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EMPLOYMENT SECTION OF THE CIVIL RIGHTS DIVISION OF THE U.S. 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

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EMPLOYMENT SECTION OF THE CIVIL RIGHTS DIVISION OF THE U.S. DEPARTMENT OF JUSTICE

TUESDAY, SEPTEMBER 25, 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 10:05 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

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

Staff present: David Lachmann, Subcommittee Chief of Staff; LaShawn Warren, Majority Counsel; Keenan Keller, Majority Counsel; Susana Gutierrez, Professional Staff Member; Crystal Jezierski, Minority Counsel; and Paul B. Taylor, Minority Counsel.

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 continue the Subcommittee's oversight of the Civil Rights Division of the Department of Justice. Today, the Subcommittee will focus on the work of the Employment Section of the Civil Rights Division.

The Chair now recognizes himself for 5 minutes for an opening statement.

Before we begin, I would like to take note of the fact that today is the 50th anniversary of the integration of Central High School in Little Rock, Arkansas. When those nine brave students walked into that school, they made a mark on American education and paid tribute to our civil rights. Fifty years later, while discrimination has been erased from most of our laws, it has yet to be fully achieved in our actions.

It is partly through the work of this Subcommittee, the full Committee and Congress that I hope we can soon see the day where equality is found both in our hearts and deeds. Deny an otherwise qualified person a job and you deny that person's dignity, the ability to feed his or her family, possible health insurance and all the necessities that go along with gainful employment. Deny someone a job this person has trained for or has worked at for many years and you are destroying what might be a lifetime of work.

One of the most important missions of the Department of Justice is to protect all Americans against employment discrimination on the basis of race, religion, gender, disability or natural origin. Hopefully, in the not-too-distant future, we will add to that list sexual orientation and gender identity, but that is a battle for another day.

Today, we are concerned with how well the Department of Justice is enforcing the present laws. In many other areas, this Committee has brought to light decisions made at the Department of Justice that seem to have been guided more by political considerations than by the merits of an issue. Sometimes, it is not so much politics as ideology.

Today, we will examine a number of cases in which the department seems to have gone against established civil rights policy or even turned its back on consent decrees to which it had committed itself. As in other parts of the department, we have received reports of poor morale, departures of career staff and political interference with the section's important work.

I am concerned that this pattern may also be present in the employment section. The Justice Department's Employment Litigation Section is mandated to enforce title VII of the Civil Rights Act of 1964 and various other civil rights laws that prohibit employment discrimination.

As challenges to discriminatory employment practices are usually factually and legally complex and often take several years to litigate, the Justice Department is uniquely positioned to lead the charge in those cases.

The Bush administration, however, has filed only 47 title VII cases since 2001. By comparison, the Clinton Administration filed 34 cases in its first 2 years and a total of 92 by the end of its term. Also, in many cases, the current Justice Department has reversed the position taken by all previous Administrations in the middle of a case or has opposed settlement to which the department had previously been a party. One of the witnesses has been a victim of discrimination in such a case and will describe her experience.

Also at issue is the exit of a significant number of career lawyers in the section and the hiring of lawyers who have little experience in civil rights. There is nothing more un-American than bigotry. Or maybe we should say that there is nothing more typical of history both in America and elsewhere than bigotry, but we want to make it very un-American.

When those charged with fighting discrimination fail to do so, the Government provides tacit support for discrimination. Discrimination destroys families and tears at the fabric of our Nation.

We are at our strongest as a people when we use the talents and abilities of all of our citizens to their fullest extent. To that end, the enforcement of our discrimination laws must be above partisan and political influence.

The promise of our Nation's civil rights laws is only met when the Justice Department applies them aggressively and in an even-handed fashion. We will examine today whether that promise is being kept by the current Justice Department.

I look forward to our witness testimony and I thank you for being here to testify.

I would now recognize our distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman, and thank you, Mr. Agarwal. I appreciate you being here.

