms.

But in September 2002, the Civil Rights Division joined forces with Pittsburgh officials and asked a federal judge to lift the consent decree, despite the fact that the court-appointed auditor's report had recently documented many remaining problems, including flaws in the systems used to investigate misconduct. Nonetheless, the court granted the Justice Department's motion in part, over the objection of the NAACP, the ACLU, and other groups that had initiated the lawsuit prior to the Justice Department's involvement.[42]

Changes in position by federal government litigators should be relatively rare. While priorities may shift and strategies may be modified, the government's fundamental support for enforcement of the law, especially civil rights laws, should never be in doubt. Current occupants of the White House and the Justice Department should recognize the institutional interests that are served by continuity in litigation from one administration to the next.

John Dunne, a former New York State legislator who served as Assistant Attorney General for Civil Rights during the first Bush administration, has said that in his time at the Justice Department he never asked the solicitor general's office to cancel an appeal. Indeed, Dunne says that his views on the merits of litigation were based, in part, on the institutional views of career attorneys in his Division.[43]

In contrast, the current Bush administration has shown itself to be too quick to alter the government's litigation posture in important cases. This is one more arena in which the 50-year old bipartisan civil rights consensus is being tested as never before.

IV. Undermining Civil Rights through Funding Decisions

A third arena in which the current administration is undercutting the anti-discrimination agenda is the federal budget. Key civil rights initiatives and enforcement efforts have been underfunded over the past year, and budgetary constraints are likely to worsen.

Funding is an especially important indicator of an administration's commitment to civil rights. While there are major civil rights proposals still awaiting congressional action, including the Employment Non-Discrimination Act, the End Racial Profiling Act, and the Local Law Enforcement Enhancement Act, many federal civil rights protections have been on the books for decades. The question is whether they will be enforced.

Enforcement actions by federal agencies are not the only way to vindicate civil rights. Historically, agency enforcement has been only a corollary to private lawsuits. But private civil rights litigation has become more difficult in recent years due to recent Supreme Court decisions such as *Alexander v. Sandoval*[44], which undermined the right of private plaintiffs to bring actions under Title VI's disparate impact regulations, and *Buckhannon Board & Care Home, Inc. v. West Virginia*[45], which has harmed the ability of plaintiffs' lawyers to recover attorneys' fees.

Most ominously, the Rehnquist Court has handed down several decisions in recent years shielding states from private lawsuits under a strained reading of the 11th Amendment to the U.S. Constitution. In *Kimel v. Florida Board of Regents*[46] and *University of Alabama v. Garrett*,[47] the Court held that the Constitution immunizes states from private lawsuits seeking damages under, respectively, the Age Discrimination in Employment Act and the Americans with Disabilities Act. Unlike *Sandoval* and *Buckhannon*, which involve statutory interpretation and may someday be overturned by Congress, *Kimel* and *Garrett* are constitutional decisions that cannot directly be addressed by amending the underlying statutes. There may be other means available to Congress to bolster enforcement of these laws, but for now, federal agency enforcement is the only clear-cut legal avenue for victims of state-sponsored discrimination.

The Bush administration is therefore undermining civil rights laws from two directions. The President's judicial nominees include conservative law professors and lawyers who share a "states' rights" perspective on constitutional law and are likely to continue the legal trends that limit the rights of private plaintiffs to sue states for violations of federal civil rights statutes. At the same time, the President's budget fails to provide increased resources for federal civil rights agencies to ensure compliance with anti-discrimination mandates. The combined effect of these policies is diminishing civil rights enforcement.

Enforcement of existing civil rights laws is one important funding priority, but more funding is also needed for social programs that advance the overarching civil rights goal of equal opportunity. Federal programs in the fields of education, housing, and health care are targeted at the low-income communities in which minorities disproportionately live. But the Bush tax cuts and multi-billion dollar increases for the Pentagon have squeezed resources for these domestic priorities. Civil rights are illusory in a society without quality public education, decent housing, and affordable health care for all citizens.

In his first two years in office, President Bush has pushed though Congress tax cuts and other economic policies that deplete resources available to domestic discretionary programs, including civil rights enforcement. Among the civil rights programs that have received inadequate funding are programs to remedy the so-called "digital divide," the well-documented gap between communities with access to computers and high-technology training, and communities without those advantages.

There is a danger that Americans in rural areas and inner cities will be left behind in the New Economy unless special efforts are made to ensure access to new technologies across income brackets and in all geographic regions. To respond to this "digital divide," Congress authorized and began funding a series of targeted programs to enhance skills development, teacher training, and other mechanisms to address inequality between the technological haves and have-nots.

The Bush administration has resisted the concept of a digital divide and has actively — but so far unsuccessfully — sought to eliminate programs to remedy it. The Clinton Commerce Department had published a series of reports about the digital divide entitled *Falling Through the Net*. The Bush Commerce Department renamed the series *A Nation Online* and painted an overly rosy picture of access to technology. Consistent with this approach, the current administration has proposed to eliminate funding for a number of the remedial technology programs, including the Technology Opportunities Program and the Community Technology Centers initiative, both innovative, community-based partnerships. Congress has salvaged these programs up until now, but their prospects are uncertain.

A third crucial program, Preparing Tomorrow's Teachers to Use Technology (PT3), supports the development of tools and incentives to help educators adapt to technology-infused teaching. School districts are investing billions of dollars to equip schools with computers and modern communication networks, but only a third of all teachers feel prepared to use computers and the Internet in their teaching. The PT3 program was funded at $125 million in the last year of the previous administration, but the current President has consistently sought to defund it.

Finally, the President has tried to eliminate the Start Schools program, a $27 million initiative promoting the development of telecommunications services and audiovisual equipment in under-funded schools. Senator Kennedy, author of the bill establishing the Start Schools program, has consistently fought for continued funding.

The campaign to bridge the digital divide enjoys bipartisan congressional support as well as strong support from the business community, which recognizes the long-term consequences of this disparity for the American workforce. The administration's unwillingness to accept this consensus parallels its skepticism of the more general bipartisan civil rights consensus.

VI. Recommendations

The pattern of civil rights policy reversals described in this report should serve as a wake-up call to defenders of civil rights in Congress and outside the government. So far, no one of these actions has aroused the widespread public indignation in the way that Senator Lott's comments did. But in the aggregate, these decisions have very serious consequences. The trend they represent is a clear roadmap of what to expect in the coming years.

Opponents of these measures and others that will follow must come together in principled opposition to civil rights backsliding. Opponents of the administration's civil rights policies have several important goals:

1. The Bush administration should demonstrate renewed commitment to the fifty year-old bipartisan consensus on civil rights progress.

After apologizing for his paean to Strom Thurmond's 1948 campaign, Senator Lott expressed his willingness to take concrete steps in the new Congress that would ameliorate concerns his remarks had generated. Senator Lott will no longer be able to carry out those steps as majority leader, but the need for a reconciliation process remains.

President Bush should pick up this mantle. The President should meet with a broad range of civil rights leaders and jointly formulate a civil rights agenda for the 108th Congress. He should reconsider regulatory activity that threatens civil rights progress, refrain from overturning settled government positions in civil rights cases, and request adequate funding of civil rights activities, including activities to address the digital divide and flaws in election administration.

2. Congress should fulfill its constitutional role of overseeing the administration's civil rights activities and should consider how it can address regulatory actions inconsistent with the purpose of the 1960s civil rights laws.

The administration has undermined enforcement of important civil rights laws without sufficient criticism from Congress. Last year both the Senate and House Judiciary Committees held oversight hearings with respect to the Civil Rights Division of the Justice Department, but were met with bland denials from Assistant Attorney General Boyd that policy changes were taking place.

Congress should play a more aggressive role in ensuring that the executive branch executes the laws as they are written, especially in the case of landmark laws like the Civil Rights Act of 1964. In 1991, Congress passed a new civil rights law for the

sole purpose of overturning court decisions that had interpreted the civil rights laws too narrowly; consideration should be given to whether a similar approach is needed to overturn unfavorable court decisions and unfavorable regulatory choices.

3. Congress should provide adequate funding for important civil rights programs.

Congress also has responsibility to ensure that its civil rights laws are enforced by adequately funded agencies. While the administration proposes a budget to Congress, lawmakers retain ultimate responsibility for setting funding levels. In some cases, as with the digital divide programs, Congress has resisted cuts proposed by the executive branch. But in funding the civil rights enforcement units of each department, Congress has generally gone along with inflationary funding.

The promotion and protection of civil rights is a pressing domestic priority and should be funded accordingly.

4. Congress should consider seriously the need for new laws protecting gays and lesbians against employment discrimination, strengthening federal hate crime law, and ending the discredited practice of racial profiling.

While enforcement of existing civil rights laws is important, there are some minorities that lack statutory protection and other areas where protections need to be broadened and remedies expanded. The Employment Non-Discrimination Act, the End Racial Profiling Act, and the Local Law Enforcement Enhancement Act, each discussed earlier in this report, should be near the top for consideration in the 108th Congress.

5. The civil rights community must remain vigilant in monitoring the state of civil rights.

Citizens and groups concerned about civil rights must be ever vigilant against backsliding in the nation's civil rights policies. This report is the first step in a long-term effort to monitor regulations, litigation positions, and funding decisions that affect the state of civil rights in America. The Bush administration's decisions that make up civil rights policy will remain below the radar screen unless advocates bring this work to the attention of the public.

Conclusion

Senator Lott's now-infamous remarks at Strom Thurmond's birthday party engendered a national discussion about civil rights. On the one hand, Senator Lott's offensive comments were a potent reminder of America's ignominious racial history and the prejudice that lurks beneath the surface of American life. On the other hand, the swift condemnation that greeted his words is a tribute to the bipartisan American consensus in favor of civil rights progress.

President Bush was among Senator Lott's sharpest critics. The President spoke clearly: "Any suggestion that the segregated past was acceptable or positive is offensive and it is wrong...Recent comments by Sen. Lott do not reflect the spirit of our country."

The President is absolutely right that Senator Lott's remarks are not in the spirit of our country. But neither is the President's systematic reversal of civil rights in America.

Condemning Senator Lott was a necessary but insufficient step for the President to exorcise the ghost of Senator Thurmond's 1948 Dixiecrat campaign from his party and from his administration. The next step is to rededicate his presidency to the goal of advancing civil rights. The President should reexamine the decisions that his appointees have made in recent months that thwart enforcement of civil rights laws or that undercut their purpose. Senator Lott's comments are like a scab that has been opened — President Bush must do more than regret the wound — he must heal it.

In a nationally televised address on June 11, 1963, President John F. Kennedy explained to the American people why he had just deployed National Guard troops to escort African-American students onto the campus of the University of Alabama. He said, in part: "One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free."

Despite heroic progress over the four decades since President Kennedy spoke these words, it cannot yet be said that the nation is "fully free" of discrimination. This generation faces a civil rights challenge that is different, but in some ways more pernicious, than the civil rights challenge of President Kennedy's generation. President Bush must assume that challenge.

Endnotes

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LC CR Education Fund

Founded in 1969 as the education and research arm of the civil rights coalition, the Leadership Conference on Civil Rights Education Fund (LCCREF) promotes an understanding of the need for national policies that support civil rights and social and economic justice, and encourages an appreciation of the nation's diversity. LCCREF initiatives are grounded in the belief that an informed public is more likely to support effective federal civil rights and social justice policies.Through its online newsletter, "This Week in Civil Rights"; special reports and curricula; briefings; and tracking of legislation, court decisions and executive branch enforcement in "The Civil Rights Monitor", LCCREF accentuates the vital relationship between the movement's storied past and the critical civil rights issues of today.

Through its public education campaigns on contemporary civil rights issues, including education, voting rights and the federal judiciary; its community tensions prevention and response initiative, CommUNITY 2000; its youth-initiated hate violence education and awareness program, Partners Against Hate; its highly acclaimed fellowship program for college students poised to become the next generation of civil rights leaders, Civil Rights Summer; and its Information/Technology/Communications initiative, which is educating the public about the importance of federal leadership in bridging the digital divide in low income urban areas, rural communities, and Indian reservations, LCCREF has helped move the nation forward in its journey toward equal opportunity and justice for all.

Mr. NADLER. Thank you.

I will yield myself 5 minutes for question. I will start with Mr. Rich.

According to your written testimony, sir, political appointees intruded into the attorney evaluation process in certain instances, something that did not happen in the past.

Could you tell us how the appointees intruded into the attorney performance evaluations, what happened, when, and how frequently did this happen? And try to keep your answers brief, because we are running up against——

Mr. RICH. Okay. It happened approximately seven or eight times. It happened primarily in 2003. The group of attorneys who had worked on different matters, that the supervisors in the front office disagreed with those judgments, and——

Mr. NADLER. Give us an example, such as.

Mr. RICH. Such as my recollection was one of the cases that was recommended had to do with sending some observers to Texas, and the judgment was that it wasn't necessary. That was accepted.

Six months later, when I wrote the evaluation for this particular person, I was actually sent back and told to include in that evaluation criticism of the work on that particular matter.

Mr. NADLER. Even though that work had been accepted at the time.

Mr. RICH. Yes. I mean, well, it was—they disagreed and didn't approve it, but it was not a matter of something that would go in an evaluation, in my judgment.

Even more particular, there was another matter in which there was disagreement initially. Eventually, the supervisors agreed with us, but when it came time to performance evaluations, a criticism was made concerning their initial recommendation.

Mr. NADLER. Okay. And in this connection, were you put under political pressure directly to hire or promote personnel based upon specific political objectives, or were you put under political pressure to make specific decisions or recommendations based upon political concerns?

Mr. RICH. Well, I am not sure that that is quite what happened. Certainly, there was a sense in the section 5 decisions that I have discussed in my article that there were political considerations that overruled the recommendations of career staff, the Mississippi, Texas and Georgia, and——

Mr. NADLER. Yes, but were you put under political pressure to hire or promote personnel based upon——

Mr. RICH. Well, we did not have any real authority to hire.

Mr. NADLER. Okay.

Mr. RICH. So I didn't get involved in hiring. And the hiring process changed. Promotions——

Mr. NADLER. Okay. Now, in the matter of the Georgia photo I.D. case——

Mr. RICH. Yes.

Mr. NADLER [continuing]. According to a November 17th Washington Post article, a team of Justice Department lawyers and analysts who reviewed the case recommended rejecting it because it was likely to discriminate against Black voters but were overruled the next day by higher ranking officials.

Did this section 5 submission go through the normal review process?

Mr. RICH. I was not there, but I have read the same materials you have. I had left by that time. But I can tell you that the process that was followed was unusual.

Mr. NADLER. In what way was it unusual?

Mr. RICH. The August 25th memo recommending an objection—typically, the case—it is very rare for those to be overruled above. It happens, but it is very rare.

This time, it happened the next day, even though there were 30 days remaining that they could still review the matter further. And furthermore, on the same day that the——

Mr. NADLER. In other words, there were 30 days in which they could have conferred with the attorneys and——

Mr. RICH. Right.

Mr. NADLER [continuing]. Seen why they made it and so forth.

Mr. RICH. And furthermore, on the day that it was pre-cleared, the State of Georgia had submitted more information to be looked at. The staff had brought that to the attention——

Mr. NADLER. And they didn't have time—and they didn't do that because they made the decision right away.

Mr. RICH. Right. They didn't wait to look at that, and the decision was made the next day.

Mr. NADLER. And do you believe politics played a role in this decision? And if so, why? Why do you believe that?

Mr. RICH. Well, I think it was political. Voter I.D. was an issue that this Administration was pushing very hard and had changed the policies and the way that the Voting Section had reviewed voter I.D. laws in the past.

Mr. NADLER. Wait, wait. When you say that, just—in the 20 seconds remaining, how was the policy as to the way they reviewed it in the past changed?

Mr. RICH. It goes to the substance. In the past, they had pre-cleared a Georgia voter I.D. law because it had a backup provision that said if you come in and sign an affidavit swearing you are who you are, you can vote.

Mr. NADLER. And now they didn't——

Mr. RICH. And we pre-cleared that.

Mr. NADLER. And now they didn't require that.

Mr. RICH. Now they didn't require that.

Mr. NADLER. My time has expired.

The distinguished Ranking Member, Mr. Franks?

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, in the interest of time, I am just going to ask one question and then yield the balance—to two different witnesses and yield the balance of my time to the gentleman from Indiana.

Mr. Taylor, I will start with you. It seems that the real discussion here centers around priorities of enforcement rather than the vigor of enforcement, because certainly the Division has been very vigorous given the statistics that we have seen here. They have been very active in their enforcement.

Related to some of the priorities, one of those has been the increased priority on prosecuting human trafficking civil rights violations.

Mr. Taylor, I don't want to make any assumptions here. Why do you or why do you not believe that the prevention of human trafficking is a civil rights issue to which the considerable talents of the Division should be applied?

Mr. TAYLOR. Well, if you read the article by Seth Rosenthal, the piece that he submitted as a former member of the Criminal Civil Rights Division, carefully, with due respect, Mr. Clegg's conclusion is wrong.

The traditional work of the section was diminished in the area of hate crimes and in the area of police misconduct.

The subject is human trafficking is certainly an important subject, Mr. Franks, but it had been handled capably by prosecutors outside the Civil Rights Division.

Mr. FRANKS. So you essentially think that this is probably not an area where considerable talents of the Division should be applied.

Mr. TAYLOR. Well, I have no basis for thinking it was not being handled well by prosecutors. So yes, I am not saying that——

Mr. FRANKS. Thank you. Thank you, Mr. Taylor.

Mr. TAYLOR [continuing]. This is not handled capably within the Division, but there was no reason to transfer it——

Mr. FRANKS. In the interest of time, Mr. Clegg, could I give you a shot at the same question?

Mr. CLEGG. Well, let me just read to you from the report. "[N]either the quantity nor quality of their work," that is, the section's work, "in traditional enforcement areas has suffered. . . ." "The changed emphasis of the Criminal Section during the Bush years is not a negative development."

I mean, I am quoting from the report. And I think that the reason for the reallocation of enforcement authority from the Criminal Division to the Civil Rights Division is also explained in here.

There was a new statute that was passed at the behest of the Division in the Clinton administration that is called the Trafficking Victims Protection Act that widened the law enforcement authority of the department generally.

And I think it makes perfect sense to have all of those cases prosecuted within one Division rather than half in one Division and half in the other Division.

But you know, even if reasonable people, can differ about that, this is hardly the stuff of scandal. Why should this Subcommittee try to micromanage the Civil Rights Division in that way?

Mr. FRANKS. Thank you, Mr. Clegg. And——

Mr. TAYLOR. If I may——

Mr. FRANKS [continuing]. With that, I will yield the balance of my time——

Mr. TAYLOR. If I may say another word about——

Mr. FRANKS [continuing]. To the gentleman from Indiana.

Mr. TAYLOR. If I may say another word, Mr——

Mr. FRANKS. In the interest of time, I will let him——

Mr. NADLER. The time is going to the gentleman——

Mr. FRANKS. From Indiana, please.

Mr. PENCE. I appreciate the gentleman yielding.

And let me say to the panel that I appreciate the testimony. I voted for the Voting Rights Act. I actually voted against the King amendment to preserve the bilingual elements of that legislation.

I will vote for D.C. voting today. I am a little bit broader than some people think sometimes.

But let me ask you very sincerely, the Ranking Member just said that this is really about priorities.

And it seems to me that, Mr. Taylor, you were critical of, you know, a failure to pass immigration reform, a failure to be concerned about issues of abuse among potential illegal immigrants.

Isn't it precisely correct that currently DOJ—part of the complaint that is being leveled here is that the Department of Justice is beginning to focus on the language requirements of the Voting Rights Act to the broader community, including ensuring that American Hispanics have full access to the ballot box?

And isn't there an argument over—in fact, that is a shifting priority which does address some of the most immediate questions of our time.

Mr. Henderson and Mr. Taylor?

Mr. HENDERSON. Well, Mr. Pence, first, thank you so much for the question.

Thank you, by the way, for your vote in the Judiciary Committee in support of the D.C. Voting Rights Act. That was tremendous, courageous. We appreciate it.

Having said that, I want to take issue with your initial characterization that the only matter of concern is that of shifting priorities.

I think as we look at the Civil Rights Division, there are three areas of concern. First, there has been an overall dropoff in the number of actual cases brought within the Division.

Secondly, there have been shifting priorities, and we are not referring in that regard to an expansion of priorities with respect to——

Mr. NADLER. The gentleman's time has expired. Excuse me. The gentleman's time has expired, but the witness will be permitted to complete his answer. But please do so briefly. We will be able to get back to Mr. Pence, I think.

Mr. HENDERSON. Thank you, sir.

And then the third area of concern is one that I focused on, and that is the politicization of the appointment process and the treatment of longstanding career attorneys in ways that have either driven them out of the Division or diminished their ability to be effective in offering counsel.

So those three areas, not really the one you highlighted.

Mr. NADLER. The time of the gentleman has expired. I thank the gentleman.

The distinguished Chairman of the Committee, Mr. Conyers?

Mr. CONYERS. Thank you so much.

Am I glad to see you witnesses here. I mean, it reminds me of the old days—hale and hearty.

Let me allow Mr. Taylor to complete his thought. He had a point that he wanted to make and time had run out under one of the Members of the Committee.

Did you want to continue that?

Mr. TAYLOR. Thank you very much, Mr. Conyers. I will try to be brief. I do think that priorities are a major part of the issue.

We have made great progress in this country under the civil rights laws and under Brown in desegregating schools, in beginning the opportunities in housing, and in employment.

But the Civil Rights Division, which has a role—not the only role in that—has really put them on the back burner. And when you say—I will give you one example, by the way. It is not in this report. The Civil Rights Division Education Section, which we will report on later, under the prior Administration was siding with school districts which wanted to continue desegregation after their court obligations expired by having voluntary desegregation plans. And the section filed a number of—the Division filed a number of amicus briefs in the lower courts. Now, the Justice Department has turned around completely, said that a school district can't desegregate its schools or balance them even if it wants to. And in the Supreme Court, they took a completely opposite position without stating any real legal basis or educational reason for doing so. That is the kind of thing that is happening these days.

Mr. CONYERS. Thank you.

Let me ask Mr. Clegg—welcome again to the Committee. Are you still opposed to the extension of the Voter Rights Act?

Mr. CLEGG. Well, yes. I was outvoted, though, on that, as you know. But I do think that it was a mistake to reauthorize section 5 and section 203—not the entire act, but those two provisions.

Mr. CONYERS. I see. Okay.

Let me ask Wade Henderson, what about the types and numbers of cases the Civil Rights Division has been bringing? Do you have some concerns about that?

Mr. HENDERSON. Absolutely, Mr. Chairman. I think there are two areas that confirm our belief that there has been a dropoff in the quantity of cases they have brought to the detriment of effective civil rights enforcement.

For example, in the area of employment, since January 2001, the Administration has filed just 35 title VII cases, or an average of approximately six cases per year.

Now, this number includes five cases in which DOJ intervened in ongoing litigation, and two cases that were initiated by the U.S. Attorney's Office in the Southern District of New York using their own resources.

By contrast, the Clinton administration filed 34 cases in its first 2 years in office. And by the end of its term, the Administration—that is, the Clinton administration, had filed 92 complaints of employment discrimination, for an average of 11 per year.

I think if you look at what has happened in the Housing and Civil Enforcement Sections, you will see essentially the same thing, 53 cases in 2001 down to 31 cases in 2006.

And the number of race cases that have been brought in this area has fallen by 60 percent. What we are looking at is really not just a shifting emphasis of priorities. What we are looking at is a backing away from the statutory obligation of the Division to effectively enforce——

Mr. CONYERS. Thank you.

Mr. HENDERSON [continuing]. Existing civil rights laws.

Mr. CONYERS. Attorney Clegg, let me ask you my last question. I was wondering why you didn't appreciate Attorney Taylor, Pro-

fessor Taylor, pointing out that the nature of the appointments of the members of the judiciary have been extremely conservative lately.

And you felt that that was an inappropriate comment before the Subcommittee of the Judiciary Committee.

Mr. CLEGG. That is not what he said. Had he complained about their being "conservative" appointees, I wouldn't have had any problem. What he said was that these were judges "hostile" to——

Mr. NADLER. The time of the gentleman has——

Mr. CLEGG [continuing]. The enforcement of civil rights laws.

Mr. NADLER. The time of the gentleman has expired. The witness can complete his answer.

Mr. CONYERS. Yes. Wasn't that valid criticism? I mean, it could be agreed with or disagreed with, but when witnesses begin to challenge other witnesses' statements, we could have a full hearing—as a matter of fact, I recommend it to Chairman Nadler—on this conservatizing situation to straighten it out.

But I don't think that he has any more right to criticize you on your views than you have to criticize him on his.

Mr. CLEGG. I think we both have the right to criticize each other, and that is what I am doing.

Mr. CONYERS. Well, that is not why——

Mr. CLEGG. I am saying that it is——

Mr. CONYERS. But that is not why the hearing is being held. We are here for a different subject.

Mr. CLEGG. I don't agree.

Mr. NADLER. The time of the gentleman has expired.

Mr. Pence?

Mr. PENCE. Thank you, Chairman.

I would just like to return to this question of priorities. I appreciate Mr. Henderson's response to that. And as we have a vote on, I will leave the majority of my time for reaction here.

I just continue to—I should have checked this box, too. You know, I get beat up by a lot of people because I suggested comprehensive immigration reform in the last Congress.

You know, I mean, I am a head first without a helmet guy. You know, but I think it is the right thing to do.

So using those bona fides, let me say again, Mr. Taylor or Mr. Rich, is it possible here that what we are seeing in evidence I actually just that elections have consequences, that different Administrations do bring a different intensity level, a different level of priorities?

Or is it, in fact, your contention that the law is being disregarded here?

It does seem to me that this Administration has placed greater emphasis on ensuring that classes of persons apart from traditional targets of civil rights enforcement law have had their rights protected under the Voting Rights Act, especially, and that may have diverted resources that previously were focusing on more traditional areas of civil rights.

But is there at least—would either one of you allow that this is a natural outgrowth of the changing of the guard the American people made in the year 2000?

Or is it your firm belief that this represents ignoring the law and stepping aside from constitutional duty?

Mr. TAYLOR. Mr. Pence, I think—I will turn it over to Joe in a minute. I think voting rights are central in this country. And I don't think they have been—I think part of the story is they have not been adequately protected.

And when I look at what has happened at the Justice Department and look at the unfolding story about prosecutors, U.S. attorneys and vote fraud, I see a dilution of the right to vote. I think——

Mr. PENCE. But would you grant the point—forgive me for interrupting, but would you grant the point that this Department of Justice has placed greater emphasis and resources on ensuring that Hispanic Americans have access to bilingual ballots and——

Mr. TAYLOR. I was going to say that I think that it is important for the department to keep up to date with problems as they unfold, with hate crimes, with ill treatment of Muslims.

I think they do have to—and I think they—I didn't hear an answer to the question about what additional resources would be requested for the department to do some of that work, and I wish they would request some additional resources.

I think housing is another important area. I think employment is another area. I think high-impact cases, which the department is not bringing these days, is important, not just individual complaints, but to stop practices which affect a great many people.

So I think there—we could have a good discussion about this, I think.

The other thing I will just say briefly is Mr. Clegg has called me a lot worse things than he called me here today, so maybe I am improving in his estimation.

But I would just say to the Committee, look at the two reports by highly regarded attorneys on the nominations to the court and see if you disagree with them.

Mr. PENCE. If I could reclaim my time, Mr. Chairman.

Mr. Clegg, could you respond to that? Is my characterization of this fair from your perspective, in the minute and 10 seconds we have left?

Mr. CLEGG. No, I think it is very fair. And as I say in my statement, I think a lot of this is driven by simply a difference in enforcement priorities, which, you know, is perfectly legitimate.

Times change. Congress passes new laws. New problems arise. And there are legitimate differences in the way that different Government lawyers interpret the law, just as there are legitimate differences in the way that judges interpret the law.

And we ought to be able to have those differences without characterizing one another as "hostile to the enforcement of [civil rights] laws." That is not what this is about.

Mr. PENCE. Mr. Henderson, the balance of the time.

Mr. HENDERSON. Mr. Pence, in the time you have left, let me just say the Division was started under the Administration of Dwight Eisenhower.

But every successive Administration after that, both Democratic and Republican, saw the need for steady progress on civil rights enforcement.

What we saw with the Bush administration was a precipitous dropoff in the number of cases being brought in a variety of different areas, and not just shifting priorities, but an effort to diminish its primary responsibility to ensure the effective civil rights enforcement for all Americans.

Mr. CLEGG. But as you point out, yes, the number of cases have gone down in some areas but they have gone up in others.

Mr. NADLER. The time of the gentleman has expired. All time has expired.

Oh, Mr. Scott again. Mr. Scott, I am sorry. [Laughter.]

I keep not looking at the front row.

Mr. SCOTT. What did that lawyer say, "I am not a potted plant"?

Mr. Rich, you were at the Division 37 years. Can you make a comment on the attorney-client privilege question that was brought up in the first panel?

Mr. RICH. That has always been a very vexing issue, what the attorney-client privilege means for a Government attorney.

I agree with Mr. Kim's portrayal that we represent the United States, the people of the United States. The question is how does that affect that attorney-client privilege.

I think that there is a sense of career attorneys that internal deliberations, internal memos, are something that are privileged to protect the ability to give your frank opinions.

Mr. SCOTT. Have the recommendations been rejected in previous Administrations—or has the level of rejection increased in this Administration, rejecting the opinions of the career attorneys on section 5 cases?

Mr. RICH. Oh, most definitely. I think that the high profile cases show that more than anything.

A couple other things I wanted to add about the Georgia Voter I.D. matter that were extraordinary is that each of the attorneys who worked on that case that recommended an objection are no longer in the section, including the deputy chief, who was removed.

And after that particular matter is when the Justice Department changed the longstanding policy of asking civil rights analysts and attorneys to give their recommendations on whether to object.

That has now changed. Mr. Kim was not clear on that. What has changed is that the section chief still gives a recommendation, but the civil rights analysts who always had given recommendations to the section chief no longer give those recommendations to the section chief.

Mr. SCOTT. Is the section chief a political appointee or a career appointee?

Mr. RICH. He is a career appointee. He replaced me.

Mr. SCOTT. Okay. Mr. Kim also went to great lengths to show that the courts had validated certain decisions. Isn't it true that you can have a section 5 violation without having a section 2 violation?

Mr. RICH. That is correct.

Mr. SCOTT. And the section 5 decision is not reviewable. If you are in court, it is on a section 2 violation.

Mr. RICH. The only time a section 5 matter would be reviewable—if there was an objection, the jurisdiction has the ability to

go to the U.S. District Court here in D.C. and raise it before that court. It is not an appeal.

Mr. SCOTT. Now, that is if it has been rejected—if it has not been—if it has been pre-cleared, there is no jurisdiction for appellate review.

Mr. RICH. There is no jurisdiction, and that happened certainly in the Mississippi case.

Mr. NADLER. Well, I thank the gentleman, and I thank the gentlemen in particular for coming in under his time limit in spite of my blindness in failing to see him for a second time, for which I apologize.

First of all, the Chair thanks all the witnesses and the Members of the panel.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as you can, so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, this hearing is adjourned.

[Whereupon, at 11:48 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

U.S. Department of Justice

Civil Rights Division

Washington, D.C. 20530

APR 30 2007

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

During the March 22, 2007, oversight hearing of the Civil Rights Division before the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Chairman Conyers noted a 2007 Citizens' Commission on Civil Rights report, entitled "Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration." I received a copy of this report a few days before the hearing. To my knowledge, the Civil Rights Division was not aware of, nor asked to comment on, this report before it was issued.

Chairman Conyers asked me to detail some of my disagreements with this report, which is hardly an objective assessment of the Division. Most notably, the report ignores the Division's significant accomplishments over the past six years in numerous areas, such as prosecuting human trafficking offenders; convicting law enforcement officials for willful misconduct, such as excessive force; enforcing Section 203 of the Voting Rights Act; helping more than 3 million Americans with disabilities through Project Civic Access; ensuring constitutional policing by law enforcement agencies; and protecting the religious liberties of all Americans. Indeed, recent years have seen the Civil Rights Division launch several initiatives to protect the civil rights of Americans. Our many accomplishments demonstrate that the Civil Rights Division is fully committed to combating discrimination consistent with the Federal laws passed by Congress. Our extraordinary record of success in the courts demonstrates a record of fair and even-handed law enforcement through cases that are thoroughly grounded in the facts and the law.

The report criticizes three (of the 10) litigating sections in the Division. The bulk of these criticisms have been aired many times and conclusively rebutted in dozens of pages of written testimony, including my written testimony before the House Judiciary Committee on March 22, 2007, and before the Senate Judiciary Committee on November 16, 2006; the written testimony of former Assistant Attorney General R. Alexander Acosta before the House Judiciary Committee on March 10, 2005, and March 2, 2004; and the written testimony of former Assistant Attorney General Ralph Boyd before the House Judiciary Committee on May 15, 2003, and June 25, 2002, and the Senate Judiciary Committee on May 21, 2002. Indeed,

frequent allegations that Congress has not adequately discharged its oversight responsibilities are unfounded. Congress has conducted seven oversight hearings over the Civil Rights Division thus far during this Administration, as compared to just four during the entire eight years of the previous Administration.

In light of this extensive record, my responses here focus on certain of the report's allegations regarding the Division's management and outstanding professional staff. As an initial matter, the Division's many accomplishments are the result of the talent, hard work, and dedication of the Division's professional attorneys and staff. These records could not have been achieved without a high level of teamwork between career attorneys and political appointees. While the report alleges that political appointees are unwilling to draw on the expertise of career staff, quite the contrary is true. The Division's political appointees consistently rely on career attorneys for expertise in their respective areas of civil rights enforcement. Career attorneys routinely prepare detailed memoranda, setting forth the facts, the law, and a recommendation on each proposed matter. As a former career prosecutor at the Department of Justice, I very much expect, encourage, and appreciate the thoughtful recommendations of career attorneys.

My policy is to maintain open communication between the sections' career staff and the Office of the Assistant Attorney General. In contrast to the allegations in the report, I conduct regular meetings with all Section Chiefs and have met with trial attorneys to discuss their cases. Moreover, my deputy assistant attorneys general communicate daily with career section management as well as conduct regular meetings with the sections they oversee.

I find it unfortunate that the report's mischaracterization of the Division's hiring procedures unfairly casts doubt on the demonstrated excellence of the outstanding attorneys who the Division has been fortunate to hire. While the report claims that hiring decisions are made by political appointees with little or no input from career staff, this simply is not accurate. The Civil Rights Division hires attorneys through a collaborative approach that includes both career employees and political appointees. I place great weight on the recommendations of career section management in all personnel matters, including hiring decisions. The Division hires outstanding attorneys from an extremely wide variety of backgrounds. There is no political litmus test in making hiring decisions.

The report also suggests impropriety in the fact that political appointees help to rate the performance of career attorneys. Such a conclusion would be unfounded. The rating of career attorneys has historically involved the input and collaboration of *both* career management and political appointees. The form used to appraise the performance of career attorneys in the Civil Rights Division has contained some three to seven performance-related elements (depending on the work of the Section) on which an attorney is evaluated; a brief narrative typically accompanies the actual evaluation. Each rating involves a "rating official" (typically, a career section chief) and the "reviewing official" (typically, a political appointee). As has been true for years, both officials sign the final rating; hence, both are expected to attest to it. The involvement of political appointees in this process – whether in editing the narrative or in

changing the actual evaluation – is neither unusual nor unwarranted. I have worked collaboratively and harmoniously with career management in carrying out this responsibility, and I am confident that my staff does so as well.

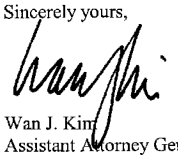
The report also claims that the Division has an "unprecedented turnover of career personnel." In fact, the average rate of attorney attrition in the Civil Rights Division during this Administration is almost identical (less than a 1.5% difference) to a comparable period of the prior Administration. During this Administration, the peak attrition rate for attorneys occurred in 2005, when a number of attorneys accepted a retirement package offered to multiple Justice Department components. The report notes a number of departures from the Voting Section since April 2005 and suggests that these departures have sapped the ability of the Voting Section to enforce the Federal voting laws. That is not true. Since April 2005, the outstanding attorneys in the Voting Section have worked diligently to file 27 lawsuits – as compared to 22 lawsuits filed from January 2001 until April 2005. Stated differently, the Voting Section has filed more lawsuits during the past two years than in the preceding four.

Of course, we make every effort to retain our extremely talented and experienced attorneys, who are in high demand both throughout the government and in the private sector. I have worked hard to create an environment of hard work, mutual respect, open dialogue, and professionalism. In this vein, we recently created a new Office of Professional Development that is focused on the needs of individual attorneys for training and career resources. The Division also recently created the internal Ombudsman to meet with Division employees on a wide variety of issues and concerns. I maintain regular contact with the leadership of each Section and work closely with career staff to address any problems that arise.

In sum, the leadership of the Division remains strong with each Section Chief, for example, averaging nearly two decades of experience within the Civil Rights Division. This experience, dedication, and practical knowledge continue to serve the Division well. The productivity and record levels of enforcement achieved by the Division during the last six years are the direct result of the hard work of career professionals under the expertise of the Section Chiefs.

I appreciate the opportunity to appear before your Subcommittee. Please do not hesitate to contact the Department of Justice if we can be of further assistance.

Sincerely yours,



Wan J. Kim
Assistant Attorney General

cc: The Honorable Trent Franks
Ranking Minority Member

cc: The Honorable John Conyers
Chairman
Committee on the Judiciary

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March 19, 2007

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John Conyers, Chairman
House Committee on the Judiciary

Jerrold Nadler, Chairman
House Subcommittee on the Constitution
Committee on the Judiciary

Dear Chairmen Conyers and Nadler:

It is with some sadness that I join in submitting to you the latest report of the Citizens' Commission on Civil Rights—The Erosion of Rights. I am sad because the report chronicles actions taken by the current Administration that threaten the civil rights protections that the nation has built into the law over the past half century.

I hope the Committee will pay particular attention to the four essays written by lawyers who served with distinction in the Civil Rights Division of the Justice Department. They are emblematic of the skill, professionalism and dedication that have characterized the division since its founding in 1957.

Yet, the current Administration has set about to dismantle the Division, to ignore the work of its most able lawyers and to weaken civil rights and remedies.

As a Republican, I am proud of the historical contribution my party has made to the strengthening of civil rights. Every significant achievement has been accomplished on a bipartisan basis. During the period from 1969 to 1973, when I served as Chairman of the Equal Employment Opportunity Commission by appointment of President Nixon, our bipartisan agency examined discrimination in employment and services by AT&T. We eventually settled the case by consent decree and helped set the stage for new equal employment opportunities in some of America's largest corporations.

We also collaborated in adopting guidance under Title VII which made clear that employment practices that worked to disadvantage minorities and that were not dictated by business necessity should be interpreted to violate Title VII. The Supreme Court adopted that doctrine in its landmark decision in *Griggs v Duke Power Company* in 1971and it has been a pillar of civil rights law ever since.

When the Court reneged on the principle in the 1980s, a bipartisan coalition in the Congress restored it in the Civil Rights Act of 1991. Now the current Administration is weakening the law again.

As to the Department of Justice it was Lincoln's Attorney General, Edward Bates who wrote that,

> "The office I hold is not properly *political*, but strictly *legal;* and it is my duty, above all other ministers of state, to uphold the law and to resist all encroachments, from whatever quarter of mere will and power."

And it was as the Republican, the late Elliot Richardson (who was my colleague for many years on the Citizens' Commission on Civil Rights) who showed the greatest courage in putting the Bates principle into action, by resigning his office when he was threatened with an "encroachment of mere will and power."

Finally, I want to commend your committee for taking on this issue when you have such a full agenda. Our Commission along with the Center for American Progress, recommends that Congress establish a Select Committee of the House and Senate to conduct a two year review of the implementation of civil rights laws. We believe that such a review would provide a record that will enable the rebuilding of the institutions we need to protect the rights of all of us and we hope that this is work that will have bipartisan support.

Sincerely,

William Brown

William H. Brown, III

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 12, 2006

The Honorable F. James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter dated February 28, 2006, requesting information about the Civil Rights Division. You first requested information about the Division's procedures in Voting Rights Act cases.

The Voting Section of the Civil Rights Division employs a consistent and straightforward decision-making process. Regardless of the type of decision to be made whether to file a lawsuit, to make a determination under Section 5, or to provide legal arguments -- the decision-making process begins with a careful analysis of the facts and the legal elements at issue. Justice Department attorneys have great legal skill and knowledge. They are expected to identify all of the relevant facts, legal issues and other concerns that bear upon a law enforcement decision. This process often begins with a search for relevant and reliable evidence. Voting Section attorneys interview potential witnesses; locate, authenticate and review documents; corroborate potential facts; and track back from the many second- and third-hand allegations, regularly received by the Section, in order to identify trustworthy evidence. After identifying and obtaining evidence that bears upon a particular course of action, Section attorneys identify and explore potential defenses. They are responsible for making recommendations that follow the law as written by the Congress and interpreted by the judiciary. Varied and sometimes contradicting views are encouraged. Only after this careful process, does a matter move forward for decision.

Each stage of the decision-making process is interactive. The activity of Department attorneys is guided and encouraged at every step by more senior attorneys, typically Special Litigation Counsel and Deputy Section Chiefs, as well as by the Chief of the Voting Section. Each of these supervisors is a career attorney, as well, with significant experience in civil rights and voting rights litigation. The current Voting Section Chief has been with the Civil Rights Division for over 30 years. The Section Chief is responsible for presenting the Section recommendation to Division leadership. Under 28 C.F.R. 51.3, the Chief of the Voting Section

has the authority to preclear state voting redistricting plans submitted under Section 5 of the Voting Rights Act.

The Department of Justice rightly expects the highest standards and strict adherence to the law by its attorneys. Nowhere is such fidelity more important than when addressing the sensitive areas touched on by the Voting Section, where we strive to maintain the highest standards of professionalism.

Citing *Johnson v. Miller,* 864 F. Supp. 1354 (S.D. Ga. 1994); *Miller v. Johnson,* 515 U.S. 900 (1995); *Abrams v. Johnson,* 521 U.S. 74 (1997); and *United States v. Jones,* 125 F.3d 1418 (11th Cir. 1997), you also requested information of any "instances, past or present, where the Civil Rights Division's legal work was either admonished in a court opinion or where the Division paid attorneys' fees or settlement fees over its involvement in a lawsuit." The following cases arguably contain "admonish[ments]" similar in degree to those in the cases that you cited or involve the payment of attorneys' or settlement fees for purportedly unfounded litigation. While the Department fully respects and accepts the court rulings, judicial statements, dispositions and payments in these matters, we do not concede by listing them here that each was warranted.

1. *Johnson v. Miller*. In 1992, the Voting Section of the Civil Rights Division precleared a legislative redistricting plan in Georgia, after rejecting two previous plans because there were only two majority black districts. In 1994, voters challenged the constitutionality of the state's Eleventh Congressional District, contending that it was a racial gerrymander, and sought to enjoin its use in congressional elections. Shortly after the case was filed, the Voting Section intervened as a defendant. The plaintiffs prevailed. 864 F. Supp. 1354 (S.D. Ga. 1994) (Copy of opinion enclosed as Attachment A). As relevant to your request, the court stated, "[d]uring the redistricting process, [the ACLU attorney] was in constant contact with . . . the DOJ line attorneys overseeing preclearance of Georgia's redistricting efforts. . . . The Court was presented with a sampling of these communiques, and we find them disturbing. It is obvious from a review of the materials that [the ACLU attorney's] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." *Id.* at 136; *see also id.* (Voting Section attorneys' "professed amnesia [about their relationship with the ACLU attorney] less than credible"); *id.* at 1364 ("Though counsel for the United States objected to Plaintiffs' 'characterization that the Justice Department "suggested things" [to the General Assembly],' it is disingenuous to submit that DOJ's objections were anything less than implicit commands.") (citation omitted); *id.* at 1367-68 ("the Department of Justice had cultivated a number of partisan 'informants' within the ranks of the Georgia

legislature". . . ."We find this practice disturbing."); *id.* at 1368 ("the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment"); *id.* ("It is surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote.").