Among other things, the Employment Litigation Section of the Department of Justice enforces against State and local government employers the provisions of title VII of the Civil Rights Act of 1964 and of other Federal laws prohibiting employment practices that discriminate on the grounds of race, sex, religion and national origin.

I look forward to the testimony today as I, like all of us here, want to be assured that the employment section is adequately enforcing these essential civil rights laws. The litigation handled by the section is of national importance, as it speaks to the principles that define America's kindness, compassion and core essence.

Its attorneys are to be commended for their tireless dedication to enforcing the law, which extends to every corner of complex litigation, from investigations to filing motions, from settling negotiations to trials, from the monitoring and enforcement orders to the securing of remedial relief.

I am particularly encouraged that the employment section appears to be putting forth appropriate resources into the prosecution of religious discrimination cases.

In the *United States v. Los Angeles,* the Metropolitan Transit Authority, for example, the section alleged that the MTA was engaged in a "pattern or practice" of religious discrimination by not reasonably accommodating employees and applicants for employment as bus operators, who in accordance with their religious beliefs, are unable to work weekends.

In another religious discrimination suit, the *United States v. New York Transit Authority,* the section alleged that the New York authority has engaged in a pattern or practice of discrimination against Muslim and similarly situated employees who wear religious head coverings by not reasonably accommodating their religious beliefs and by selectively enforcing its uniform policies.

Mr. Chairman, religious freedom is at the core foundation of all other freedoms, and though America often fails to enforce the laws protecting against religious discrimination as we should, we still do it better than anyone else in the world. And I believe that the even-handed defense of religious freedom, across the board of all religious perspectives, is vitally important and, again, is at the core of who we are as Americans.

The Employment Section also has enforcement responsibility for the Uniformed Service Employment and Reemployment Rights Act of 1994. As a Member of the Armed Services Committee, I believe it is essential that the employment rights of those who serve in the military are protected with as much vigor as our men and women in uniform apply in defending all of us.

The Uniformed Service Act protects veterans of the armed services when they seek to resume their jobs upon returning from serving the United States in some foreign battlefield or otherwise. And it helps guarantee that they will return to their civilian positions

with the seniority, status, rate of pay, health benefits and pension benefits they would have received if they had never left.

I understand that in fiscal year 2006, the Employment Section filed four complaints in Federal district court and resolved six cases under the law. I look forward to hearing about those cases in more detail, and I am pleased to hear that the Department of Justice recently launched a Web site for service members, www.servicemembers.gov. It explains the rights of service members under this law, as well as their rights under the Uniform and Overseas Citizen Absentee Voting Act.

And, with that, I look forward to hearing from all of our witnesses in the defense of religious freedom.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you. In the interest of proceeding to our witnesses and mindful of our busy schedules, I would ask other Members to submit their statements for the record.

Without objection—I will revise that. The Chairman of the full Committee will now be recognized.

Mr. CONYERS. Thank you, Mr. Chairman.

And to the Ranking Member and to my friend from California, who joins us on this very important morning, the reason I want to use a few minutes to make an opening statement is that we have a political deputy assistant, Mr. Agarwal, who we welcome. But the person we probably should have had was attorney Kay Baldwin.

And I regret that Mr. Agarwal is going to have to take the burden for her, because the department is in pretty bad shape, lots of people leaving, lots of people being moved around. But the enforcement priorities at the Employment Section have taken a dangerous turn.

We are left to grapple here with allegations of partisan politics that have infected both the hiring, the promotion and the substantive work of the section. Even the most cursory glance at the section's docket, as outlined by the Chairman and detailed in written testimony, shows the marked decline that Mr. Nadler has referred to in the enforcement of employment discrimination laws.

The only thing I can think of is that this section, like the department, thought they would never be oversighted and called to be held in account this morning for what is going on over there. That is the only thing I can think of that would have such a dismal, retrograde record of nonaccomplishment.

It is absolutely shocking and the Administration has turned against parties it formerly assisted and taken directly adverse positions in the same litigation.