In 1994, the United States appealed *Johnson v. Miller* to the U.S. Supreme Court, arguing that evidence of a legislature's deliberate use of race in redistricting is insufficient to establish a racial gerrymander claim. The Court found for the plaintiffs-appellees. *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (Copy of opinion enclosed as Attachment B). As relevant to your request, the Court stated, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that policy and seems to concede its impropriety, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans." *Id.* at 924-25 (citations omitted). *See also id.* at 926 ("The Justice Department's maximization policy seems quite far removed from [Section 5 of the VRA]'s purpose."); *id.* at 927 ("the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under [Section] 2 of the Fifteenth Amendment into tension with the Fourteenth Amendment.") (citation omitted). In 1995, the Department agreed to pay $202,000 to settle plaintiffs' interim claims for attorneys' fees. In 1997, the Department agreed to pay an additional $395,000 to settle plaintiffs' remaining claims for attorneys' fees, expenses and costs.

2. *Hays v. State of Louisiana*. In 1992, the Voting Section of the Civil Rights Division precleared a redistricting plan for Louisiana. The same year, voters sued Louisiana, contending, among other things, that the plan constituted impermissible gerrymandering in violation of the Equal Protection Clause. The Voting Section initially participated as *amicus curiae* in September 1992 and subsequently intervened as a defendant in July 1994. The district court held the plan to be unconstitutional. 839 F. Supp. 1188 (W.D. La. 1993) (Copy of opinion enclosed as Attachment C). As relevant to your request, the court stated, "neither Section 2 nor Section 5 of the Voting Rights Act justify the [U.S. Attorney General's Office's] insistence that Louisiana adopt a plan with two safe, black majority districts." *Id.* at 1196 n.21; *see also id.* (DOJ's position was "nothing more than...'gloss' on the Voting Rights Act – a gloss unapproved by Congress and unsanctioned by the courts."); *id.* ("[the Assistant Attorney General's Office] arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies.").

Louisiana enacted a new redistricting plan. The district court struck down the revised plan. 936 F. Supp. 360 (W.D. La. 1996) (*per curiam*) (Copy of opinion enclosed as Attachment D). As relevant to your request, the court stated, "the Justice Department impermissibly encouraged -- nay, mandated -- racial gerrymandering." *Id.* at 369. The court also noted that "the Legislature succumbed to the illegitimate preclearance demands of the Justice Department." *Id.* at 372; *see also id.* at 363-64, 368-70. In 1999, the Department agreed to pay $1,147,228 to settle claims for attorneys' fees, expenses, and costs.

3. *Scott v. Department of Justice*. On August 12, 1992, the Voting Section of the Civil Rights Division precleared a redistricting plan in Florida. In 1994, voters sued the Department and the State of Florida, contending that the state's configuration for a certain Senate district violated the Equal Protection Clause. After the Supreme Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995), and *United States v. Hays*, 515 U.S. 737 (1995), the parties agreed to proceed by mediation. The district court approved the mediated settlement (which did not address attorneys' fees) in March 1996. *Scott v. Department of Justice*, 920 F. Supp. 1248 (M.D. Fla. 1996). In 1999, the Department and plaintiffs settled plaintiffs' claims for attorneys' fees, expenses and costs for $95,000.

4. *United States v. City of Torrance*. In 1993, the Employment Litigation Section of the Civil Rights Division brought suit, alleging that the City of Torrance, California, had engaged in a pattern or practice of discrimination in its hiring of new police officers and firemen. The defendant prevailed. The district court concluded that the Division's actions violated Rule 11 of the Federal Rules of Civil Procedure, or alternatively 42 U.S.C. 2000e-5(k), and awarded attorneys' fees. The Ninth Circuit affirmed the district court. 2000 WL 576422 (9th Cir. May 11, 2000) (Copy of opinion enclosed as Attachment E). The court stated that attorneys' fees may be awarded in a Title VII case when the plaintiff's action is "frivolous, unreasonable, or without foundation." *Id.* at *1 (citation quotation marks omitted). As relevant to your request, the court stated, "[i]n this case, the record amply supports the district court's determination that this standard was satisfied, that is, 'that the Government had an insufficient factual basis for bringing the adverse impact claim' and 'that the Government continued to pursue the claim . . . long after it became apparent that the case lacked merit.'" *Id.* The Ninth Circuit affirmed the district court's award, in 1998, of $1,714,727.50 in attorneys' fees.

5. *United States v. Jones*. In 1993, the Voting Section of the Civil Rights Division sued county officials in Dallas County, Alabama, under Section 2 of Voting Rights Act and the Fourteenth and Fifteenth Amendments. The Division alleged that at least fifty-two white voters who did not reside in a black-majority district

were improperly permitted to vote in that district. The defendants prevailed and the district court ordered the government to pay attorneys' fees under the Equal Access to Justice Act ("EAJA"), 22 U.S.C. 2412(d)(1(A). The Eleventh Circuit affirmed. As relevant to your request, the court stated that a "properly conducted investigation would have quickly revealed that there was no basis for the claim that the Defendants were guilty of purposeful discrimination against black voters. . . . The filing of an action charging a person with depriving a fellow citizen of a fundamental constitutional right without conducting a proper investigation of its truth is unconscionable. . . . Hopefully, we will not again be faced with reviewing a case as carelessly instigated as this one." 125 F.3d 1418, 1431 (11th Cir. 1997) (Copy of opinion enclosed as Attachment F). In 1995, the district court ordered the Department to pay $73,038.74 in attorneys' fees and expenses. In 1998, the appellate court ordered the Department to pay an additional $13,587.50 in attorneys' fees.

6. *Motoyoshi v. United States*. In 1993, the Office of Redress Administration of the Civil Rights Division denied compensation to a Japanese-American man relocated during World War II. He filed suit challenging the denial. The district court granted the plaintiff's motion for summary judgment. As relevant to your request, the court stated that the Department's "failure to consider and determine plaintiff's eligibility for compensation . . . was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 33 Fed. Cl. 45, 52 (1995) (Copy of opinion enclosed as Attachment G). In 1995, the court ordered the Department to pay $8,437 in attorneys' fees under the EAJA.

7. *United States v. Tucson Estates Property Owners Association, Inc.* In 1993, the Housing and Civil Enforcement Section of the Civil Rights Division brought suit alleging that an owners' association in Tucson violated the Fair Housing Act. The defendants prevailed on summary judgment. *United States v. Tucson Estates Prop. Owners Ass'n, Inc.* No. 93-503, slip op. (D. Ariz. Nov. 7, 1995) (Copy of order is enclosed as Attachment H). As relevant to your request, the court stated, "it is not a reasonable *legal* basis that the United States lacked in this case; it was the *factual* basis upon which its legal theory rested that was unreasonable. Based on the totality of the circumstances present prior to and during litigation, this Court finds that the United States' position was not substantially justified." *Id.* at 5 (emphasis in original) (citation and quotation marks omitted). In 1995, the court ordered the Department to pay $150,333.07 in attorneys' fees and expenses under the EAJA.

8. *United States v. Laroche*. In 1993, the Housing and Civil Enforcement Section of the Civil Rights Division brought a Fair Housing Act suit in federal district court in Oregon. The defendants prevailed on summary judgment. The court awarded

defendants $17,885.78 in attorneys' fees and costs. The United States appealed. During the pendency of the appeal, the parties entered into a settlement and filed a joint stipulation of dismissal on April 24, 1995. The district court withdrew and rendered void its rulings on summary judgment and attorneys' fees and dismissed the case on December 28, 1995.

9. *Smith v. Beasley* and *Able v. Wilkins* (consolidated cases). In 1994, the Voting Section of the Civil Rights Division precleared South Carolina State House districts, and then precleared State Senate Districts in 1995. Voters challenged the constitutionality of South Carolina House and Senate districts created by the state legislature in two separate actions, which were consolidated. The Voting Section intervened as a defendant in the House action on May 3, 1996. On September 27, 1996, the court found that six of nine House districts and all three Senate districts were unconstitutional as they were drawn with race as the predominant factor. As relevant to your request, the court stated, "[t]he Department of Justice's advocacy position is evidenced in many memoranda, letters and notes of telephone conversations, but most particularly by the apparent epidemic of amnesia that has dimmed the memory of many DOJ attorneys who were involved with South Carolina's efforts to produce a reapportionment plan that would pass preclearance." 946 F. Supp. 1174, 1190-91 (D.S.C. 1996) (Copy of opinion enclosed as Attachment I); *see also id.* at 1208 ("[t]he Department of Justice in the present case, as it had done in *Miller*, misunderstood its role under the preclearance provisions of the Voting Rights Act. Here, Department of Justice attorneys became advocates for the coalition that was seeking to maximize the number of majority [black voting age population] districts in an effort to achieve proportionality. . . . It is obvious that the Voting Section of the Department of Justice misunderstands its role in the reapportionment process."). In 1996, the Department settled plaintiffs' claims for attorneys' fees and costs for $282,500.

10. *United States v. Weisz*. In 1994, the Housing and Civil Enforcement Section of the Civil Rights Division initiated a religious discrimination suit under the Fair Housing Act. The district court granted defendant's motion for judgment on the pleadings. 914 F. Supp. 1050, 1055 (S.D.N.Y. 1996). In 1997, the Department settled the issue of attorneys' fees and costs for $7,857.50.

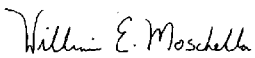
11. *Abrams v. Johnson*. In 1996, the United States appealed a later proceeding in *Johnson v. Miller* to the Supreme Court, alleging that the district court's plan did not defer to the legislative preferences of the Georgia Assembly because it had only one majority-black district when all previous Assembly plans had two, and that it diluted minority voting strength by not adequately representing the voting interests of Georgia's black population, in violation of the Voting Rights Act. The Court found for the plaintiffs-appellees. 521 U.S. 74 (1997) (Copy of opinion

enclosed as Attachment J). As relevant to your request, the court made a number of statements. *E.g., id.* at 90 ("Interference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan; the unconstitutional predominance of race in the provenance of the Second and Eleventh Districts of the 1992 precleared plan caused them to be improper departure points; and the proposals for either two or three majority-black districts in plans urged upon the trial court in the remedy phase were flawed by evidence of predominant racial motive in their design."); *id.* at 93.

In total, the Division was ordered to pay or agreed to pay $4,107,595.09 from 1993 to 2000 in the eleven cases specified above. In searching for instances where the "Division's legal work" has been "admonished in a court opinion," we have diligently searched through both published and unpublished judicial decisions available on electronic databases. In searching for instances "where the Division paid attorneys' fees or settlement fees over its involvement in a lawsuit," we also have diligently searched through financial records maintained by the Division for such expenditures of government funds. We note that these records are only complete for the past thirteen fiscal years. Consistent with your request, our summary does not include cases where the Department was only assessed costs pursuant to Fed. R. Civ. P. 54(d)(1), which provides for the prevailing party in an action to be awarded costs other than attorneys' fees by the losing side "as of course." Please be aware, however, that the amounts paid by the Division in seven of the eleven cases listed above may include such costs because those settlement agreements or court orders did not separate costs from attorneys' fees. In the event that we discover any additional information responsive to your February 28, 2006, letter, we will supplement this letter in a timely manner.

Thank you for the opportunity to address the work of the Civil Rights Division. Please do not hesitate to contact the Department of Justice if we can be of further assistance in this or any other matter.

Sincerely,



William E. Moschella
Assistant Attorney General

Attachments

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Incoming Request

JAMES SENSENBRENNER, JR., Wisconsin, CHAIRMAN
HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
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BOB GOODLATTE, Virginia
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ADAM SMITH, Washington
CHRIS VAN HOLLEN, Maryland

ONE HUNDRED NINTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY

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February 28, 2006

The Honorable Alberto Gonzales
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Gonzales:

As you are aware, the current Administration has come under scrutiny by the media and some private interest groups for recommendations made on recent Voting Rights Act (VRA) decisions.

To help the House Judiciary Committee better assess this situation, I am requesting that you address the concerns raised and, in particular, requesting clarification on the Civil Rights Division's current policies and past practices, as they relate to the VRA. Your response should address both the policies under which recommendations made on Voting Rights Act decisions are reviewed, and also the reasons those policies exist[1]. I appreciate your immediate and detailed responses to these inquiries.

The Civil Rights Division plays a critical role in ensuring that the rights afforded to American citizens are protected. Recommendations by the Civil Rights Division must be thoroughly researched, analyzed, and independently reviewed under the applicable statutes and Supreme Court precedents. This detailed decision-making is necessary in deciding when and when not to file a lawsuit. With each investigation and lawsuit undertaken, the Department of Justice must be mindful of the integrity demanded and potential consequences.

It is imperative that the members of the House Judiciary Committee gain full knowledge of these incidents, in order to properly conduct our responsibilities in oversight. I look forward to your prompt response to these inquiries.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

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[1] Regarding the latter, I am aware of federal court opinions that questioned the objectivity and investigation practices of the Civil Rights Division in the context of voting rights cases. See *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Abrams v. Johnson*, 521 U.S. 74 (1997); and *United States v. Jones*, 125 F.3d 1441 (11th Cir. 1997). I would like information on any other instances, past or present, where the Civil Rights Division's legal work was either admonished in a court opinion or where the Division paid attorneys fees or settlement fees over its involvement in a lawsuit.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 30, 2007

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Deputy Attorney General Wan Kim, before the Committee on March 22, 2007, at a hearing entitled "Oversight Hearing on the Civil Rights Division of the Department of Justice." We hope that information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Trent Franks
Ranking Minority Member

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary

The Honorable Lamar S. Smith
Ranking Minority Member
Committee on the Judiciary

CIVIL RIGHTS DIVISION OVERSIGHT HEARING
Questions from Chairman Conyers and Chairman Nadler
to Assistant Attorney General Wan Kim

Personnel

1. Please provide a complete list of the names of individuals who received an invitation to interview for the following positions in the employment and voting sections of the Civil Rights Division (CRT): special counsel, section chief, staff/trial attorney, analyst, and paralegal from 2001 - 2007.

Answer: The Division does not maintain lists of the names of individuals who received an invitation to interview.

2. Please provide a complete list of all individuals for whom an offer for employment was extended to work in the employment and voting sections of the Civil Rights Division from 2001-2007. Please also provide the job title, race/ethnicity, and gender for each individual listed.

Answer: The Division does not maintain lists of individuals to whom offers of employment were extended. Rather, the Division maintains lists only of individuals who join the Division. Attached is a list of individuals who have joined the Employment and Voting Sections from 2001 – 2007 along with their job title. As revealing the race and gender of these individuals would implicate their privacy interests, we are providing the following breakdown of these employees by race and gender. Fifty-three females and 40 males have joined the Employment Section from 2001 – 2007. Their races follow: 5 Asians, 40 African Americans, 7 Hispanics, 39 Whites, and 2 employees whose race is listed as Unknown. Sixty-five females and 53 males have joined the Voting Section from 2001 – 2007. Their races follow: 6 Asians, 35 African Americans, 12 Hispanics, 63 Whites, and 2 employees whose race is listed as Unknown.

3. Please provide a staff directory with job titles for the Civil Rights Division for the following years: 2002 - 2007.

Answer: The Division has not maintained a staff directory for the years 2002 - 2007.

4. Please provide a copy of all vacancy announcements publicly posted for employment in the Voting and Employment sections of Civil Rights Division from 2001 - 2007.

Answer: Attached please find copies of the vacancy announcements publicly posted for employment in the Voting and Employment Sections of the Division from 2001 – 2007.

5. Please describe in detail the process for recruiting and hiring Honors attorneys in the Civil Rights Division. Has the process been modified in the last three years? If so, how?

Answer: The Attorney General's Honors Program (HP) is one of the most prestigious and competitive hiring programs in the country. It is administered and promoted by the Office of Attorney Recruitment and Management (OARM). This is a career office with administrative oversight of all career attorneys within the Department. OARM manages the applications and conducts the initial screening process to make certain that all applicants are eligible for participation in the HP. Applicants are then referred to components (such as the Civil Rights Division) based on the applicant's stated preference. The applications are reviewed by each component. This review typically includes the input of both career and political appointees. In the Civil Rights Division, applicants are interviewed by both career employees and political appointees and hiring recommendations are made to the Assistant Attorney General.

In 2002, the Attorney General's Honors Program was revised to modernize the application process to be E-government-compliant and to open the program to the broadest possible pool of interested applicants. The changes converted recruitment materials from print to web-based formats; allowed applicants to submit their applications online and track their status as hiring decisions were made; and streamlined automation to achieve an earlier extension of offers and acceptances. Additionally, rather than sending teams of interviewers out to 14 separate locations around the country, the Department brought candidates to Washington so they could see the Department first-hand. A Departmental-level review was also added in 2002 to meet budget requirements and assure the high-quality standards suitable for an Honors program. An ad hoc review group was assembled by a staff member from either the Deputy or Associate Attorney General's office.

On April 26, 2007, the Justice Department issued new guidelines with respect to the hiring process for the Attorney General's Honors Program. (Please see the attached new guidelines.) The new guidelines remove any political appointees from the Attorney General's office, Deputy Attorney General's office, or Associate Attorney General's office from participation in this hiring process. Under the guidelines, the hiring process is now delegated to the individual DOJ components and to a working group that is comprised of career employees from OARM and representatives from the various DOJ components. Among other things, the purpose of these changes was to avoid even the perception of any political influence in the process, provide greater transparency to the programs, and facilitate the goals of assuring the selection of highly qualified candidates from the broadest applicant pool possible. It is important to note that career attorneys have always participated in the selection process for these programs and continue to do so.

6. Please describe in detail the process for recruiting and hiring lateral career attorneys in the Civil Rights Division. Has the process been modified in the last three years? If so, how?

Answer: Lateral attorney vacancies are posted on the Department's website. The Office of Attorney Recruitment and Management also sends email notification of recently advertised attorney vacancies to various legal organizations with access to a large number of constituents both nationally and within the immediate hiring area. These legal organizations include national and state organizations as well as legal career offices to help reach a broad base of well-qualified applicants. Applicants submit their resumes for consideration directly to the Civil Rights Division. When the application period for the vacancy announcement has closed, copies of all resumes received in response to the posting are given simultaneously to the career Section Chief and to the Office of the Assistant Attorney General. The Section Chief chooses candidates to interview, and the Office of the Assistant Attorney General may also choose candidates to be interviewed. Candidates are generally interviewed first by section personnel. Based on those interviews, the Section Chief forwards recommendations to the Office of the Assistant Attorney General, which then interviews the candidates. Hiring decisions are made with input of both the career Section Chief and other Division leadership.

7. Are all sectiou chiefs in the Civil Rights Division given an opportunity to review applicant materials for lateral attorney vacancies in their Sections and to help select attorneys whom the Division will interview? If not, please identify which section chiefs currently participate in the hiring process. Please explain *in* detail the role, if any, that section chiefs currently have in reviewing applications for lateral attorney positions. If that role has been changed at any point in this Administration (2000 - 2007), please explain how and why it has changed.

Answer: Consistent with my management style and my historical practices, Section Chiefs review the resumes of all applicants for vacancies in their respective sections, and recommend candidates for interviews. The Section Chiefs participate fully in the interview process. Hiring decisions are made with input of both the career Section Chief and other Division leadership.

8. Did Michael Elston hold a meeting on or about December 5, 2006 to discuss the hiring and interview process for the Attorney General's Honors Program and/or the Summer Law Intern Program? Did anyone from the Civil Rights Division attend this meeting? If so, who? Please describe in detail the issues that were discussed in the meeting. Please also provide any and all documents describing the substance of the meeting.

Answer: On December 5, 2006, the Office of the Deputy Attorney General held a meeting about the Attorney General's Honors Program and Summer Law Intern Program. Michael Elston, Chief of Staff to the Deputy Attorney General, hosted the meeting. All components that participated in the Honors and Summer Law Intern Programs were invited to send representatives to the meeting. The Civil Rights Division sent representatives from the Division's Administrative

Management Section and the Office of the Assistant Attorney General. The topic of the meeting was the candidate selection process.

9. There have been many reports highlighting the significant staff turnover within the Division over the last few years. Please provide the names of the Employment and Voting Section attorneys who have transferred voluntarily or involuntarily, resigned, retired, or left the Department altogether from 2002 -2007; indicate the years of litigation experience for each attorney.

Answer: Attached please find a list of the Employment and Voting Section attorneys who transferred, resigned, or retired from those Sections from 2002 – 2007. The Division does not track the years of litigation experience for each attorney.

10. Please provide the names of the paralegals or section 5 analysts who left the Voting Section of CRT from 2002 - 2007? Please also provide the years of experience for each analyst. How many Section 5 analysts and attorney reviewers are currently employed by the Voting Section?

Answer: As of May 9, 2007, there were 37 attorneys, 12 analysts, and 8 paralegal specialists in the Voting Section. All have duties related to Section 5 review and enforcement.

Attached please find a list of the paralegals and Section 5 analysts who left the Voting Section from 2002 – 2007. The Division does not track the years of experience for each analyst.

11. As you are aware, we are quickly approaching the 2010 Census, which means there will be an upsurge in Section 5 submissions. What specific steps are being taken to ensure that there will be sufficient experienced Section 5 staff to accommodate the increase in Section 5 submissions?

Answer: In FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history. While 7,080 submissions were received in 2006, only 4,121 submissions were received in 2001, 5,788 in 2002, and 4,750 in 2003. Accordingly, all current staff members, including attorneys, are receiving valuable experience reviewing Section 5 submissions. The Section also has instituted Section 5 and GIS training for all attorney and professional staff and will continue and expand such training as the Census approaches. The Section will incorporate additional training as warranted.

The Section also has initiated E-Submissions so that governments can submit voting changes on-line. Among other advantages, this will free significant staff time and resources for more effective review of voting changes. In addition, each trial attorney in the Section has been assigned to gain expertise in the laws, demographic patterns, and election-related issues in several states, so that they will be better

prepared to play the major role that attorneys traditionally have played in the review of redistricting plans.