Now, while it is important to protect the rights of all Americans, I am troubled by this significant decline of title VII litigation on behalf of African Americans and Latinos, as demonstrated by the docket. Seven cases on behalf of African Americans and Latinos, out of 3,200 referrals for prosecution, from the employment board.

This is inexcusable. And over the last decade, there has been an assault on progressive enforcement of employment discrimination laws. The premise behind the retreat is that discrimination in our society has supposedly receded. However, any review of the evidence indicates that discrimination continues to still be persistent and widespread.

And while the nature of this discrimination has changed, moving from de jure form in the old days, when segregation was openly sanctioned, to the more subtle de facto form of the same problem in the 21st century.

If you look at the actual evidence, in critical areas, such as employment, housing, education and, most notably, our justice system, you see there is an overwhelming evidence of ongoing discrimination in our society. With regard to employment, the bipartisan Glass Ceiling Commission found that nearly all, 95 percent, of the top corporate jobs in America are held by White males, with African Americans holding less than a percent of top management jobs. Women holding 3 to 5 percent of senior-level positions.

Black unemployment has also found to be twice that of White unemployment in our national statistics. A recent study in which college students posed as job applicants found that a White male with a criminal record had better employment prospects than a Black man with no record whatsoever.

The disadvantage carried by a Black man applying for a job as a dishwasher or a driver is equivalent to forcing a White man to carry an 18-month prison record on his back. The American public also has few illusions about employment opportunity.

A Gallup poll asked, do you feel that racial minorities in this country have equal job opportunities as Whites, or not? Among Whites, the answer was 55 percent yes, among Blacks, the answer was 17 percent yes.

Prior to this Congress, there has been virtually no scrutiny of the problem of remedying employment discrimination. And so the real question facing the Committee today is how to secure an effective role of the department in eliminating the underlying causes of employment in the 14 months or so that we have left.

And I will submit the rest of my statement for the record and thank the Chairman for his courtesy.

Mr. NADLER. Thank you.

In the interest of time, we would encourage other Members to submit their statements for the record. But I will recognize Mr. Issa, who has requested recognition.

Mr. ISSA. Thank you, Mr. Chairman, and I will be brief.

I want to associate myself with the Ranking Member, particularly on the issue of the most basic of all the enforcements that we need done by our Government, and that is support of the first amendment, where Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.

In fact, we often hear the first amendment talked about in terms of freedom of the press, and not in fact the freedom of people to practice their religions and to be free from employment discrimination for practicing those religions.

So as we go through this process, I would like to, one, associate myself with the Ranking Member and, two, distance myself from the Chairman of the Subcommittee, who clearly has an agenda, at a time in which the full Committee Chairman says we are not doing enough about Latinos and African-Americans, meaning we are not doing enough about those who may be discriminated based on race—who wants to add sexual persuasion, orientation and the

like, those which are by no means spoken of in the Constitution or by current law.

So I would encourage this Committee to focus on ensuring that those which there is uniform agreement on must be enforced—race, religion, national origin, be strictly enforced. And until we can get to where this Committee on a bipartisan basis believes a good job is being done, we should not tread onto territory that is by definition filled with new opportunities to fail in enforcement.

And I thank the Chairman for yielding the time, and I yield back.

Mr. NADLER. I thank the gentleman. I would encourage the gentleman to join me and others, then, in getting the department the resources to deal with all the discrimination so they don't have to choose between religion and racial discrimination.

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. Hopefully we will not do that.

We will now return to our witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority in the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn 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 a short time.

Our first witness today is Asheesh Agarwal—I hope I pronounced that correctly—one of the deputy assistant attorneys general who report directly to the head of the Civil Rights Division at the Department of Justice's acting assistant attorney general, Rena Johnson Comisac.

Mr. Agarwal is a 1997 graduate of the University of Chicago Law School, and we welcome him here today.

Welcome. Your written statement will be made part of the record in its entirety. I would now ask that you summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. I am sure you are aware of that. When 1 minute remains, the light will switch from green to yellow and then red, when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses. If you could please stand and raise your right hand to take the oath. Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct to the best of your knowledge, information and belief?