Evaluations

12. Has anyone in the Office of the Assistant Attorney General for Civil Rights or the Voting Section managers (including but not limited to Brad Schlozman, Hans von Spakovsky John Tanner, or Yvette Rivera) ordered anyone to change staff performance evaluations from 2002 - 2007? If so, when were the requests made, why? Please identify the staff members whose performance evaluations were changed as a result of the requests? Please provide copies of all documents regarding performanec evaluation communications between the Office of the Assistant Attorney General of CRT and the Voting Section from 2003 - 2007.

Answer: The rating of career attorneys has historically involved the input and collaboration of *both* career management and political appointees. The form used to appraise the performance of career attorneys in the Civil Rights Division has contained some three to seven performance-related elements (depending on the work of the Section) on which an attorney is evaluated; a brief narrative typically accompanies the actual evaluation. Each rating involves a "rating official" (typically, a career section chief) and the "reviewing official" (typically, a political appointee). As has been true for years, both officials sign the final rating; hence, both are expected to attest to it. The involvement of political appointees in this process – whether in editing the narrative or in changing the actual evaluation – is neither unusual nor unwarranted. I have worked collaboratively and harmoniously with career management in carrying out this responsibility, and I am confident that my staff does so as well.

13. How long did Hans von Spakovsky work in the front office compared to the amount of time that he worked as a trial attorney for the Voting Section? Please describe Mr. Spakovsky's role in the Office of the Assistant Attorney General? Why was he assigned a position in the Office of the Assistant Attorney General?

Answer: Hans von Spakovsky worked as a Trial Attorney in the Voting Section for just over one year before serving in the Office of the Assistant Attorney General for just over three years. He assisted with voting issues and was assigned his position because of his experience in election-related matters.

Awards

14. How many individuals from the Employment and Voting Sections of the Civil Rights Division received "On the Spot," awards since 2001? What is the criteria for granting "On the Spot" awards?

Answer: Thirteen individuals in the Employment Section and thirty-six individuals in the Voting Section have received On-the-Spot Awards (OTS) since 2001.

OTS's are designed to provide quick feedback and special recognition to an employee or a small group of employees who make extra efforts to perform duties or special assignments in an exemplary manner. If possible, they should be granted within two weeks after the date of the act or service. An employee cannot be granted more than four OTS cash awards in a calendar year. The value of the award can range from $50 to $250, and must be in an increment of $50. When an employee's payroll records are updated to reflect the award, withholdings for tax deductions will be added to arrive at the appropriate gross amount for tax purposes.

Per the Department's policy, the types of accomplishments an employee must make to be eligible for this award are:

1. **making a high-quality contribution to a difficult or important project or assignment;**
2. **producing exceptionally high-quality work under a tight deadline;**
3. **performing added or emergency assignments in addition to regular duties;**
4. **demonstrating exceptional courtesy or responsiveness in dealing with the public, client agencies, or colleagues; or**
5. **exercising extraordinary initiative or creativity in addressing a critical need or difficult problem.**

15. Please provide the names of all the recipients of the "On the Spot" award from the Employment and Voting Sections of CRT from 2001 - 2007. If the awards are monetary, please provide the amount each recipient received, the number of years each recipient has worked for the Civil Rights Division, and a statement explaining why each recipient was nominated? Please also list the name of the nominator for each recipient.

Answer: Consistent with the Privacy Act and OPM regulations, the Civil Rights Division has gathered the names of the recipients of the "On the Spot" awards from the Employment and Voting Sections from 2001 - 2007, the amount each recipient received, and the recipient's date of entry into the Division and award date. As revealing this information in a public document would implicate the privacy rights of many dedicated public servants, I request that you meet with me to review this information in a private setting.

Civil Rights Docket

16. What were the issue priorities for the Civil Rights Division from 2002 -2007 and how were these priorities selected?

Answer: The Civil Rights Division has enforcement responsibility for myriad antidiscrimination statutes. The Division takes seriously its responsibility to protect the rights secured by each of these laws. During this Administration, the Division has been vigilant and aggressive in its enforcement, outreach, and training efforts across the full breadth of its jurisdiction, including prosecuting criminal civil rights violations, protecting equal access to the ballot box, combating discrimination in employment, housing, and educational settings, ensuring the rights of limited English proficient persons, and protecting the rights of institutionalized persons and persons with disabilities.

To enhance the Division's law enforcement efforts in three of its busiest areas, the Attorney General has endorsed major iuitiatives to combat housing discrimination, human trafficking, and post-9/11 backlash. In addition, the Attorney General has announced initiatives to investigate and prosecute unsolved civil rights era murder cases and to protect religious liberty.

The Attorney General announced his housing discrimination initiative, "Operation Home Sweet Home," on February 15, 2006. Operation Home Sweet Home seeks to ensure equal access to housing by expanding and targeting the Division's fair housing testing program. In FY 2007, the Division's Housing and Civil Enforcement Section is on track to conduct a record high number of fair housing tests in order to expose housing providers who are illegally discriminating against persons seeking to rent or purchase homes. The program is conducted primarily through paired tests, an event in which two individuals – one acting as the "control group" (e.g., white male) and the other as the "test group" (e.g., black male) – pose as prospective buyers or renters of real estate for the purpose of determining whether a housing provider is complying with the fair housing laws. Under the initiative, the Department focuses significantly on outreach by creating a new fair housing website, establishing a telephone tip line and e-mail complaint process, and sending outreach letters to more than 400 public and private fair housing organizations encouraging them to report suspected housing discrimination.

At the outset of this Administration, President Bush identified the eradication of human trafficking as a priority. The President focused Federal resources on combating these crimes by creating a cabinet-level Interagency Task Force to Monitor and Combat Trafficking in Persons and by issuing a directive which instructed Federal agencies to strengthen their efforts to combat this crime. Trafficking in persons is a form of modern-day slavery. The victims of human trafficking are often lured to this country with the promise that they will enjoy the great gifts of liberty and prosperity. Instead, they find themselves trapped, victims of forced prostitution, or of domestic labor or migrant farm work under illegal and exploitative circumstances. They are predominantly women and children; many are undocumented immigrants, who lack familiarity with our language and culture. They fear law enforcement because of their illegal status. Their captors often

confiscate their passports, limit their access to the outside world, and physically or psychologically coerce them into providing labor or services.

Since 2001, the Civil Rights Division and U.S. Attorneys' offices throughout the nation have prosecuted 360 human trafficking defendants, secured almost 240 convictions and guilty pleas, and opened nearly 650 new investigations. That represents a six-fold increase in the number of human trafficking cases filed in court, quadruple the number of defendants charged, and triple the number of defendants convicted in comparison to 1995-2000. In FY 2006, the Department obtained a record number of convictions in human trafficking prosecutions.

We will seek to build on this success by continuing vigorous investigations and prosecutions. Furthermore, we will continue to coordinate and share intelligence among the 42 victim-centered law enforcement task forces established across the nation. These task forces are collaborations among U.S. Attorneys, law enforcement, and victim service agencies. Their activities focus on increasing the identification and rescue of trafficking victims through proactive law enforcement, provision of services to victims, and investigation and prosecution of human trafficking cases.

On January 31, 2007, the Attorney General and I announced the creation of the new Human Trafficking Prosecution Unit within the Criminal Section. This new Unit is staffed by the Section's most seasoned human trafficking prosecutors, who will work with our partners in Federal and State law enforcement to investigate and prosecute the most significant human trafficking crimes, such as multi-jurisdictional sex trafficking cases.

After the national tragedy of September 11, 2001, the Assistant Attorney General for the Civil Rights Division directed the Division's National Origin Working Group to work proactively to combat violations of civil rights laws against Arab, Muslim, Sikh, and South-Asian Americans, and those perceived to be members of these groups, through the creation of the Initiative to Combat Post-9/11 Discriminatory Backlash.

Since the terrorist attacks of September 11, members of these groups, and those perceived to be members of these groups, have been the victims of increased numbers of bias related assaults, threats, vandalism and arson. Reducing the incidence of such attacks, and ensuring that the perpetrators are brought to justice, is a Civil Rights Division priority. The Division also has made a priority of cases involving discrimination against Arab, Sikh, Muslim, and South-Asian Americans in employment, housing, education, access to public accommodations and facilities, and other areas within the Civil Rights Division's jurisdiction.

The Initiative is combating bias crimes and discrimination by:

- **Ensuring that there are efficient and accessible processes in place for individuals to report violations to the Civil Rights Division and making sure that these cases are handled expeditiously.**

- **Implementing proactive measures to identify cases involving bias crimes and discrimination being prosecuted at the State level that may merit Federal action.**

- **Conducting outreach to affected communities to provide them with information about how to file complaints and the resources available through the Department of Justice and other Federal agencies to protect their civil rights.**

- **Working with other Department of Justice components and other government agencies to ensure accurate referral, effective outreach, and comprehensive provision of services to victims of civil rights violations.**

There has been renewed interest in the investigation and prosecution of unsolved civil rights era murder cases. The Criminal Section continues to play a central role in this effort. In January 2007, the Attorney General announced the indictment of James Seale on two counts of kidnapping and one count of conspiracy for his role in the 1964 abduction and murder of Charles Moore and Henry Dee in Franklin County, Mississippi. A federal jury returned guilty verdicts against Seale on all three counts on June 14, 2007. And, in February 2007, the Attorney General and the FBI announced an initiative to identify other unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal law.

On February 20, 2007, the Attorney General announced a new initiative, entitled *The First Freedom Project*, and released a *Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001 to 2006. The First Freedom Project* includes creation of a Department-wide Religious Liberty Task force, a series of regional seminars on federal laws protecting religious liberty to educate community, religious, and civil rights leaders on these rights and how to file complaints with the Department of Justice, and a public education campaign that includes a new website, www.FirstFreedom.gov, speeches and other public appearances, and distribution of literature about the Department's jurisdiction in this area.

In addition to these initiatives, the Division has built on and plans to build on several other recently announced and ongoing innovations pertaining to the rights of persons with disabilities and military servicemembers.

The Division has continued its important work under Project Civic Access, a wide-ranging initiative to ensure that towns and cities across America comply with the

ADA. The goal of Project Civic Access is to ensure that people with disabilities have an equal opportunity to participate in civic life. As of June 18, 2007, we have reached 153 agreements with 143 communities to make public programs and facilities accessible. Each of these communities has agreed to take specific steps, depending on local circumstances, to make core government functions more accessible to people with disabilities. The agreements have improved access to many aspects of civic life, including courthouses, libraries, parks, sidewalks, and other facilities, and address a wide range of accessibility issues, such as employment, voting, law enforcement activities, domestic violence shelters, and emergency preparedness and response. During the past 6 years, our agreements under Project Civic Access have improved the lives of more than 3 million Americans with disabilities.

In October 2006, the Attorney General directed the Civil Rights Division to use the knowledge and experience the Division has gained in its work with state and local governments under Project Civic Access to begin a technical assistance initiative. As a result, the Division is publishing the "ADA Best Practices Tool Kit for State and Local Governments," a document to help state and local governments improve their compliance with ADA requirements. This Tool Kit is being released in several installments. In the Tool Kit, the Division will provide common sense explanations of how the requirements of Title II of the ADA apply to state and local government programs, services, activities, and facilities. The Tool Kit will include checklists that state and local officials can use to conduct assessments of their own agencies to determine if their programs, services, activities, and facilities are in compliance with key ADA requirements.

The first installment, released on December 5, 2006, covered "ADA Basics: Statute and Regulations" and "ADA Coordinator, Notice and Grievance Procedure: Administrative Requirements Under Title II of the ADA." The second installment, issued February 27, 2007, covered "General Effective Communication Requirements Under Title II of the ADA" and "9-1-1 and Emergency Communications Services." The third installment, released May 7, 2007, covered "Website Accessibility Under Title II of the ADA" and "Curb Ramps and Pedestrian Crossings." These installments, and all subsequent installments, will be available on the Department's ADA Website (www.ada.gov). While state and local officials are not required to use these technical assistance materials, they are strongly encouraged to do so, since the Tool Kit checklists will help them to identify the types of noncompliance with ADA requirements that the Civil Rights Division has commonly identified during Project Civic Access compliance reviews as well as the specific steps that state and local officials can take to resolve these common compliance problems.

On August 14, 2006, the Attorney General unveiled www.servicemembers.gov, a website aimed at ensuring that our nation's troops understand the rights that the Civil Rights Division enforces on their behalf and how to file a complaint in the

event that those rights are violated. The website provides information on three statutes: the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Servicemembers Civil Relief Act (SCRA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). One example of the Division's work to protect the rights of service-members is *Woodall, McMahon & Madison v. American Airlines*, the first class-action USERRA complaint filed by the United States. The Division will continue its enforcement of those important statutes, and outreach to educate servicemembers of their rights.

In addition to these newly announced and ongoing priorities, the Division's ten litigating sections have pursued the following priorities from 2002 – 2007:

- **In addition to representing the Department on direct appeal in civil rights cases across the Division, the Appellate Section has focused on identifying appropriate cases for participation as amicus curiae. In particular, the Section has monitored Eleventh Amendment cases and has prepared briefs defending the constitutionality of civil rights statutes in the Federal district courts, the Federal courts of appeals, and the United States Supreme Court. This work is vital to the defense of the statutes enforced by the Division, especially Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act.**
- **The Coordination and Review Section has focused its outreach to train recipients of Federal funds on the requirements of Title VI and to educate Federal agencies on their responsibilities under Executive Order 13166. The Section conducts outreach and training to beneficiary groups and organizations that represent them. In addition, the Section uses www.lep.gov as a vehicle for outreach and technical assistance. The Section has played a central role in assisting persons with limited English proficiency (LEP). For example, in March 2007, the Section hosted the Interagency LEP Conference, which was designed to assist Federal agencies, fund recipients, and the community in the quest for reasonable language access. Additionally, the Section has organized and coordinated meetings of the Federal Interagency Working Group on LEP, which functions under Section leadership. Active members of this group represent more than 35 Federal agencies.**

- **The Criminal Section has made a priority of the prosecution of hate crimes, which are acts or threats of violence motivated by a victim's race, color, religion, or national origin that interfere with certain Federally protected rights. In fact, Criminal Section Deputy Chief Barbara Bernstein was selected to receive the coveted Helene and Joseph Sherwood Prize for Combating Hate by the Anti-Defamation League. As one of the select few in law enforcement to receive the prestigious award, the ADL said that Deputy Chief Bernstein "exemplifies an ongoing commitment, support, and contribution in helping to eliminate hate and prejudice." The ADL also**

praised the Department for its successful prosecution of *U.S. v. Walker* in which three members of the National Alliance, a white supremacist organization, were charged and convicted with assaulting a Mexican-American bartender in the Salt Lake City bar where he was working and of assaulting an individual of Native-American heritage outside a different bar in Salt Lake City.

In an effort to enhance the Division's ability to identify hate crime incidents, the Section has held regular meetings with officials from the ADL and other members of the Hate Crimes Coalition.

Nearly fifty percent of the criminal civil rights prosecutions brought in the last fiscal year involved official misconduct. The Division has also worked closely with the Federal Bureau of Investigation (FBI), the United States Attorneys' Offices, and State and local law enforcement to identify and prosecute historical civil rights era crimes.

- **In addition to actively investigating and seeking to resolve meritorious complaints of discrimination against persons with disabilities, the Disability Rights Section has continued its efforts under Project Civic Access and has focused on outreach to representatives of the business and disability communities in order to increase voluntary compliance with the Americans with Disabilities Act. During 2006 and 2007, the Section continued to develop revised ADA regulations that will adopt updated design standards consistent with the revised ADA Accessibility Guidelines published by the Access Board in July 2004. The revised guidelines are the result of a multi-year effort to promote consistency among the many Federal and State accessibility requirements. We are now drafting a proposed rule and developing the required regulatory impact analysis.**

- **The Educational Opportunities Section (EDO) has aggressively investigated and taken appropriate action with respect to reports of discrimination, including harassment, on the basis of race, sex, religion, and national origin in our nation's public schools. The Section has also reviewed existing desegregation orders to ensure compliance and seek relief where appropriate. Additionally, the Section has expanded its English Language Learner project by initiating investigations and developed other practice areas such as disability rights.**

- **The Employment Litigation Section has investigated and prosecuted employers engaging in patterns or practices of discrimination in violation of Section 707 of Title VII of the Civil Rights Act of 1964, and individual acts of discrimination in violation of Section 706 of Title VII. The Section has actively monitored and ensured full compliance with existing consent decrees.**

- **The Housing and Civil Enforcement Section has worked to ensure nondiscriminatory access to housing, public accommodations, and credit. The Section has maintained its commitment to vigorous enforcement of the Fair Housing Act, the mainstay of our efforts to eliminate housing discrimination in America. Enforcing the prohibitions against credit discrimination in the Fair Housing Act and Equal Credit Opportunity Act is another priority for the Section. The Housing and Civil Enforcement Section has built on its efforts to enforce the Religious Land Use and Institutionalized Persons Act, opening investigations and initiating litigation when warranted.**

- **The Office of Special Counsel has expanded its outreach efforts concerning the Social Security Administration "no-match" letters to ensure that employers understand how to handle them in a non-discriminatory manner. The Section has worked with the Department of Homeland Security to ensure that employers are properly educated about their anti-discrimination obligations before and during participation in DHS's voluntary electronic employment verification system (or Basic Pilot Program). Participating employers use this program to determine whether new hires are authorized to work in the United States. OSC also is working with DHS to develop procedures to identify employers who may have engaged in discrimination while using the Basic Pilot Program.**

- **The Special Litigation Section has built on its impressive record of actively protecting the rights of institutionalized persons under the Civil Rights of Institutionalized Persons Act (CRIPA) by identifying, investigating, and seeking remedial reform of patterns or practices of unconstitutional conditions in institutions. The Section has monitored consent decrees, settlement agreements, and court orders involving nearly 100 facilities to ensure compliance with negotiated reform.**

  Under the police misconduct statutes, the Section has investigated, and, where appropriate, sought systemic reform regarding patterns or practices of constitutional and Federal violations involving law enforcement agencies. The Special Litigation Section has prioritized our enforcement of police misconduct consent decrees and other settlement agreements to ensure compliance with negotiated reform by local law enforcement agencies.

- **The Voting Section has vigorously enforced each of the statutes within its responsibility, including the Voting Rights Act (VRA), the Help America Vote Act (HAVA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and the National Voter Registration Act (NVRA). The 18 new lawsuits we filed in CY 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding 30 years.**

The Division places importance on enforcement of each provision of the Voting Rights Act. Enforcement of Section 2 has been a priority; the Section recently won a judgment against an at-large election system and is currently litigating three other cases under Section 2. It is also investigating potential election-related discrimination in other jurisdictions. The Division continues to vigorously defend challenges to the constitutionality of Section 5 of the Voting Rights Act as the top priority. The Section is also expanding its pool of local citizens whom it contacts in reviewing Section 5 submissions to include current leadership of African American, Hispanic, Asian, and Arab American groups and communities. Additionally, our investigations and enforcement of Section 203 and Section 208 continue to be a priority.

As for HAVA, as of January 1, 2006, virtually all of HAVA's requirements became fully enforceable. In advance of this deadline, the Division worked hard to help states achieve timely voluntary compliance. Where that did not appear possible, the Division brought enforcement actions, filing five lawsuits under HAVA in 2006.

The Uniformed and Overseas Citizens Absentee Voting Act remains a priority of the Section. In CY 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. The Section has proactively identified and challenged structural impediments to compliance in various States' laws, such as unrealistic primary and special election schedules. The Section has continued to make expansion of its enforcement of the National Voter Registration Act a priority.

Finally, election monitoring has proved to be an important element of our overall enforcement program and will remain a priority. During CY 2006, the Division deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. On November 7, 2006, more than 800 federal personnel monitored the polls in 69 political subdivisions in 22 states. In CY 2006, we sent over 1,500 federal personnel to monitor elections, double the number sent in CY 2000, a presidential election year.

17. Please provide a complete list of cases filed by the Employment, Housing, Special Litigation, and Voting Sections from 2000 - 2007. Also, identify the race, ethnicity, religion, and gender of the individuals on whose behalf the Department filed the case. Please also provide a description of the legal and policy issues raised in the cases filed.

Answer: Attached is a list of all requested cases. We have included the requested information about the individuals on whose behalf each case was filed where that information is included in our systematic records. However, we have systematic

information about the race, ethnicity, religion, or gender of those individuals only in cases where that characteristic was the basis for the lawsuit. In other cases, such as those alleging disability discrimination, our systems do not record any of that information about the aggrieved persons.

The list includes the information available from our systematic records relevant to "the legal and policy issues raised" in each case. That information is the statute(s) under which the case was filed, the type of claims, and the subject matter of the case.

18. Please provide a complete list of any "disparate impact" cases filed by the Employment Section from 2000 - 2007?

Answer: The Employment Litigation Section filed the following "disparate impact" cases from 2000 – 2007: *United States v. Tennessee Department of Corrections*, *United States v. Delaware State Police*, *United States v. Erie, Pennsylvania*, *United States v. City of Virginia Beach*, *United States v. City of Chesapeake*, and *United States v. City of New York* (Fire Department of the City of New York).

19. Please provide a complete list of cases filed by CRT that allege racial discrimination in employment on behalf of African and Latino Americans from 2000 - 2007.

Answer: The Employment Litigation Section filed the following cases from 2000 – 2007 that allege discrimination on the basis of race or national origin in employment on behalf of African and Latino Americans: *United States v. Harris County*, *United States v. State of Delaware*, *United States v. Matagorda County*, *United States v. City of Sulphur*, *United States v. City of New York*, *United States v. New York City Dept. of Parks and Recreation*, *United States v. City of Fort Lauderdale*, *United States v. University of Guam*, *Lemons and United States v. Pattonville*, *United States v. Weimar Independent School District*, *United States v. City of Virginia Beach*, *United States v. City of Chesapeake*, *United States v. Tallahassee Community College*, and *United States v. City of New York*.

The Division also has filed cases alleging sex discrimination in employment and USERRA cases on behalf of African-American and Latino victims.

20. How many Equal Opportunity Commission (EEOC) referrals did DOJ receive during 2000 - 2007? Please list referrals by year. Also provide a complete list of lawsuits filed based on the EEOC referrals for the years listed above.

Answer: Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most

allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission (EEOC). The Civil Rights Division's Employment Litigation Section is responsible for enforcing Title VII against public employers.