Mr. AGARWAL. I do.

Mr. NADLER. Let the record show that the witness answered in the affirmative. You may be seated.

Sir?

TESTIMONY OF ASHEESH AGARWAL, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION

Mr. AGARWAL. Thank you.

Mr. Chairman, Ranking Member Franks, Members of the Subcommittee, it is a pleasure to appear before you to represent President Bush, Acting Attorney General Keisler and the dedicated professionals of the Employment Litigation Section of the Civil Rights Division.

I am pleased to report that the division continues to vigorously combat employment discrimination using all of the provisions of title VII on behalf of all Americans. Those provisions include both section 707 of title VII, which bars employers from engaging in a pattern or practice of discrimination and section 706, which bars individual acts of discrimination.

The division has been extremely proactive in using section 707. Thus far, in fiscal year 2007, we have filed or authorized three pattern or practice cases. We also resolved another suit under section 707 on behalf of African-American and Hispanic employees.

In fiscal year 2006, we filed three more complaints alleging a pattern or practice of employment discrimination and obtained settlement agreements or consent decrees in six other cases.

Therefore, in the past 2 years, we have filed six pattern or practice cases and resolved seven others under section 707. These cases include some very significant ones that have the potential to benefit a large number of employees.

On May 21st, 2007, we filed a title VII lawsuit against the largest fire department in the country, the Fire Department of New York. Our complaint alleges that the city of New York's use of written exams discriminates against Blacks and Hispanics in the hiring of entry-level firefighters.

As outlined in our complaints, FDNY employs 11,000 uniformed firefighters. However, only about 3 percent of those employees and only about 4.5 percent are Hispanic.

Our suit seeks to force the city to end its discrimination against Black and Hispanic firefighter applicants. We also seek remedial relief for those firefighter applicants who have been harmed by the city's use of the challenge exams.

We recently obtained such relief in another significant lawsuit. On June 8th of this year, the department announced the settlement of a lawsuit against the city of Chesapeake, Virginia.

Like the FDNY suit, this lawsuit alleged that the city's use of a math exam unlawfully discriminated against Black and Hispanic entry-level police officer applicants. Under the terms of the settlement agreement, Chesapeake will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the use of the math test as a pass-fail screening device.

The city will also provide priority job offers for African-Americans 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.

In addition to title VII, the section works closely with the Department of Labor to vigorously enforce the Uniform Services Employment and Reemployment Rights Act, or USERRA.

USERRA protects the employment rights of our brave men and women serving in the armed forces. In fiscal year 2006, the division filed four USERRA complaints in Federal district court, including the first USERRA class action complaint ever filed by the United States. We also resolved six USERRA cases.

Thus far, in fiscal year 2007, we have filed five USERRA complaints in district court and resolved five other cases. One particular case highlights the importance of USERRA.

In the case *McKeage v. Town of Stewartstown,* New Hampshire, Staff Sergeant Brendon McKeage had been employed as the chief of police for the town of Stewartstown. While Staff Sergeant McKeage was on active duty in Iraq, the town sent him a letter, telling him that he no longer had his job with the town.

When the citizens of Stewartstown learned that their chief of police had been terminated while servicing his country abroad, they voted to censure the town for its "illegal and outrageous."

Despite this public censure, the town still refused to reemploy Staff Sergeant McKeage into his former position. After we learned about this case, we notified Stewartstown that we intended to sue. Once we did, the town decided to settle the case and the settlement terms include a payment to Staff Sergeant McKeage of $25,000 in back wages.

This case, and similar cases, demonstrate the continued need for this important statute. As all of these cases indicate, the Civil Rights Division has vigorously enforced and will continue to vigorously enforce, the provisions of title VII and USERRA.