The Employment Litigation Section received 753 charges from the EEOC in CY 2000, 606 charges in CY 2001, 597 charges in CY 2002, 504 charges in CY 2003, 393 charges in CY 2004, 393 charges in CY 2005, 290 charges in CY 2006, and 140 charges in CY 2007 as of May 21. The EEOC itself does not file suit on every charge in which it has found reasonable cause to believe that a private employer has violated Title VII. It also is important to note that a strong employment discrimination case can, at times, take years to develop.

Please see the response to question 17, above, which contains all of the Section 706 cases filed by the Section from 2000 – 2007.

In addition, the Section received 272 charges from the EEOC in CY 1997 and filed 3 complaints based on these referrals, received 350 complaints in CY 1998 and filed 6 complaints based on these referrals, and received 350 complaints in CY 1999 and filed 10 complaints based on these referrals. Thus, over the past decade, from CY 1997 – CY 2006, less than 3% of the charges referred to the Section each year have resulted in the filing of a complaint.

21. Please provide a complete list of "pattern and practice" cases filed under § 707 of Title VII of the Civil Rights Act of 1964 from 2000 - 2007.

Answer: The Employment Litigation Section filed the following Section 707 pattern or practice cases from 2000 – 2007: *United States v. Tennessee Department of Corrections*, *United States v. State of Delaware*, *United States v. New York City Department of Parks and Recreation*, *United States v. Erie, Pennsylvania*, *United States v. Los Angeles Metropolitan Transit Authority*, *United States v. City of Gallup, New Mexico*, *United States v. New York Metropolitan Transit Authority and New York City Transit Authority*, *United States v. Pontiac, Michigan*, *United States v. Ohio Environmental Protection Agency*, *United States v. Southern Illinois University*, *United States v. City of Virginia Beach*, *United States v. City of Chesapeake*, *United States v. New York City and New York City Department of Transportation*, *United States v. New York City Department of Correctional Services*, *United States v. City of New York* (Fire Department of the City of New York).

22. How many "disparate impact" cases has the Housing Section filed from 2000 - 2007. Please also identify the race/ethnicity of the individual on whose behalf the case was filed.

Answer: The Housing Section considers and relies upon evidence of "disparate impact" in applicable cases. The Section has not, however, filed a case based solely on a "disparate impact" theory of liability during the period from 2000 to 2007 nor are we aware that the Section has ever filed a case based solely upon a "disparate impact" theory.

23. The Civil Rights Division filed briefs in the Lown v. Salvation Army, 393 F. Supp. 2d (S.D.N.Y. 2005) and Westfield High School L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98 (D. Mass. 2003). What statutory enforcement authority did the Civil Rights Division rely on as a basis for intervening in these cases?

Answer: The United States did not intervene in either of these two cases. The United States in both cases filed motions for leave to file amicus briefs and in both cases was granted leave based on its interest in the subject matter of each case.

In the *Lown v. Salvation Army* case, the United States set forth its interest as follows in its brief:

> **The United States has a strong interest in the federal constitutional principles governing this case. This case presents important questions of how the Establishment, Free Exercise, and Equal Protection Clauses of the Constitution should be applied to the Government Defendants' contracts with the Salvation Army. The United States, pursuant to numerous statutes and regulations, provides for grants and contracts with religious and other private organizations. *See, e.g.*, 42 U.S.C. § 604(a) (job training and other services); 42 U.S.C. § 290kk-1 (substance abuse services); 42 U.S.C. § 9920(a) (services authorized under the Community Development Block Grant Act); 16 U.S.C. § 470a(e)(3) (grants for preservation of historic properties). Indeed, the principal cases relied on by the parties in their memoranda filed with this Court all involved the constitutionality of funding under federal statutes. *See Agostini v. Felton*, 521 U.S. 203 (1997) (20 U.S.C. § 6301, *et seq.*); *Mitchell v. Helms*, 530 U.S. 793 (2000) (20 U.S.C. §§ 7301-73); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (42 U.S.C. § 300z, *et seq.*); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 832-33 (1982) (funding pursuant to state and federal statutes). The United States is currently engaged in litigation addressing the constitutionality of statutes and regulations providing grants and contracts with religious and other private organizations. *See Winkler v. Chicago Sch. Reform Bd. of Trs.*, No. 99-cv-02424 (N.D. Ill.) (Establishment Clause challenge to statutory programs through which the Department of Defense and the Department of Housing and Urban Development provide assistance to the Boy Scouts of America; *see* 10 U.S.C. §§ 1785, 2012, 2554, and 2606; 32 U.S.C. § 508; 42 U.S.C. §§ 5303, *et seq.*, 11901, *et seq.*); *American Jewish Congress v. Corporation for National and Community Service*, No. 02-cv-01948 (D.D.C.) (Establishment Clause challenge to**

inclusion of religious schoolteachers in AmeriCorps Education Awards Program); *Laskowski v. Paige*, 03-cv-1810 (S.D. Ind.) (Establishment Clause challenge to Congressional earmark grant for teacher quality initiative at University of Notre Dame, Pub. Law 106-113 § 309 (Nov. 29, 1999)).

Regarding the *Westfield* case, the United States set forth its reasons for filing as follows in its brief:

> **The United States is charged with enforcement of Title IV of the Civil Rights Act of 1964, which authorizes the Attorney General to seek relief if a school deprives students of the equal protection of the laws. *See* 42 U.S.C. § 2000c-6. The United States also is authorized under Title IX of the Civil Rights Act of 1964 to intervene in cases alleging violations of the Equal Protection Clause that are of general public importance. *See* 42 U.S.C. § 2000h-2. Because the complaint in this case alleges an Equal Protection Clause violation, and First Amendment violations that parallel the Equal Protection claim, the United States has a stroug interest in the outcome of this case.**

24. Were justification memoranda prepared for *Lown v. Salvation Army*, 393 F. Supp. 2d (S.D.N.Y. 2005) and *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003)? If so, please provide a copy of the memoranda.

Answer: The Division has substantial confidentiality interests in documents that reflect internal deliberations in particular matters. Encouraging line attorneys to set forth fully the factual and legal considerations that bear on particular matters is vital to the work of the Division. Disclosure of these documents would chill the internal debate that we welcome in all of our cases.

25. For every justification memorandum submitted to the Assistant Attorney General for the Civil Rights Division for review and approval (2000 - 2007) from the Employment, Housing, and Voting Sections, please provide the following information: (a) description of the issue discussed in the memo (b) date when the memo was submitted; (c) date the AAG made a decision on the matter and (d) the outcome.

Answer: The Division has substantial confidentiality interests in documents that reflect internal deliberations in particular matters. Encouraging line attorneys to set forth fully the factual and legal considerations that bear on particular matters is vital to the work of the Division. Disclosure of these documents would chill the internal debate that we welcome in all of our cases.

With regard to subquestions b and c, the Division does not systematically track the date on which justification memos are submitted to the AAG or the date on which the AAG made a decision on the matter.

Immigration Appeals

26. The Citizens' Commission on Civil Rights (CCCR) report, 'The Erosion of Rights" indicates that as much as 40% of attorney time in the Appellate Section was diverted to defending deportations in 2005. Why are Civil Rights Division resources being used for Office of Immigration Litigation (OIL) appeals?

Answer: Attorneys in all of the Department's litigating Divisions and every United States Attorney's Office are assisting in handling the extraordinary caseload of immigration briefs. While the Civil Rights Division's Appellate Section shares in these responsibilities as well, the Appellate Section is still doing tremendous work. Overall during FY 2006, the Appellate Section filed more briefs than in any fiscal year for which the Appellate Section has maintained such statistics. During FY 2006, the Division's Appellate Section filed 145 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. Excluding OIL decisions, the Appellate Section had an overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. In FY 2006, the Appellate Section filed 17 amicus briefs, an increase over the previous two fiscal years. As of May 31, 2007, the Appellate Section had filed a total of 98 amicus briefs under this Administration.

27. How many OIL appeals have been assigned to the Civil Rights Division from 2001 - 2007?

Answer: The assignment of immigration cases to the Department's litigating Divisions began in November 2004. From that date through May 31, 2007, the Civil Rights Division has received approximately 418 cases, which is approximately 5.3% of the total number of briefs distributed nationwide. By way of simple comparison, the Environment and Natural Resources Division has received approximately 469 briefs, the Antitrust Division has received approximately 432 briefs, the Criminal Division has received approximately 465 briefs, and the Tax Division has received approximately 360 briefs. The United States Attorneys, other than the Southern District of New York, collectively have received approximately 5,532 briefs. Overall, more than 7,951 cases have been distributed to the litigating divisions and USAOs since the program began.

28. List the Divisions within the Department of Justice required to do OIL appeals. Please also provide the number of cases each Division was assigned from 2001 - 2007.

Answer: Please see the above response to question 27.

29. List the Sections within the Civil Rights Division required to do OIL appeals from 2002 - 2007. Also provide the number of appeals given to each Section.

Answer: From November 2004, the date the assignment of immigration cases to the Department's litigating Divisions began, through May 31, 2007, the Civil Rights Division has received approximately 418 cases. Of those cases, the Appellate Section has been assigned approximately 218 cases, the Office of the Assistant Attorney General has been assigned approximately 17 cases, the Coordination and Review Section has been assigned approximately 2 cases, the Criminal Section has been assigned approximately 28 cases, the Disability Rights Section has been assigned approximately 31 cases, the Educational Opportunities Section has been assigned approximately 16 cases, the Employment Litigation Section has been assigned approximately 30 cases, the Housing and Civil Enforcement Section has been assigned approximately 29 cases, the Special Litigation Section has been assigned approximately 30 cases, and the Voting Section has been assigned approximately 17 cases.

30. How many OIL appeals have been filed by the Civil Rights Division from 2002 - 2007?

Answer: The assignment of immigration cases to the Department's litigating Divisions began in November 2004. From that date through May 31, 2007, the Civil Rights Division has received approximately 418 cases, which is approximately 5.3% of the total number of briefs distributed nationwide. By way of simple comparison, the Environment and Natural Resources Division has received approximately 469 briefs, the Antitrust Division has received approximately 432 briefs, the Criminal Division has received approximately 465 briefs, and the Tax Division has received approximately 360 briefs. The United States Attorneys, other than the Southern District of New York, collectively have received approximately 5,532 briefs. Overall, more than 7,951 cases have been distributed to the litigating divisions and USAOs since the program began. Of the OIL cases it has been assigned, the Civil Rights Division has filed approximately 402 briefs and substantive papers through May 31, 2007.

31. What are the guidelines for assigning OIL briefs within the Employment and Voting Sections? Please list the attorneys who were assigned OIL appeals in the Employment and Voting Sections? Please also provide the number of appeals each individual was assigned from 2002 - 2007.

Answer: The Civil Rights Division sends all OIL cases assigned to it to a Deputy Chief in the Appellate Section. Under guidelines established by the Section Chief, that Deputy Chief then determines which cases will be assigned to available attorneys within the Appellate Section and which will be delegated to the trial sections. Cases are assigned to trial sections on a rotating basis, ensuring that the number of cases assigned is proportional to the size of the attorney staff.

The Voting Section assigns OIL cases on an ad hoc basis, considering availability and other assignments. The Employment Litigation Section creates a rotation of five attorneys to take OIL cases as they are assigned. A lawyer is removed from the rotation once he or she has done three OIL cases, and another lawyer is then placed into the rotation. No one lawyer will do more than three OIL cases until all the lawyers in the Section have done three OIL cases. Nearly all the sections solicit or allow volunteers for OIL cases, other assignments permitting.

A career Section manager's decision to assign an attorney to a particular matter or case involves many factors, including an attorney's experience, caseload, interests, and potential conflicts. In response to your specific question, through May 31, 2007, approximately 17 immigration briefs had been assigned to approximately 10 different attorneys in the Voting Section, and approximately 30 immigration briefs had been assigned to approximately 14 different attorneys in the Employment Litigation Section.

Investigations

32. How many vote dilution investigations have been initiated under Section 2 of the Voting Rights Act on behalf of: (a) African-Americans, (b) Latino Americans, (c) Native Americans (d) Asian Americans from 2000 - 2007. Please provide the location of the investigation and the date the investigation commenced and concluded. Also provide the reasons the investigations were closed.

Answer: The Department receives complaints on voting matters from a variety of sources and follows up on these complaints when appropriate. We are committed to the vigorous and even-handed enforcement of the Voting Rights Act and regularly investigate possible violations of Section 2 on behalf of all Americans. Investigations are closed when it is determined that the evidence then available does not establish a statutory violation.

For example, the Division successfully litigated, through appeal to the U.S. Supreme Court, allegations that the at-large system for election of council members in Charleston County, South Carolina, diluted the voting strength of African-American citizens. In addition, in July 2006, the Division filed a complaint against the City of Euclid, Ohio, alleging that the mixed at-large/ward system of electing the city council diluted the voting strength of African-American citizens in violation of Section 2 of the Voting Rights Act. In its investigation, the Division found that while African Americans composed nearly 30% of Euclid's electorate, and although there had been eight recent African-American candidacies for the city council, not a single African-American candidate had ever been elected to that body. Further, the Division found that in seven recent city council elections, white voters voted sufficiently as a bloc to defeat the African-American voters' candidates of choice.

On December 15, 2006, the Department filed a complaint against the Village of Port Chester, New York, alleging that Port Chester's at-large system of electing its governing board of trustees dilutes the voting strength of the Village's Hispanic citizens, in violation of Section 2 of the Voting Rights Act of 1965. On March 2, 2007, the Court granted the United States' motion for a preliminary injunction, enjoining the election of two trustees scheduled for March 20, 2007.

On July 18, 2005, the Department filed a complaint in *United States v. Osceola County*, challenging the at-large system for electing the county's Board of Commissioners under Section 2 of the Voting Rights Act. Although Hispanics comprise more than one-third of the county's electorate, the county never elected a Hispanic candidate to the Board under the at-large system or to any county-wide office. The complaint alleges that the existing electoral system operated to dilute Hispanic voting strength and that Osceola County had adopted and maintained the at-large method of election with a discriminatory purpose. On June 26, 2006, the court issued a ruling from the bench granting the Department's motion for a preliminary injunction, enjoining the scheduled 2006 county commission elections. On October 18, 2006, after a trial on the merits, the court issued a memorandum opinion ruling that the at-large method of election violated Section 2. On December 8, 2006, the court entered its remedial order rejecting the county's proposal of a mixed system of five single-member districts and two at-large seats, and adopting the five single-member district map submitted by the United States and agreed to by the parties. The court ordered a special election in 2007 in two districts, including the majority Hispanic district, under the court-approved plan.

Voting Rights Issues

33. Please describe in detail the review process for section 5 submissions.

Answer: Each Section 5 submission is processed on receipt and assigned to one or more analysts, paralegals, or attorneys. These staff members conduct a review of the file and gather information from knowledgeable persons to determine the limited question of whether the change was adopted with a discriminatory purpose or whether it would have a retrogressive effect on minority voters. Members of each affected minority community in the jurisdiction, as well as relevant officials, are contacted.

The large majority of submissions involve routine changes that do not raise issues of discrimination cognizable under Section 5. Such submissions are processed routinely by analysts, paralegals, and reviewing attorneys. Where a change does raise substantive issues, the responsible staff members prepare a memorandum setting forth in neutral fashion the facts and legal issues. This process often involves considerable discussion. The authority to interpose an objection to a change rests with the Assistant Attorney General for Civil Rights.

34. The Citizens' Commission Report raises concerns about the Division's role in preclearing a mid-decade Congressional redistricting plan enacted by the State of Texas. The plan targeted several areas of minority voting strength. The career staff of the Voting Section concluded that the plan violated Section 5 because it resulted in a retrogression of minority electoral opportunity. The Department's political appointees rejected the staff's recommendations and pre-cleared the plan.

a. Please describe in detail how the decision was made to reject the recommendations of the career staff concerning the Texas redistricting plan?

Answer: In 2003, the Department conducted a deliberate and careful review of every relevant fact relating to the Texas submission of its congressional redistricting under Section 5 of the Voting Rights Act, concluding that there was no retrogression in the overall plan. The legislature offset one lost opportunity district for Latino voters by creating a new district in that region in which Latino voters dependably would be able to elect a representative of their own choice. Indeed, the plan was used during the 2004 elections and resulted in an increase in the number of minority representatives elected to Congress from Texas.

In *LULAC v. Perry*, the Supreme Court agreed with the Department's principal argument that the state did not violate Section 2 by redrawing former congressional district 24. The Court also found no violation of the Constitution or the Voting Rights Act in 31 of Texas's 32 congressional districts. The Court's decision left the Texas redistricting plan largely intact and left it to the state to determine how to remedy the lone problem identified as to congressional district 23. With respect to district 23, the Supreme Court reversed the decision of the lower court, which found no violation in the redistricting plan, including district 23. Moreover, the Supreme Court's 5-4 decision produced six separate opinions from six different Justices in 120 pages of discussion.

The Supreme Court's decision in no way calls into question the Department's decision to preclear the Texas redistricting plan under Section 5 of the Voting Rights Act. Indeed, only one Justice suggested that Section 5 had been violated; no other Justice joined him in that portion of his opinion. The majority's decision as to district 23 was founded on a new principle, under Section 2 of the Voting Rights Act, that the creation of an offsetting majority-minority district may not remedy the loss of a majority-minority district in the same part of the state if the new district is not compact enough to preserve communities of interest. Indeed, this new compactness inquiry issue was not the subject of briefing and was not addressed by the Department.

b. What was the rationale and legal basis for the rejection?

Answer: In 2003, the Department conducted a deliberate and careful review of every relevant fact relating to the Texas submission of its congressional redistricting

under Section 5 of the Voting Rights Act, concluding that there was no retrogression in the overall plan. The legislature offset one lost opportunity district for Latino voters by creating a new district in that region in which Latino voters dependably would be able to elect a representative of their own choice. Indeed, the plan was used during the 2004 elections and resulted in an increase in the number of minority representatives elected to Congress from Texas.

35. In 2005, the Justice Department precleared a Georgia law requiring voters to present a government issued picture identification in order to vote. According to a Washington Post article, "Criticism of Voting Law Was Overruled," a detailed memorandum was prepared by career staff in the Voting Section recommending an objection.[1] The memo included information about explicit racial statements made by a sponsor of the legislation that "if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud," and dismissing the black voters in her district as only voting when paid to do so. Despite the staff recommendation, the AAG precleared the Georgia plan.

    a. Please describe in detail how the decision was made to reject the recommendations of the career staff concerning the Georgia ID plan? What was the rationale and legal basis for the decision?

Answer: In August 2005, the Department precleared a Georgia voter identification law, which itself amended an existing voter identification statute that had been precleared by the prior Administration. This preclearance decision followed a careful analysis that lasted several months and considered all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards and the views of minority legislators in Georgia (as well other current and former minority elected officials). The data showed, among other things, that the number of people in Georgia who already possessed a valid photo identification greatly exceeded the total number of registered voters and that there was no racial disparity in access to the identification cards. The state subsequently adopted, and the Department precleared in April 2006, a new form of voter identification that would be available to voters for free at one or more locations in each of the 159 Georgia counties.

In *Common Cause/Georgia v. Billups*, the district court did not conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act. Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision. In addition, the state court decision blocking Georgia's

[1] Dan Eggen, *Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, THE WASH. POST, November 17, 2005, at A01.

implementation of the identification requirement was issued on state constitutional grounds and, therefore, also did not call into question the Department's preclearance decision. Georgia's Supreme Court recently vacated the decision and remanded with directions that the case be dismissed for lack of standing.

Indiana's voter identification law was upheld by the Seventh Circuit in *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), in the face of allegations similar to those made against the Georgia law.

b. According to the CCCR report, the memorandum recommending an objection was not forwarded to the Assistant Attorney General for Civil Rights for consideration prior to the final decision to pre-clear the Georgia submission. Did the Assistant Attorney General review the memorandum written by staff recommending an objection?

Answer: It is my understanding that the Acting Assistant Attorney General was aware of the analysis of the career staff, including the views of the career Section Chief.

c. Additional information was submitted by the state of Georgia prior to pre-clearance. Please describe the content of the materials submitted to the Department. Was the Georgia reviewing team given an opportunity to analyze this data? If so, who, specifically? When did Georgia submit additional information and how much time was given to staff to review the information prior to the AAG's decision to preclear the Georgia plan?

Answer: It is my understanding that all data, including data received from Georgia within a day or so of when the preclearance was issued correcting earlier data on driver's licenses and photo IDs issued in the state, were considered by career staff in the Voting Section, and that the data supported the preclearance decision. The data on the number of persons with qualifying identification issued by the Georgia Department of Motor Services were provided by the State of Georgia. Population estimate data were obtained from the Census Bureau.

d. What role did Hans von Spakovsky have in preclearing the Georgia voter identification submission?

Answer: Mr. von Spakovsky served as a Counsel to the Assistant Attorney General and worked closely with the Voting Section on all matters.

e. Was Hans von Spakovsky cleared by the Department to write a law review article endorsing the practice at question in the Georgia ID plan? Publius, *Securing the Integrity of American Elections: The Need for Change, 9* Texas Review of Law and Politics 277 (2005). If so, by whom? What was the rationale for clearance?

Answer: Pursuant to 5 CFR §§ 2635.703 and 2635.807, Department employees "shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another." In addition, "[a]n employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity" with certain exceptions.

Pursuant to these regulations, a Department employee such as Mr. von Spakovsky may publish a law review article without formal Departmental clearance so long as the article does not divulge non-public information and the employee is not identified as a Departmental employee. However, it is our understanding that Mr. von Spakovsky obtained clearance from a Department ethics official for the publication of the article.

f. Was the Office of Professional Responsibility ever notified that Mr. Von Spakovsky used a pseudonym to conceal his legal writings on an issue that was before him in his professional capacity? If not, why?

Answer: It is our understanding that, during the course of OPR's investigation of a matter pending at the time, OPR learned of Mr. von Spakovsky's use of the pseudonym "Publius" in connection with his publication of an article in the Texas Review of Law and Politics (Spring 2005). Further, it is our understanding that Mr. von Spakovsky obtained clearance from a Department ethics official for the publication of the article itself. We are also informed that, after a careful review, OPR determined that Mr. von Spakovsky's use of a pseudonym in publishing this article did not warrant further investigation.

g. Please provide the names of all individuals in the Department of Justice who were in any respect involved in reviewing the 2001-2002 Mississippi redistricting submission, 2003 Texas redistricting submission, and 2005 Georgia photo identification submission. Please also provide the number of years each person has worked for the Voting Section, if applicable.

Answer: Please see the response to question 33, above, regarding the process followed by the Division in reviewing Section 5 submissions. Following are the relevant Assistant Attorney General, Deputy Assistant Attorney General, Section Chief, and Deputy Chief who were involved in reviewing the submissions to which your question refers. With regard to the 2001 – 2002 Mississippi redistricting submission, Ralph Boyd was the Assistant Attorney General, Michael Wiggins was the Deputy Assistant Attorney General, Joseph Rich was the Section Chief, and Robert Berman was the Deputy Chief. With regard to the 2003 Texas redistricting submission, Sheldon Bradshaw was the Acting Assistant Attorney General, Bradley Schlozman was the Deputy

Assistant Attorney General, Joseph Rich was the Section Chief, and Robert Berman was the Deputy Chief. With regard to the 2005 Georgia photo identification submission, Bradley Schlozman was the Acting Assistant Attorney General, John Tanner was the Section Chief, and Robert Berman was the Deputy Chief. No Deputy Assistant Attorney General was assigned to this submission.

h. Please provide the names of all individuals outside the Department of Justice who were in any respect involved with the 2001-2002 Mississippi redistricting submission, 2003 Texas redistricting submission, and 2005 Georgia photo identification submission.

Answer: During the review of Section 5 files, the Department often receives comments from community organizations, advocacy groups, elected officials, and individual citizens expressing their views on the proposed voting change. The Department's Procedures for the Administration of Section 5 provide specifically for the receipt and consideration of such communications. See 28 C.F.R. 51.29 - 51.32. The Department does not track this information for retrieval.

With regard to the 2005 Georgia photo identification submission, we received a large number of written comments, including correspondence from approximately 40 organizations, associations, advocacy groups, state and local elected officials, and Members of Congress. In addition, we received a large volume of letters or petitions from individual citizens (including numerous form letters).

During our review of the 2003 Texas congressional redistricting submission, which comprises several boxes of material, we also received an extremely large volume of written comments. These include voluminous pleadings, trial testimony, and expert witness documents from the pending litigation and large numbers of letters, statements, petitions, and written testimony offered by citizens during redistricting hearings around the State. We also received written comments from various groups and organizations, state and local elected officials, Members of Congress, and others.

During the review of the 2001 Mississippi congressional redistricting submission, we received a number of written comments. These included voluminous materials from the pending redistricting cases in federal and state court in Mississippi, including pleadings, exhibits, transcripts, redistricting data, and court decisions. These materials also included letters and faxes from counsel for the various parties to the pending cases, written comments from various organizations, state and local elected officials, Members of Congress, and others.

Recommendation Memoranda

36. According to a 2005 Washington Post article, "Staff Opinions Banned In Voting Rights Cases," the Justice Department barred staff attorneys from offering recommendations in major Voting Rights Acts cases.[2] Were the guidelines for the structure of recommendation memoranda changed? If so, explain how the policy changed, who changed it and why?

Answer: Career staff continues to be involved in the review and decision-making process of every case brought under the Voting Rights Act, and every Voting Rights Act matter comes with a recommendation from career staff attorneys.

37. If there was a new policy prohibiting staff recommendations, was it applied Divisionwide, or only to the Voting Section? If only for the Voting Section, why?

Answer: See response to question 36.

38. How was the new policy communicated to the Voting Section? If communicated in writing, please provide copies of documents.

Answer: See response to question 36.

Outreach to Community Groups

39. Has the Civil Rights Division engaged in outreach efforts to communities affected by the laws enforced by CRT? Please describe theses efforts. List outreach efforts to the (a) African-American; (b) Latino; c) Native-American; (d) Asian; (e) Jewish; (f) Muslim; (g) Catholic; (h) Protestant; and (i) Evangelical community from 2000 - 2007.

Answer: Outreach to the communities affected by the laws enforced by the Division is key to the Division's mission. Other than outreach conducted by the attorneys in the Office of the Assistant Attorney General, outreach is generally left to the discretion of each of the Division's Sections. Each Section conducts and tracks its outreach differently. Attached please find reports on the areas on which the Division engages in outreach. This list may be supplemented.

[2] Dan Eggen, *Staff Opinions Banned In Voting Rights Cases: Criticism of Justice Dept.'s Rights Division Grows*, THE WASH. POST, December 10, 2005, at A03.

Document Production

We request that you supply the following documents and information in accordance with the definitions enclosed with this letter:

1. copies of all resumes and other related employment application materials submitted from 2001 - 2007 for the following positions in the Employment and Voting Sections of the Civil Rights Division (CRT): special counsel, section chief, staff/trial attorney, intern, analyst, and paralegal;

Answer: On June 15, 2007, the Department produced the resumes of the attorneys hired into the Employment and Voting Sections from 2001-2007. Attached please find the resumes and other related employment application materials for analysts and paralegals who were hired into the Employment and Voting Sections from 2001-2007.

Consistent with the Privacy Act and OPM regulations, the Division has gathered all available resumes and other employment application materials submitted by persons who were not hired for attorney, paralegal, and analyst positions in the Employment and Voting Sections. In general, resumes and other employment application materials for individuals who are not hired by the Division are maintained only for three years. As revealing this information would implicate the privacy interests of many applicants who were not hired by the Division, I request that you meet with me to review this information in a private setting.

The Division's general practice is to post a single advertisement soliciting interns on a Division-wide basis. Although some sections have elected to post section-specific advertisements soliciting interns, neither the Employment Litigation Section nor the Voting Section has done so. Accordingly, the Division does not have materials for interns that are responsive to this request.

2. copies of all documents relating to the review of employment application materials on behalf of CRT for special counsel, section chief, staff/trial attorney, intern, analyst, and paralegal positions in the Employment and Voting Sections from 2001 - 2007, including by not limited to hand-written notes, high-lighting, underscoring, comments or other similar notations by reviewers regarding application materials;

Answer: The Department does not track this information for retrieval.

3. copies of all Equal Employment Opportunity (EEO) complaints filed from 2001-2007 regarding staff and management in the Employment and Voting Sections of CRT; please also provide copies of the disposition of these complaints;

Answer: Attached please find a chart describing all responsive Equal Employment Opportunity complaints, and their disposition, on record with the Justice Management Division (JMD) and/or the Executive Office of the Civil Rights Division of the Department of Justice.

As providing the complaints would implicate the privacy interests of the individuals mentioned therein, I request that you meet with me to review this information iu a private setting.

4. copies of all Merit Systems Protection Board (MSPB) complaints filed from 2001 - 2007 regarding anyone in the Office of the Assistant Attorney General for CRT and the Employment and Voting Sections of CRT; please also provide copies of the disposition of these complaints;

Answer: Attached please find a chart describing all responsive Equal Employment Opportunity complaints, and their disposition, on record with the Justice Management Division (JMD) and/or the Executive Office of the Civil Rights Division of the Department of Justice.

The chart further describes the one responsive Merit Systems Protection Board complaint, and its disposition, that the JMD has on record as being referred to the Department. The Division is aware of a second MSPB complaint that MSPB found to be without merit. JMD has no record of MSPB having referred that complaint to the Department.

As providing the complaints would implicate the privacy interests of the individuals mentioned therein, I request that you meet with me to review this information in a private setting.

5. copies of all complaints filed with the Office of Professional Responsibility (OPR) from 2001 - 2007 regarding anyone in the Office of the Assistant Attorney General for CRT and the Employment and Voting Sections of CRT; please also provide copies of the disposition of these complaints;

Answer: In response to this inquiry, OPR has advised us that we may provide the Committee with the attached chart.

6. copies of all versions of section 5 training materials used by the Voting Section;

Answer: Please see the attached 2003 Section 5 training manual and further materials located on our website at http://www.usdoj.gov/crt/voting/overview.htm. The current materials are being, and will continue to be, updated to keep abreast of developments in the law, including those resulting from the 2006 Reauthorization of the Voting Rights Act.

7. copies of all investigation and justification memoranda submitted from 2001- 2007 to the Assistant Attorney General's Office from the Employment and Voting Sections of CRT;

Answer: The Division has substantial confidentiality interests in documents that reflect internal deliberations in particular matters. Encouraging line attorneys to set forth fully the factual and legal considerations that bear on particular matters is vital to the work of the Division. Disclosure of these documents would chill the internal debate that we welcome in all of our cases.

8. copies of all documents relating to communications between anyone in the Office of the Assistant Attorney General (AAG) of CRT and the Voting Section regarding the 20012002 Mississippi redistricting submission, 2003 Texas redistricting submission, and 2005 Georgia photo identification submission;

Answer: The Division has substantial confidentiality interests in documents that reflect internal deliberations in particular matters. Encouraging line attorneys to set forth fully the factual and legal considerations that bear on particular matters is vital to the work of the Division. Disclosure of these documents would chill the internal debate that we welcome in all of our cases.

9. copies of all documents relating to communications between the Justice Department and Members of Congress (including congressional staff) concerning the 2001-2002 Mississippi redistricting submission, 2003 Texas redistricting submission, and 2005 Georgia photo identification submission;

Answer: Attached please find copies of the letters received from and sent to Members of Congress by the Department concerning the 2001-2002 Mississippi redistricting submission, the 2003 Texas redistricting submission, and the 2005 Georgia photo identification submission. Any other communications between Members of Congress (including congressional staff) and the Department are not tracked by the Division for retrieval.

10. copies of all documents relating to communications between the Justice Department and the White House concerning the 2001-2002 Mississippi redistricting submission, 2003 Texas redistricting submission, and 2005 Georgia photo identification submission;

Answer: We are not aware of any such materials.

11. copies of all documents relating to communications between the Justice Department and anyone outside of *the* Department (excluding the White House and Members of Congress) concerning the 2001-2002 Mississippi

redistricting submission, 2003 Texas redistricting submission, and 2005 Georgia photo identification submission;

Answer: During the review of Section 5 files, the Department often receives comments from community organizations, advocacy groups, elected officials, and individual citizens expressing their views on the proposed voting change. The Department's Procedures for the Administration of Section 5 provide specifically for the receipt and consideration of such communications. See 28 C.F.R. 51.29 - 51.32. The Department does not track this information for retrieval.

With regard to the 2005 Georgia photo identification submission, we received a large number of written comments, including correspondence from approximately 40 organizations, associations, advocacy groups, state and local elected officials, and Members of Congress. In addition, we received a large volume of letters or petitions from individual citizens (including numerous form letters).

During our review of the 2003 Texas congressional redistricting submission, which comprises several boxes of material, we also received an extremely large volume of written comments. These include voluminous pleadings, trial testimony, and expert witness documents from the pending litigation and large numbers of letters, statements, petitions, and written testimony offered by citizens during redistricting hearings around the State. We also received written comments from various groups and organizations, state and local elected officials, Members of Congress, and others.

During the review of the 2001 Mississippi congressional redistricting submission, we received a number of written comments. These included voluminous materials from the pending redistricting cases in federal and state court in Mississippi, including pleadings, exhibits, transcripts, redistricting data, and court decisions. These materials also included letters and faxes from counsel for the various parties to the pending cases, written comments from various organizations, state and local elected officials, Members of Congress, and others.

12. copies of all documents including but not limited to section 5 recommendation memoranda (drafts and final), telephone memoranda, and any dissenting view documents (drafts and final) prepared when the Voting Section reviewed the following submissions: 2001-2002 Mississippi redistricting, 2003 Texas redistricting, 1981 Georgia identification requirements for voter registration, 1994 Louisiana photo identification requirement for voting, 1997 Georgia identification, 1997 Texas voter registration cards, and 2005 Georgia photo identification;

Answer: The Division has substantial confidentiality interests in documents that reflect internal deliberations in particular matters. Encouraging line attorneys to set forth fully the factual and legal considerations that bear on

particular matters is vital to the work of the Division. Disclosure of these documents would chill the internal debate that we welcome in all of our cases.

13. copies of all investigation and justification memoranda submitted from 2001 - 2007 to the Office of the Assistant Attorney General for CRT for review from the Employment and Voting Sections.

Answer: The Division has substantial confidentiality interests in documents that reflect internal deliberations in particular matters. Encouraging line attorneys to set forth fully the factual and legal considerations that bear on particular matters is vital to the work of the Division. Disclosure of these documents would chill the internal debate that we welcome in all of our cases.

Definitions

1. The term "document" means any written, recorded or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, hooks, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers,. prospectuses, interoffice and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including without limitation, tapes, cassettes, disks, computer files, computer hard drive files, CDs, DVDs, memory sticks, and recordings) and other written, printed, typed or other graphic or recorded matter of any kind of nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, telexes, discussions, releases, personal delivery, or otherwise.

CIVIL RIGHTS DIVISION OVERSIGHT HEARING:
QUESTIONS FOR THE RECORD SUBMITTED BY MR. FRANKS
TO AAG WAN KIM

Proposed Questions for Assistant Attorney General Wan Kim

Performance of the Division

1. In February of last year, then Chairman Sensenbrenner sent a letter to the Attorney General asking him about instances in which the objectivity and investigative practices of the Civil Rights Division had been questioned. The Chairman specifically asked for instances in which the Division's legal work was either admonished in a court opinion or where the Division paid attorneys fees or settlement fees over its involvement in a lawsuit.

   I would like to submit for the record a copy of Mr. Sensenbrenner's letter and the Justice Department's reply. Let me tell you about two cases detailed in the reply:

   - In the 1994 decision *Johnson v. Miller*, the court described the level of communications between Division attorneys overseeing preclearance of Georgia's redistricting efforts as "disturbing" and continued: "It is obvious from a review of the materials that [the ACLU attorney's] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." The court found the Voting Section attorneys' "professed amnesia" about their relationship with the ACLU attorney "less than credible."

   - In 2000, the Ninth Circuit affirmed the district court's award for directing the Department to pay more than $1.7 million in attorney's fees in *United States v. City of Torrance*, a Title VII case alleging a pattern or practice of discrimination in employment. The court stated, "in this case, the record amply supports the district court's determination that... 'the Government had **an insufficient factual basis for bringing the adverse impact claim' and** 'that the Government continued to pursue the claim...long after it became apparent that the case **lacked merit.'"**

   There are many more such examples detailed in the Department's response. I find this pattern very disturbing. What steps have you taken to ensure that the Division does not repeat these costly, embarrassing, and egregious mistakes?

Answer: I made a pledge to take my cases where I find them and to bring any case where I find a recognizable violation of the law based upon the facts that would be sufficient for the Division to prove that violation in court. I have been, and will continue to be, committed to honoring this pledge.

During the past six years, the Division has enjoyed a remarkable rate of success in our cases. Please see the responses below to questions 15-21, 23, and 25-27, outlining our enforcement record.

Allocation of Resources and Selection of Priorities

2. Are positions added to a Section or eliminated based on changes in the CRT's priorities or based on a demonstrated need (such as an increase in the number of complaints from the public or other Federal agencies)?

Answer: Position levels in the various sections may be adjusted based on a number of factors, including addressing short-term or long-term demonstrated need and ensuring that the Division successfully fulfills its mission.

5. Does the CRT monitor trends in the number of complaints filed by members of the public, complaints referred by other Federal agencies, phone calls, and questions or information received through other outreach mechanisms in the areas under the CRT's jurisdiction?

Answer: The Division monitors the nature and quantity of complaints it receives on a section by section basis. The Division maintains flexibility to allow it to adequately respond to emerging issues as the need arises. For example, in response to the rash of violence and discriminatory actions reported against members of the Arab-American, Muslim, Sikh, and South-Asian American communities in the wake of the September 11, 2001, terrorist attacks, the Division directed its National Origin Working Group to work proactively to combat violations of civil rights laws against those groups, and those perceived to be members of these groups, through the creation of the Initiative to Combat Post-9/11 Discriminatory Backlash.

6. Do the annual priorities established by the CRT, the priorities of the ten Sections, the budget allocations, and the Section staffing decisions reflect these trends?

Answer: Please see the response above to question 5.

7. How flexible are the priorities such that the CRT is able to shift resources to adequately respond to emerging issues?

Answer: Please see the response above to question 5.

Leaks of Internal Memoranda and Deliberative Discussions to the Public

8. There have been several reported leaks of internal DOJ memoranda in *high*-profile matters in the Civil Rights Division, including materials protected by attorney-client privilege. *Anyone* found to violate the attorney client privilege, of course, should be sanctioned and could be subject to disbarment. I also think that the motivation of the leaker calls into question his or her impartiality, since the leak is often done for the purpose of advancing the leaker's own agenda. Do you share my concern about leaks of internal and privileged information?

Answer: All attorneys should be concerned by the disclosure of internal and privileged information.

Enforcement Activities Related to Religious Liberty

10. Most of the laws enforced by the Civil Rights Division, including the 1964 Civil Rights Act, prevent discrimination based on religion. I am concerned that past Administrations have done little to enforce these important protections. Congress unanimously passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) nearly 7 years ago in response to the massive evidence we found of discrimination against houses of worship in zoning decisions. RLUIPA created a private cause of action, but also gave authority, to the Attorney General to enforce it. In light of all of these laws preventing religious discrimination, I am heartened to see more enforcement of these protections in the past 6 years. Will this continue to be a priority for you?

Answer: The Civil Rights Division has undertaken efforts over the past six and a half years to ensure that RLUIPA and other laws against religious discrimination, as well as laws against religious-based hate crimes, are vigorously enforced. While the Division has made a particular effort to protect the rights of Muslim and Sikh Americans, who have faced a disproportionate rise in discrimination and hate crime since 9/11, our efforts have been aimed at enforcing laws against discrimination for people of all faiths. Our "Report on Laws Protecting Religious Freedom, Fiscal Years 2001 - 2006," released in February 2007, documents the Division's increased enforcement efforts and describes the breadth of the cases handled by the Division during this period. On February 20, 2007, the Attorney General announced a new initiative, the First Freedom Project, to make increased enforcement of these laws a priority, to coordinate religious liberty cases and priorities among the components of the Department of Justice, and to educate the public about federal protections of religious freedom. Through the First Freedom Project, the Division will continue to build on its success in protecting religious freedom for all Americans.

The Division's Hiring Practices

11. I've heard some allegations of partisan hiring at the Civil Rights Division. Some are suggesting that any applicant who worked for a Republican member of Congress or was a member of the Federalist Society should not be hired to work at the Civil Rights Division. I've heard some suggest that only people who've worked with certain advocacy groups should be hired by the Civil Rights Division. This kind of rank stereotyping is problematic, and I could not disagree more. I also wonder whether, during the Clinton administration, the Division hired people of all backgrounds and political ideologics. Would you agree with me that applicants of all backgrounds and political persuasions should have an equal shot at working at the Department of Justice and the Civil Rights Division?

Answer: Yes. We measure three important things, among others, when evaluating candidates for attorney positions in the Civil Rights Division: whether they have a demonstrated record of excellence, whether they are talented attorneys consistent with that excellent record, and whether they share a commitment to the work of the Division. The Division hires outstanding attorneys from an extremely wide variety of backgrounds. There is no political litmus test in making hiring decisions.

Voting Rights Act Enforcement Activities

12. I've heard many criticisms of the decision to preclear the Georgia law that required voters to show identification at the polls. This sounds to me like a pretty minor and obvious way to prevent voter fraud. I am also aware that similar laws were passed in Missouri, Indiana, and Arizona, and are being considered throughout the country. In fact, the House of Representatives passed a federal voter identification law last year.

The Justice Department reviewed the Georgia law because Georgia is a state that remains covered under the Voting Rights Act. Indiana and Missouri, of course, passed their voter identification laws without the necessity of undergoing federal review. Indiana's voter identification law was recently upheld by the Seventh Circuit in *Crawford v. Marion County Election Board* in the face of allegations similar to those made against the Georgia law.

Does that mean those voter identification laws are less problematic? Why should the federal government be telling certain states what they can do while others are not subject to the *same scrutiny?*

Answer: In 1965, based on review of problems encountered by minority voters, Congress directed under Section 5 of the Voting Rights Act that election practices or procedures in certain states, or portions of states, were not to be changed until the new procedures were subjected to review, either by the United States Attorney

General or the United States District Court for the District of Columbia. Consequently, voting changes in covered jurisdictions may not become effective until that review has been obtained. The review requires the jurisdiction to affirmatively prove that the proposed voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group.

The requirement was enacted in 1965 as temporary legislation, to expire in five years, and applicable only to certain states. The specially covered jurisdictions were identified in Section 4 of the Act, based on a formula. The first element in the formula was that the state or political subdivision of the state maintained on November 1, 1964, a "test or device," restricting the opportunity to register and vote. The second element of the formula looked to see whether less than 50 percent of persons of voting age were registered to vote, or voted, in the 1964 Presidential election. In 1970, and again in 1975, when the Act was extended, the formula was changed slightly. In 1975, the 1965 definition of "test or device" was expanded to include the practice of providing election information, including ballots, only in English in states or political subdivisions where members of a single language minority constituted more than five percent of the citizens of voting age. Congress temporarily extended Section 5 again in 1982 and 2006, each time for 25 years, but no new Section 5 coverage formula was adopted.

13. I've heard many criticisms of the decision to preclear the 2002 redistricting plan in Texas under Section 5 of the Voting Rights Act because it harmed minority voters. I also understand that the number of minority legislators elected under the new redistricting plan actually increased, and that the entire plan was affirmed by a 3 -judge panel in federal court. The Supreme Court affirmed the validity of 31 out of the 32 districts drawn, and by a 5-4 majority, found that 1 district was drawn in a way that violated Section 2. Did that decision call into question the Department's decision to preclear this plan under Section 5?

Answer: No, the Supreme Court decision did not call into question the Department's decision to preclear the Texas redistricting plan.

In 2003, the Department conducted a deliberate and careful review of every relevant fact relating to the Texas submission of its congressional redistricting under Section 5 of the Voting Rights Act, concluding that there was no retrogression in the overall plan. The legislature offset one lost opportunity district for Latino voters by creating a new district in that region in which Latino voters dependably would be able to elect a representative of their own choice. Indeed, the plan was used during the 2004 elections and resulted in an increase in the number of minority representatives elected to Congress from Texas.

In *LULAC v. Perry*, the Supreme Court agreed with the Department's principal argument that the state did not violate Section 2 by redrawing former congressional

district 24. The Court also found no violation of the Constitution or the Voting Rights Act in 31 of Texas's 32 congressional districts. The Court's decision left the Texas redistricting plan largely intact and left it to the state to determine how to remedy the lone problem identified as to congressional district 23. With respect to district 23, the Supreme Court reversed the decision of the lower court, which found no violation in the redistricting plan, including district 23. Moreover, the Supreme Court's 5-4 decision produced six separate opinions from six different Justices in 120 pages of discussion.

The Supreme Court's decision in no way calls into question the Department's decision to preclear the Texas redistricting plan under Section 5 of the Voting Rights Act. Indeed, only one Justice suggested that Section 5 had been violated; no other Justice joined him in that portion of his opinion. The majority's decision as to district 23 was founded on a new principle, under Section 2 of the Voting Rights Act, that the creation of an offsetting majority-minority district may not remedy the loss of a majority-minority district in the same part of the state if the new district is not compact enough to preserve communities of interest. Indeed, this new compactness inquiry issue was not the subject of briefing and was not addressed by the Department.

14. In December 2005, the *Washington Post* reported, based on a leaked internal DOJ memorandum, that career lawyers in the Civil Rights Division had unanimously recommended that the Department interpose an objection to the Texas congressional redistricting plan, and that the Divisions political leadership had overruled this recommendation. Critics cite this leaked memorandum as evidence of the politicization of the Civil Rights Division - a view they say is vindicated by the U.S. Supreme Court's decision last term in *LULAC v. Perry,* which determined that a single redrawn district violated the Voting Rights Act.
    - What was the standard for review of redistricting plans at the time the redistricting plan was submitted to the Department? Was it followed by the Department?
    - The Supreme Court appeared to create a new standard regarding "compactness" in its opinion. Is that standard something that the Department knew that it had to consider, or something that the Voting Rights Act lays out as a relevant factor?
    - As I understand it, the redistricting plan in Texas that was the benchmark against which the new Texas congressional redistricting plan was to be measured for retrogression had 8 of the 32 congressional districts allocated to Texas as minority districts protected by the Voting Rights Act six districts for Hispanic voters and two districts for African-American voters. Did the new Texas Congressional

Redistricting plan pre-cleared by the Department preserve the eight minority districts?

- Did the Supreme Court decision on the Texas Congressional Redistricting plan indicate that the Department had erroneously pre-cleared the plan?

Answer: Each Section 5 submission is processed on receipt and assigned to one or more analysts, paralegals, or attorneys. These staff members conduct a review of the file and gather information from knowledgeable persons to determine the limited question of whether the change was adopted with a discriminatory purpose or whether it would have a retrogressive effect on minority voters. In 2003, the Department conducted a deliberate and careful review of every relevant fact relating to the Texas submission of its congressional redistricting under Section 5 of the Voting Rights Act, concluding that there was no retrogression in the overall plan.

The majority's decision as to district 23 was founded on a new principle, under Section 2 of the Voting Rights Act, that the creation of an offsetting majority-minority district may not remedy the loss of a majority-minority district in the same part of the state if the new district is not compact enough to preserve communities of interest. Indeed, this new compactness inquiry issue was not the subject of briefing and was not addressed by the Department.

The plan preserved eight minority districts. The legislature offset one lost opportunity district for Latino voters by creating a new district in that region in which Latino voters dependably would be able to elect a representative of their own choice. Indeed, the plan was used during the 2004 elections and resulted in an increase in the number of minority representatives elected to Congress from Texas.

The Supreme Court's decision in no way calls into question the Department's decision to preclear the Texas redistricting plan under Section 5 of the Voting Rights Act. Indeed, only one Justice suggested that Section 5 had been violated; no other Justice joined him in that portion of his opinion.

15. This past July, certain sections of the Voting Rights Act of 1965 were extended for an additional 25 years. In addition, amendments were made to these provisions that will require the Department of Justice to revisit its responsibilities under the Act.
    - When does the Department of Justice anticipate reviewing its regulations in that regard?
    - Can you please describe your recent enforcement efforts under Sections 5 of the Voting Rights Act, as recently amended by the VRA reauthorization legislation Congress passed last year?

Answer: The Department is currently defending the constitutionality of the reauthorization of the Voting Rights Act. Consequently, it anticipates a review of its regulations later this year or early next year.

In FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history and interposed important objections to protect minority voters in Texas and Georgia. With over 7,100 submissions, the Division handled roughly 40 percent more submissions in FY 2006 than in a normal year. The Voting Section also brought the first Section 5 enforcement action since 1998.

Submissions for FY 2007 are also on track to be higher than normal. So far this year, the Section interposed an important objection in Alabama. Almost 3,000 submissions were made in the first seven months of FY 2007.

Additionally, the Voting Section has begun a major enhancement of the Section 5 review. Jurisdictions are now able to submit voting changes online, making the process easier, more efficient, and more cost effective for covered jurisdictions and for the Department.

Bilingual/English Only Issues

16. Can you please describe your recent enforcement efforts under Section 203 of the Voting Rights Act, which requires bilingual ballots in certain covered jurisdictions?
    - Are you aware of any concerns expressed by localities regarding unreasonable costs they must incur under Section 203?
    - If so, do you share those concerns? If not, why not?

Answer: Since 2002, the Voting Section has increased its enforcement of the minority language provisions of the Voting Rights Act. Indeed, during that short period, the Section has initiated over 60 percent of all of the minority language cases it has brought in history. These cases include the first Voting Rights Act cases in history on behalf of Filipino, Korean, and Vietnamese Americans.

The Department follows an approach of (1) vigorous outreach and education of state and local authorities, (2) investigation, and (3) enforcement actions where necessary and appropriate. At each step, the Section is mindful of cost issues and offers best practices to local officials to meet the legal requirements both effectively and efficiently.

The Division formally notified each jurisdiction covered under Section 203 of the Voting Rights Act promptly upon the announcement by the Director of the Census

of the Census coverage, i.e., as soon as the covered jurisdictions are identified. In the past, this had involved a letter to each affected jurisdiction and, in 1992, a visit by Department attorneys to local election officials in selected newly-covered jurisdictions. In 2002, this Administration instituted by far the most vigorous outreach program in the history of the Act. Outreach began before the Census determinations actually were made to prepare local officials and minority advocacy groups of the impending determinations and the requirements of federal law. The Division also for the first time produced a plain language brochure to help guide local officials and citizens through the legal requirements and how to meet them. The traditional letter to each jurisdiction was expanded to include practical information on achieving compliance, and Division attorneys met personally with election officials and members of the affected language minority community in virtually all of over 80 jurisdictions with new obligations under the Act. The Division also sent a letter to jurisdictions covered under Sections 203 and 4(f)(4) on August 31, 2004, to remind them of their obligations as the 2004 general election approached and offering clear, practical guidance on how to comply with the Act. Since then, the Voting Section has conducted frequent outreach to minority communities and to state and local election officials on the Act's requirements and best practices to meet those requirements.

Such presentations in all cases include guidance on minimizing costs while maintaining effectiveness. Many jurisdictions, for example, publish minority language notices in English language newspapers. This practice costs considerable money and serves few if any persons who do not read English. The Section urges communities to consult with those who serve each language minority community to identify those media that actually reach votes who rely on other languages and, essentially, follow the examples of cost-conscious businesses. The Section also promotes the use of fax and e-mail lists of individuals and groups – businesses, unions, social and fraternal organizations, churches, senior centers, health clinics and the like – to whom election information can be sent at essentially zero cost along with a request that the information be posted and an announcement be made alerting group members to the election information. The Section also promotes coordiuatiou of translation and other activities among the various governments so that all are not paying separately to have the same information translated.

While the Section's practices thus assist jurisdictions in avoiding unnecessary expenses, the role of the Section is to enforce the law's command to protect the right to vote.

17. Can you please describe your recent efforts to enforce Executive Order 13166, which requires facilitating access to federal programs by people who are of only limited proficiency in English? Are you aware of any concerns regarding unreasonable costs entailed by such efforts?

Answer: Executive Order 13166 (EO 13166) contains two main requirements for federal agencies. First, federal funding agencies (approximately 30) must develop guidance documents for their recipients on how to provide access to services for individuals with limited English proficiency (LEP) in order to comply with Title VI of the Civil Rights Act of 1964 (Title VI). Title VI and its implementing regulations require that recipients of federal financial assistance take reasonable steps to provide LEP individuals with meaningful access to their programs and activities. Thus, EO 13166 did not create a new requirement for federally funded programs but, instead, required federal funding agencies to provide guidance to their recipients about how Title VI and implementing regulations already applied to LEP individuals. The Civil Rights Division is charged with ensuring implementation of EO 13166, which includes approval of agency recipient guidance documents prior to their publication in the Federal Register.

All federal agency LEP recipient guidance documents must take into account the resources available to recipients, including costs, in assessing whether language assistance is required and, if so, what kind of assistance. Specifically, the guidance provides a four-factor analysis that a recipient uses in determining its Title VI obligations to LEP individuals. These four factors are:

1. The number or proportion of LEP persons in the eligible service population;

2. The frequency with which LEP individuals come into contact with the program;

3. The importance of the benefit, service, information, or encounter to the LEP person (including the consequences of lack of language services or inadequate interpretation/translation); and,

4. The resources available to the recipient and the costs of providing various types of language services.

Second, in addition to requiring that federal agencies provide guidance to recipients of federal financial assistance, EO 13166 requires all federal agencies (approximately 85) to improve access to their own federally conducted programs and activities for eligible LEP persons. All federal agencies must develop and implement plans for the provision of meaningful access that are consistent with the standards set forth in the guidance for recipients. Thus, the four-factor analysis also applies to the assessment of what steps are "reasonable" for federal agencies and, accordingly, cost must be considered. Under the Executive Order, the Division is a repository for those plans and has no enforcement authority over them. However, the Division provides ongoing technical assistance to federal agencies concerning these plans.

The Division has a responsibility under Executive Order 12250 to ensure consistent and effective enforcement of Title VI. Pursuant to this authority, and as a result of its responsibilities to coordinate implementation of Executive Order 13166, the Division's Coordination and Review Section (COR) conducts a major program of technical assistance and consultation for federal agencies, recipients, and community groups. Most recently, COR played a vital role in arranging and coordinating a major two-day Federal Interagency Conference on LEP, held at the National Institutes of Health in Bethesda, Maryland, on March 15-16, 2007. The conference was extremely successful, with over 350 attendees, including federal and state employees, a wide variety of recipients of federal funds, advocacy and community groups, and representatives from the interpreter/translator community. The overall theme of the conference was sharing of cross-cutting strategies and collaborative approaches to ensure cost-effective and quality language assistance. Panelists presented their experiences with and ideas for the cost-effective provision of language services. Also, the attendees had the opportunity to meet and discuss language access issues with individuals from their own state or others who shared similar program missions.

The Division has taken other proactive measures to ensure implementation of EO 13166. COR has initiated a Title VI Outreach Project, which involves reaching out to community groups and others to discuss the requirements for federal agencies and recipients to take reasonable steps to provide meaningful access to LEP persons. COR has conducted eight formal LEP training sessions in the past six months. In addition, through its coordination of meetings of the Federal Interagency Working Group on LEP (an interagency group that meets periodically to discuss LEP issues), COR maintains the Group's LEP website, www.lep.gov, which has fast become a prime source of LEP information for federal agencies, recipients, and community groups. Through the website, the Division is able to widely disseminate various technical assistance materials that it has created in the past few years, including its "Know Your Rights" brochure for beneficiaries that is printed in ten languages and its second brochure for federal agencies and recipients entitled "Affirming LEP Access & Compliance in Federal and Federally Assisted Programs." Also posted on the website is the Division's Tips and Tools document, a major LEP resource document for Department of Justice recipients that contains specific chapters on law enforcement officers, 911 centers, domestic violence service providers, courts, and Department components. The website also contains the Division's recently developed two new planning tools to assist law enforcement agencies and departments of correction in developing language access plans. Each of these tools is informed by our consultations with recipient, agency, and beneficiary stakeholders.

COR also has conducted administrative investigations of Department recipients under Title VI and the nondiscrimination provisions of the Omnibus Crime Control and Safe Streets Act. COR currently is conducting 31 investigations of allegations

of failure to provide reasonable access for LEP individuals. If violations are found and settlement cannot be achieved, the Division can either file a lawsuit or federal funds can be terminated. The Division recently signed a comprehensive Memorandum of Agreement with the Lake Worth, Florida, Police Department that requires the development of a comprehensive Language Access Plan covering everything from the 9-1-1 call centers to training of bilingual officers.

In addition to its program of formal investigations of complaints, COR also often initiates telephonic interventions and on-site trainings for recipients who have had difficulty meeting their LEP obligations. Through this mechanism of providing early pre-emptive intervention, recipients are able to learn more about cost-effective LEP requirements so that they can provide the necessary language access in an expedited manner, before the problem reaches the level of a formal complaint.

In 2002, the Office of Management and Budget (OMB) published a report (available on www.lep.gov) dealing specifically with the potential costs associated with the provision of language services entitled, "Report to Congress. Assessment of the Total Benefits and Costs of Implementing Executive Order 13166: Improving Access to Services of Persons with Limited English Proficiency." One of the conclusions of the report is that, "The benefits of language-assistance services for particular LEP individuals, while not readily quantifiable in dollar units, can be significant. Such benefits may include improved access to a wide variety of services, more efficient distribution of government services, and more effective public health and safety programs." Given the importance of providing these services to all individuals, including LEP persons, the Division continually tries to assist its recipients to identify cost-effective measures for providing language access services, such as suggesting that several recipients share the cost of one telephone language line. Other cost-effective measures might include pooling resources and standardizing documents to reduce translation needs and centralizing interpreter/translation services to achieve economies of scale.

Reverse Discrimination Cases

18. Many have complained about the lawsuits you have filed to protect people who have been discriminated against because they are white. It's very clear that the civil rights laws protect all Americans from discrimination based on the color of their skin, including Americans who are white. I have not seen anyone seek to amend the civil rights laws to remove protection for certain races. I would expect you to continue to bring cases when there is racial discrimination against all groups of Americans. Will you commit to do so?

Answer: The Division has been, and will continue to be, active in enforcing the federal civil rights laws on behalf of all Americans. For instance, this

Administration has brought the first lawsuits in history to protect the voting rights of citizens of Vietnamese, Filipino, Korean, and Haitian heritage and has filed three pattern or practice complaints alleging employment discrimination on the basis of national origin against Hispanics. The Division has also filed scores of cases on behalf of African-American victims during this Administration. In addition, after September 11, 2001, the Civil Rights Division implemented an initiative to combat "backlash" crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian.

The Division is committed to enforcing the federal civil rights laws on behalf of all Americans. I made a pledge to take my cases where I find them and to bring any case where I find a recognizable violation of the law based upon the facts that would be sufficient for the Division to prove that violation in court. I have been, and will continue to be, committed to honoring this pledge. As the Jackson, Mississippi, Clarion-Ledger editorialized on January 31, 2007, "Discrimination is discrimination – and it's wrong in whatever color it comes. That's the law."

19. On February 17, 2006, the Civil Rights Division filed the first ever reverse discrimination case under Section 2 of the Voting Rights Act on behalf of white voters in Noxubee County, Mississippi. Critics claim that it is an inappropriate use of the scarce resources of the Civil Rights Division to pursue voting rights cases on behalf of white voters while virtually ignoring the plight of black voters.

    - I know that you can't get into the specifics of the litigation, but can you describe some of the allegations as set forth in the complaint?

Answer: On February 17, 2005, the Civil Rights Division filed a complaint in *United States v. Ike Brown et al.* (S.D. Miss.), a suit against Noxubee County, its election officials, and other defendants under Sections 2 and 11(b) of the Voting Rights Act. The suit alleges that white voters, white candidates, and supporters of white candidates were subjected to racial discrimination and intimidation in the conduct of elections in the county.

On April 9, 2007, all parties submitted proposed findings of fact and conclusions of law in the case. The Department's 160-page proposed findings of fact (copy attached) detailed multiple instances of intentional discrimination against white voters by the Defendants, as well as instances where the actions of the Defendants resulted in discriminatory treatment of African-American voters, their ballots, or their preferred candidates.

On June 29, 2007, U.S. Senior District Judge Tom S. Lee fonnd the defendants liable for violating the Voting Rights Act by discriminating against white voters and white

candidates. The court found that the defendants acted with a racially discriminatory intent and engineered "a concerted effort to illegally 'assist' black voters." The court ruled that Ike Brown violated federal voting laws by discriminating on the basis of race by issuing directions to count the absentee ballots of white voters differently than the absentee ballots of black voters." According to the court, the defendants discriminated against whites in selecting poll workers for Noxubee County elections in order to appoint a nearly all-black poll work force that then followed defendant Brown's directions not to comply with Mississippi law in considering challenges to absentee ballots. The court further found these actions were taken to dilute the voting strength of voters who supported candidates preferred by white voters. The court also found that the defendants recruited ineligible black candidates to run against white candidates.

- Shouldn't the protections of the Voting Rights Act apply to all Americans, non-minority and minority alike? Is there anything in the language of the Act, or in any court decision, that suggests otherwise?

Answer: As the courts have made clear, the Voting Rights Act exists to protect all Americans. Also, please see the response above to question 18.

- What actions has the Division brought in the past six years on behalf of minority voters?

Answer: The Department is committed to the vigorous and even-handed enforcement of the Voting Rights Act on behalf of all Americans and has brought lawsuits on behalf of African-American voters, Hispanic-American voters, Asian-American voters, Native American voters, and white voters. This Administration also has brought the first lawsuits in history to protect the voting rights of citizens of Vietnamese, Filipino, Korean, and Haitian heritage.

Voting enforcement actions initiated since the beginning of this Administration include 30 lawsuits brought under the Voting Rights Act on behalf of minority voters. Eighteen additional lawsuits were brought during this Administration on behalf of voters, some of which focused on protections of minorities, under provisions of the Uniformed and Overseas Citizens' Absentee Voting Act (UOCAVA), the National Voter Registration Act (NVRA), the Civil Rights Act of 1960, and the Help America Vote Act (HAVA).

In addition to this litigation, the Department has set record numbers related to monitoring of elections on behalf of minority voters. During CY 2006, the Division deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. On November 7, 2006, over 800 federal personnel monitored the polls in 69 political subdivisions in 22 states. In CY 2006, we sent

over 1,500 federal personnel to monitor elections, double the number sent in CY 2000, a presidential election year. In addition, in 2004, a record was set for the number of monitors and observers sent during a presidential election year.

During this Administration, records have also been set for enforcement of certain statutory provisions related to enforcement of the rights of minority voters. Since 2002, the Civil Rights Division has filed approximately three-fourths of all cases filed in the history of the Voting Rights Act to protect the right of voters needing assistance to vote and over 60 percent of all minority language cases in the entire previous history of the Voting Rights Act, including the first 2 cases ever brought under Section 4(e) of the Act.

As a result of these and other lawsuits, since 2002, the Department has brought a majority of all cases it ever has filed under the substantive provisions of the Voting Rights Act to protect voters of Hispanic and Asian descent, and the first cases ever filed to protect the voting rights of voters of Filipino, Haitian, Korean, and Vietnamese descent. Indeed, over 86 percent of all cases filed by the Voting Section to protect Latino voters under the language minority provisions of the Voting Rights Act have been filed in this Administration. And, a majority of all cases to protect Latino voters ever filed by the Department under the substantive provisions of the Voting Rights Act have been filed in this Administration, including 75 percent of all cases to protect Latino voters under the voter assistance provisions of Section 208.

Additionally, a number of cases have been brought by this Administration on behalf of African American voters. These include the following key cases: (1) a complaint filed in 2006 against the City of Euclid, Ohio, alleging that the mixed at-large/ward system of electing the city council diluted the voting strength of African-American citizens in violation of Section 2 of the Voting Rights Act; (2) a vote dilution case filed in 2001 against Crockett County, Tennessee, that was successfully resolved by entry of a consent decree resulting in the creation of two majority African-American districts; (3) a Section 208 case filed in 2002 against Miami-Dade, Florida on behalf of African-American voters of Haitian descent that was successfully resolved by entry of a consent decree; (4) a Section 5 declaratory action filed in 2006 against the North Harris/Montgomery Community College District in Texas that was successfully resolved by entry of a consent decree; (5) a Section 2 voter discrimination and Section 11(b) voter intimidation case filed in 2005 on behalf of both minority and non-minority voters in Noxubee, Mississippi; and (6) beginning in 2001, the Department successfully litigated, and successfully defended through appeal to the U.S. Supreme Court, allegations that the at-large system for election of council members in Charleston County, South Carolina, diluted the voting strength of African-American citizens.

Enforcement of the Americans with Disabilities Act

20. Could you please describe your efforts to enforce the Americans with Disabilities Act?

Answer: As outlined in greater detail in my written testimony, since the January 2001 announcement of the President's New Freedom Initiative, the Division's Disability Rights Section has achieved results for people with disabilities in over 2,000 actions under the Americans with Disabilities Act (ADA), including formal settlement agreements, informal resolution of complaints, successful mediations, consent decrees, and favorable court decisions. In FY 2006 alone, the Division achieved favorable results for persons with disabilities in 305 cases and matters, which provided injunctive relief and compensatory damages for people with disabilities across the country and set major ADA precedents in a number of important areas. Our work under the ADA during the past year involved cases across the country and in a variety of settings, including hospitals, public transportation, restaurants, resorts, movie theaters, college campuses, and retail stores. Many Americans with disabilities are able to enjoy life in a much fuller capacity as a result of our enforcement activities, and the Division will continue to make our efforts in this area a priority.

The Division continued its important work under Project Civic Access, a wide-ranging initiative to ensure that towns and cities across America comply with the ADA. The goal of Project Civic Access is to ensure that people with disabilities have an equal opportunity to participate in civic life. As of June 18, 2007, we have reached 153 agreements with 143 communities to make public programs and facilities accessible. Each of these communities has agreed to take specific steps, depending on local circumstances, to make core government functions more accessible to people with disabilities. The agreements have improved access to many aspects of civic life, including courthouses, libraries, parks, sidewalks, and other facilities, and address a wide range of accessibility issues, such as employment, voting, law enforcement activities, domestic violence shelters, and emergency preparedness and response. During the past 6 years, our agreements under Project Civic Access have improved the lives of more than 3 million Americans with disabilities.

In October 2006, the Attorney General directed the Civil Rights Division to use the knowledge and experience the Division has gained in its work with state and local governments under Project Civic Access to begin a technical assistance initiative. As a result, the Division is publishing the "ADA Best Practices Tool Kit for State and Local Governments," a document to help state and local governments improve their compliance with ADA requirements. This Tool Kit is being released in several installments. In the Tool Kit, the Division will provide common sense explanations of how the requirements of Title II of the ADA apply to state and local government programs, services, activities, and facilities. The Tool Kit will include checklists that state and local officials can use to conduct assessments of their own agencies to

determine if their programs, services, activities, and facilities are in compliance with key ADA requirements.

The first installment, released on December 5, 2006, covered "ADA Basics: Statute and Regulations" and "ADA Coordinator, Notice and Grievance Procedure: Administrative Requirements Under Title II of the ADA." The second installment, issued February 27, 2007, covered "General Effective Communication Requirements Under Title II of the ADA" aud "9-1-1 and Emergency Communications Services." The third installment, released May 7, 2007, covered "Website Accessibility Under Title II of the ADA" and "Curb Ramps and Pedestrian Crossings." These installments, and all subsequent installments, will be available on the Department's ADA Website (www.ada.gov). While state and local officials are not required to use these technical assistance materials, they are strongly encouraged to do so, since the Tool Kit checklists will help them to identify the types of noncompliance with ADA requirements that the Civil Rights Division has commonly identified during Project Civic Access compliance reviews as well as the specific steps that state and local officials can take to resolve these common compliance problems.

The Division continues to have great success with the Division's innovative ADA Mediation Program. Using more than 400 professional ADA-trained mediators throughout the United States, the ADA Mediation Program continues to expand the reach of the ADA at minimum expense to the government. It allows the Division quickly to respond to and resolve ADA complaints effectively, efficiently, and voluntarily, resulting in the elimination of barriers for people with disabilities throughout the United States. Since its inception, more than 3,000 complaints filed with the Department alleging violations of Title II and Title III have been referred to the program. Of the more than 2,200 mediations completed, 78% have been successful. Last year's success rate climbed to 82%, our highest ever.

For a comprehensive discussion of the Division's enforcement activities under the ADA, please refer to the report released by the Department of Justice in October 2006 entitled *Access for All: Five Years of Progress, A Report from the Department of Justice on* Enforcement of the Americans with Disabilities Act at http://www.ada.gov/5yearadarpt/fiveyearada1.htm.

21. Please describe the outreach conducted by the Disability Rights Section (DRS) to the small business community with respcct to Title III's requirements.

Answer: The Civil Rights Division engages in a wide range of activities to foster understanding of, and voluntary compliance with, the ADA. The comprehensive ADA Technical Assistance Program, mandated by the Act itself, provides free information and technical assistance directly to businesses and other constituencies regarding the ADA and how to comply with its requirements. Key components of

the Program include the ADA Website, the toll-free ADA Information Line, the ADA Business Connection program (a multifaceted initiative that aims to improve access to everyday commerce by fostering dialog and cooperation between the business community and the disability community), and specific outreach initiatives directly targeted to reach members of the small business community, such as the annual publication of an article in the summer or fall issue of the SSA/IRS Reporter. In FY 2006, we reached more than seven million businesses with information about our online course, Reaching Out to Customers with Disabilities.

- How does the CRT respond to criticism that the guidance provided by the Department of Justice is unclear, especially as it relates to the "readily achievable" requirement set forth under Title III?

Answer: The Division's ADA Information Line provides direct, one-to-one confidential assistance to the public, including small businesses, to help them to apply the ADA's requirements, including readily achievable barrier removal, to their own unique circumstances. Since 2001, an average of more than 50,000 callers, many of them small business owners, has been personally assisted by Technical Assistance Specialists each year.

The Division's ADA Website, http://www.ada.gov/, provides easy access to an extensive collection of illustrated explanatory materials as well as the ADA design standards and regulations they need to comply with the ADA. Visitors can also learn about ADA compliance assistance resources, enforcement and mediation activities, settlement agreements, and the ADA certification program, and can access other sites that have ADA information. One of the top five sites at the Department, the ADA Website served more than 3.1 million visitors who viewed pages and images more than 49 million times in FY 2006.

As discussed above, the Division's ADA Business Connection is a multifaceted initiative that aims to improve access to everyday commerce by fostering dialog and cooperation between the business community and the disability commnnity. Since 2001, more than 700 participants from small and midsized businesses, large corporations, and people with disabilities have attended ADA Business Connection Leadership meetings. Discussions at these meetings have resulted in increased understanding of the ADA and developed ongoing collaborations between the business and disability communities. In addition, the ADA Business Connection has produced a variety of compliance assistance materials addressing issues of specific interest to small businesses. Since 2001, the program has produced five *ADA Business Briefs* – short

documents explaining specific ADA issues in nonlegal language that are designed to be easily printed and distributed to employees. Topics include service animals, parking lots, providing assistance at gas stations, and effectively communicating in hotel and hospital settings with people who are deaf or hard of hearing. The program also introduced *Expanding Your Market*, a series of documents providing demographic and topical information specifically tailored to meeting locations. Finally, the program maintains the ADA Business Connection destination on the ADA Website, which houses a variety of technical assistance materials designed expressly for the small business community.

The ADA Technical Assistance Program has created additional materials designed specifically to assist small business, including:

***ADA Guide for Small Business* - A 15-page document specifically addresses readily achievable barrier removal, providing clear explanations, illustrations, and design guidance. More than 265,000 copies of this publication have been printed and disseminated.**

***Reaching Out to Customers with Disabilities* - A ten-lesson, interactive online course that explains the ADA and how it applies to businesses. This fully accessible course is available on the ADA Website.**

***10 Small Business Mistakes* - A 13-minute video that identifies common mistakes that small businesses make when trying to comply with the ADA, which is available on DVD and in streaming video on the ADA Website.**

For a comprehensive listing of the Division's ADA Technical Assistance materials, please refer to *ADA Materials Available Free from the Department of Justice* located on the ADA Website at http://www.ada.gov/publicat.htm.

- How often does the DRS review the guidance and technical assistance provided to small businesses?

Answer: The Disability Rights Section routinely reviews technical assistance materials to ensure resources provided are accurate and up to date and that there are no duplicative documents. In addition, the Division and the Section identify areas where additional or new assistance compliance materials are needed. Much of the impetus for document development comes from input from the public, including small business, received at speaking engagements and outreach events nationwide.

- Does the DRS work with small businesses and employers to make the. Department's guidance and assistance more useful?

Answer: Yes. As noted above, Division and Section staff regularly participate in training and outreach activities, presenting workshops and speeches at conferences of national trade, disability, and professional groups, and staffing the ADA Information Booth at conferences nationwide. In FY 2006, the Division participated in more than 70 speaking engagements and outreach events, some of which included presentations to the Medical Accessibility Task Force, the American Institute of Architects (VA Society), the Annual TA Program for Small Business Conference (Equal Employment Opportunity Commission), Small Business Listening Sessions in California and Illinois (National Council on Disability), and the Society for Human Resource Management.

Additionally, the Division recently held four ADA Business Connection Leadership meetings, with the American Hotel and Lodging Association, McDonald's USA, the Asian American Hotel Owners Association, and the George Washington University School of Business each serving as hosts for one meeting.

- Are there ways to provide more clarity and protection for small businesses as they seek to comply with the ADA? Will this issue be part of your regulatory review?

Answer: Yes. In our Advance Notice of Proposed Rulemaking proposing to adopt revised ADA design standards and to make certain modifications in the Department's regulations, the Department received more than 900 comments relating to a broad range of issues, including language clarification, the requirements for readily achievable barrier removal, and safe harbor provisions. The Department will again solicit comments in its Notice of Proposed Rulemaking to revise provisions of the Title III implementing regulations.

For a comprehensive discussion of the Division's technical assistance and outreach activities, please refer to "Access for All: Five Years of Progress, A Report from the Department of Justice on Enforcement of the Americans with Disabilities Act" at http://www.ada.gov/5yearadarpt/fiveyearada1.htm.

22. Please describe how the Department of Justice carries out its certification responsibilities as required under the ADA.

- What outreach does the DRS conduct to make States and localities aware of the certification process?
- In your estimation, how effective is certification, once granted by the Department of Justice, in preempting litigation?

Answer: The Department is authorized by Title III of the ADA to certify the equivalence of state or local accessibility requirements voluntarily submitted for certification review. The Department's implementation of the ADA Certification Program enables states and local governments to obtain a determination that the building code requirements used to construct businesses and commercial facilities meet or exceed the ADA's design standards.

Certification is an important tool in the effort to secure compliance with the ADA's requirements for accessible public accommodations and commercial facilities, but the fact that it is voluntary requires that the Department use every available means to convince state and local governments of the benefits of requesting certification.

The Department actively encourages states to pursue certification. We wrote to governors and state executives with responsibility for building codes in more than 40 states in 2003 to encourage certification. In addition, we provide informal guidance to interested state/local officials regarding the prerequisites for obtaining certification review. We include materials emphasizing the benefits of certification to businesses and commercial enterprises in all of our ADA Business Connection meetings and encourage contact with state and local officials to encourage certification.

In this regard, the Department also maintains a presence at the meetings of model building code and standard setting organizations on issues involving model accessibility code requirements. State and local governments frequently rely upon these model accessibility code provisions in establishing their own requirements.

Certification harmonizes state and local accessibility requirements with federal accessibility standards, which increases the likelihood of ADA compliance, reduces regulatory burdens, and lessens the need for costly litigation. By heightening the awareness of local code officials to consider compliance with certified state accessibility requirements in the plan reviews and site inspections they conduct, certification enables them to correct design errors early in the building process, thereby avoiding costly after-the-fact retrofitting to comply with the ADA.

The Department certified North Carolina's accessibility code on November 28, 2005, and celebrated the State's accomplishments in a formal ceremony in North Carolina in February 2006 attended by Assistant Attorney General Wan J. Kim. North Carolina was the sixth state to receive certification, following Washington, Texas, Maine, Florida, and Maryland.

We are working now with California, Indiana, New Jersey, Utah, and the State of Washington in the certification review process (Washington adopted a new accessibility code and submitted the new code for certification review). We are also working with the State of Michigan and the International Code Council (a model code organization) to provide technical assistance concerning the consistency of Michigan's state code and the ICC's model code with the ADA.

The Department believes that certification can be an important deterrent to litigation, but to do so it must be accompanied by effective enforcement of certified accessibility requirements at the state and local level. The Department provides a broad array of technical assistance materials and free information in an effort to support and educate the public, including local code officials, regarding the requirements of the ADA, and many of the jurisdictions that have received certification contact us to address particularly unique accessibility questions or concerns.

Enforcement of the Help America Vote Act of 2002.

23. This coming November was the first general election under which all of the provisions of the Help American Vote Act were enforceable.
    - What did the Department of Justice and the Voting Section doing to ensure that States were in compliance?
    - If States are not yet in full compliance, what are the barriers keeping States from meeting HAVA's requirements?
    - Approximately how many States are not yet in full compliance?
    - Does the Voting Section intend to send Department attorneys to those States that are not in full compliance? If so, how many?

Answer: As of January 1, 2006, virtually all of HAVA's requirements went into effect. In advance of the first year of nationwide implementation of the database and accessible voting system requirements of HAVA, the Division worked hard to assist states to come into compliance and offered significant ongoing guidance on the law's requirements. This cooperative work continued throughout 2006, and into 2007, to help states achieve and maintain full compliance. Where that did not appear possible, the Division brought enforcement actions, filing five lawsuits under HAVA in 2006. Four suits were filed against states for failure to complete the database requirements of HAVA; two of those suits also were for violations of the accessible voting requirements. Moreover, one suit was filed against a locality for

its failure to meet the election day informational posting requirements of HAVA. We also defended three additional lawsuits challenging the congressional mandates of HAVA. In addition, in Pennsylvania, where a state court had enjoined compliance with HAVA, our formal notice to the state of our intended lawsuit assisted state officials in overturning an erroneous lower court decision, so that we did not ultimately need to file to ensure compliance in Pennsylvania.

During CY 2007, we have settled one HAVA claim, against the City of Philadelphia, regarding failures in its accessible voting equipment. There are no regularly-scheduled federal elections in 2007. However, we continue to monitor states' compliance with HAVA and continue to seek cooperative resolutions where we find areas of possible non-compliance. We also remain prepared to file enforcement actions as appropriate to enforce HAVA's mandates.

During CY 2006, the Division deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. On November 7, 2006, more than 800 federal personnel monitored the polls in 69 political subdivisions in 22 states. In CY 2006, we sent over 1,500 federal personnel to monitor elections, double the number sent in CY 2000, which was a presidential election year. Those monitors and observers gathered information regarding HAVA compliance, among other issues. As there are no regularly-scheduled federal elections in 2007, we have no current plans to send monitors or observers to any states this year for a federal election.

24. In 2006, the Civil Rights Division sued the state of Alabama as a result of its failure to create a computerized database of voters as required by the Help America Vote Act of 2002. Last summer, Division attorneys successfully argued that control of the database should be shifted from the Democratic secretary of state to a special master, namely, Republican governor Bob Riley, who had committed to delegating his authority to a bipartisan committee. Critics allege that the Division's stance in this instance was unusually aggressive, and *the New York Times* editorial page characterized this as a case in which -party politics seems to have been a driving force."

- Is it unusual for *The New York Times to* accuse the Department of Justice of partisanship? Did the Alabama papers accuse the Department of partisanship?

Answer: We are not aware of any newspaper in Alabama that accused the Department of partisanship with regard to our lawsuit to enforce the requirement, under Section 303(a) of the Help America Vote Act (HAVA), that Alabama create a statewide voter registration database.

Having served at the Department of Justice for more than a decade, I am always disappointed to hear unfounded charges of partisanship. Our record of even-handedly enforcing federal law best demonstrates that the Division makes litigation decisions that do not turn on partisan considerations.

In this case, hy January 1, 2006, virtually all states were moving rapidly toward full compliance. The Department brought formal enforcement actions against several states for violations of Section 303(a), including New York in March 2006, Alabama in May 2006, Maine in July 2006, and New Jersey in October 2006. The Department also reached an out-of-court agreement with California in 2005 regarding compliance with Section 303(a) and has worked informally on compliance issues with a significant number of other states.

At the time that we sued Alabama, five months after the databases were to be *in use*, Alabama was the only state in the nation that had failed to choose the vendor or software designer who would implement the database required by HAVA. Moreover, Alabama officials testified that they could not guarantee compliance by the time of the 2008 primaries - *six years* after HAVA's enactment, and despite having accepted $41 million in federal funds allocated expressly for that purpose. The Court's Memorandum Opinion and Order of August 8, 2006, summarizes this failure to comply with federal law:

> **On June 13, 2003 . . . the HAVA Committee was formed to advise Defendant Worley on the development of the state plan and to make recommendations on all aspects of the plan. . . . Defendant Worley issued a request for proposals ("RFP") for a new voter registration system on August 12, 2003. On September 10, 2004, a full thirteen months later, Defendant Worley and the HAVA Committee heard vendor proposals. Deliberating in an admirably non-partisan fashion, the HAVA Committee unanimously recommended a vendor to Defendant Worley on December 14, 2004. . . . On May 27, 2005, after five and one-half months, Defendant Worley chose another vendor, ignoring the unanimous recommendation of the HAVA Committee . . . . Three months later, in August 2005, Defendant Worley terminated negotiations with her choice of vendor and issued a revised RFP requesting further bids. As of the filing of this action in May 2006, for aught that appears in the record, no HAVA-compliant system was being developed.**

The Department nonetheless urged voluntary compliance: "Plaintiff maintains that the best outcome, even now, is for Defendants willingly to submit a realistic plan to comply with HAVA." Plaintiff's Response to Defendants' Submission of HAVA Plan, dated July 13, 2006, at 10, filed in *U.S. v. Alabama*, No. 2:06cv00392 (M.D. Ala. May 1, 2006).

In deciding to appoint a special master, the court carefully reviewed the evidence regarding Alabama's lack of compliance. The court held hearings on May 30, July 20, and August 2, 2006. The written evidence included an uncontested factual declaration from the Department of Justice and hundreds of pages of exhibits and documents submitted by both parties, potential interveners, and amici. The court heard oral testimony from a number of witnesses, including a software vendor, counsel for Secretary Worley, and Secretary Worley herself, on more than one occasion. The court invited statements and testimony even from witnesses who were not parties or were not otherwise permitted to join the case.

In its decision, the court explained that it would appoint a special master only because Secretary Worley refused to commit to comply with HAVA before the 2008 presidential primary. As the court noted in its Order,

> **It was against this factual backdrop that the decision to appoint a Special Master was made. In view of her history, the Court simply lacks confidence that Defendant Worley can or will achieve HAVA compliance before the 2008 federal primary election. The Court has repeatedly expressed reluctance to intervene in the affairs of the Secretary of State. The Court must now acknowledge, reluctantly still, that it has no other viable alternative than the appointment of a special master to achieve full and timely HAVA compliance.**

- In Alabama, the local election officials are called probate judges, and about three-quarters are Democrats. Did the probate judges support the appointment of a special master?

Answer: The Alabama Probate Judges Association supported the appointment of the Governor as the special master.

Enforcement Related to Law Enforcement "Use of Force" Cases

25. What are your recent enforcement efforts regarding Section 14141 of the 1 9 4 Violent Crime and Law Enforcement Act, which deals with investigating the patterns and practices of violations of federally protected rights by law enforcement officers?

Answer: The Special Litigation Section investigates patterns or practices of violations of federally protected rights by law enforcement agencies under Section 14141 of the 1994 Violent Crime Control and Law Enforcement Act and the Omnibus Crime Control and Safe Streets Action of 1968, 42 U.S.C. § 3789d. The anti-discrimination provision of this statute prohibits discrimination on the basis of race, color, sex, or national origin by police departments receiving federal funds.

The Civil Rights Division has been active in pattern or practice enforcement across the breadth of the Division through investigations, lawsuits, and settlement agreements. The Division has ensured the integrity of law enforcement by more than tripling the number of settlements negotiated with police departments across the country from 2001 to 2006. During this Administration, the Civil Rights Division has successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved during a comparable time period of the previous administration. The Division also has filed more consent decrees (4 vs. 3) than in the preceding 6 years. In addition, we have issued more than six times the numbers of technical assistance letters to police departments (19 vs. 3).

We are currently conducting ten Section 14141 pattern or practice investigations of police departments and monitoring eight agreements between the United States and police departments. In 2004 alone, the Division initiated four pattern or practice investigations against police departments.

Overall, the Division has obtained significant relief under its police misconduct authority to prevent excessive uses of force, unconstitutional uses of canines, biased policing, and unconstitutional searches and seizures. The Division works with police departments to implement widespread reforms, including training, supervising, and disciplining officers and implementing systems to receive, investigate, and respond to civilian complaints of misconduct. The reforms instituted by large and small police departments pursuant to settlements with various departments have had a widespread impact and are being used as models by other police departments. The Division also cooperatively works with departments large and small to provide valuable expert technical assistance and guidance from experts with years of police management experience.

Employment Discrimination

26. Can you please describe recent enforcement efforts regarding Title VII of the 1964 Civil Rights Act?

Answer: The Civil Rights Division remains diligent in combating employment discrimination, one of the Division's most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission (EEOC). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive.

One recent case highlights our efforts. In *United States v. City of New York*, filed on May 21, 2007, the Division alleged that since 1999, the City of New York has engaged in a pattern or practice of discrimination against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York (FDNY) in violation of Title VII. Specifically, the complaint alleges that the City's use of two written examinations as pass/fail screening devices and the City's rank-order processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have resulted in disparate impact against black and Hispanic applicants and are not job related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII, and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

In Fiscal Year 2006, we filed three complaints alleging a pattern or practice of employment discrimination. In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the city will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. On June 15, 2007, the court provisionally entered a consent decree in the City of Chesapeake litigation. Under the decree, the City will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the City's use of a math test as a pass/fail screening device. The City also will provide priority job offers for African-American and Hispanic applicants who are currently qualified for the entry-level police officer job but were screened out solely because of their performance on the math test. The City will provide retroactive seniority to such hires when they complete the training academy. In addition, the City agreed that, while it will still use scores on the mathematics test in combination with applicants' scores on other tests, it will not prospectively use the mathematics test as a stand alone pass/fail screening device.

Public School Desegregation Consent Decree Cases

27. Can you please describe recent efforts regarding the Division's examination of existing school desegregation consent decrees and court orders?

Answer: The Division continues its important work of ensuring that equal educational opportunities are available on a non-discriminatory basis. We remain active in pursuit of the Section's mission and continue to pursue desegregation as a goal. The Division currently is a party to approximately 265 elementary and secondary school desegregation cases. To ensure that districts comply with their obligations, the Division actively reviews these desegregation cases to monitor issues such as student assignment, faculty and staff assignment and hiring, transportation policies, extracurricular activities, the availability of equitable facilities, and the distribution of resources.

In addition to investigations conducted in districts where full case reviews have been initiated, the Section has opened more than 100 investigations since the beginning of FY 2004 – an average of well over 30 new investigations each year. This compares to the average of 16 new investigations opened by the Section in the last three years of the previous Administration (the only years for which we have such figures). These new investigations include more than 30 concerning desegregation issues. From the start of FY 2004 to the present, we have obtained litigated relief, entered into consent decrees, or engaged in out-of-court settlement agreements in more than 90 instances. The relief we have received includes: eliminating one-race classrooms and schools; ensuring non-discriminatory hiring and promotion of faculty and administrators; improving facilities and educational opportunities at one-race minority schools; eliminating transfers that hinder desegregation; and eliminating racially separate class superlatives and honors.

Attachments on file with the Committee on the Judiciary.

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