The division looks forward to continuing to work closely and cooperatively with this Committee in its effort to combat employment discrimination on behalf of all Americans.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Agarwal follows:]

PREPARED STATEMENT OF ASHEESH AGARWAL

STATEMENT OF
ASHEESH AGARWAL
DEPUTY 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
"EMPLOYMENT LITIGATION SECTION, CIVIL RIGHTS DIVISION, OVERSIGHT"

SEPTEMBER 25, 2007

Thank you. Mr. Chairman, Ranking Member Franks, Members of the Subcommittee, it is a pleasure to appear before you to represent President Bush, Acting Attorney General Keisler, and the dedicated professionals of the Employment Litigation Section of the Civil Rights Division.

I am honored to serve the people of the United States as a Deputy Assistant Attorney General for the Civil Rights Division. I am pleased to report that 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.

We have filed or authorized three pattern or practice cases thus far in Fiscal Year 2007. One of these cases highlights our efforts in enforcing Title VII. In *United States v. City of New York*, filed against the nation's largest fire department 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 African-American and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York 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 a disparate impact against African-American 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.

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.

In Fiscal Year 2006, the Division obtained settlement agreements or consent decrees in six cases alleging a pattern or practice of discrimination. One example is a pattern or practice case the Division brought against the State of Ohio and 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 actively enforces Section 706 of Title VII. In addition to *United States v. City of New York*, which was filed under Section 706 as well as Section 707 of Title VII, thus far in Fiscal Year 2007 the Division has filed nine other lawsuits under Section 706. The two most recent lawsuits filed under Section 706 are *United States v. Robertson Fire Protection District*, filed on July 17, 2007, and *United States v. Spartanburg County South Carolina*, filed on August 13, 2007. In *Robertson Fire*, we alleged discrimination on the basis of race and retaliation against two African-American former employees of the Fire Protection District. In

Spartanburg, we alleged discrimination on the basis of sex against a former female employee.

The Division also has enforcement responsibility for the Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA). USERRA prohibits employment discrimination on the basis of military status. USERRA also protects the civilian employment rights of reservists and other uniformed servicemembers who are called to active duty. This important statute enables those who serve our country to return to their civilian positions with the same 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 five USERRA complaints in district court and resolved five cases. Additionally, the United States Attorney's offices have resolved three cases this fiscal year. One case resolved in the current fiscal year is *McKeage v. Town of Stewartstown, N.H.* In that case, the town sent Staff Sergeant Brendon McKeage a letter while he was on active duty in Iraq telling him he no longer had his job with the town. McKeage had been employed as the Chief of Police for the Town of Stewartstown. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the Town for its "outrageous and illegal" conduct. Despite this public censure, the Town still refused to reemploy SSG McKeage in his former position. Once we notified Stewartstown that we intended to sue, the employer decided to settle the case. The settlement terms include a payment to SSG McKeage of $25,000 in back wages.

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 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).

The Civil Rights Division has vigorously enforced, and will continue to vigorously enforce, the provisions of Title VII and USERRA.

Mr. NADLER. Thank you.

We will start by the Chair granting himself 5 minutes.

Mr. Agarwal, in the *Burlington Northern and Santa Fe Railway Company v. White* case, the department urged a very narrow interpretation of title VII's anti-retaliation provisions, contrary to the EEOC's longstanding interpretation.

Ultimately, when the case went to the Supreme Court, eight justices, with the exception only of Justice Alito, rejected the department's reading as inconsistent with title VII's plain language and its underlying purpose.

How do you reconcile the department's position in this case with the Supreme Court's decision? And what was the basis of the department's decision to reject the longstanding EEOC interpretation of the scope of the retaliation provision under title VII of the Civil Rights Act, the rejection by the department, which was then repudiated by the Supreme Court?

Mr. AGARWAL. Thank you, Mr. Chairman. The department determined its position through the solicitor general by analyzing the statutory language, the case law and the legislative history.

In that case, at the time we filed our brief, six circuit courts of appeal, including a majority of all circuit courts of appeals that had addressed the issue, agreed with the position taken by the department.

Justice Breyer, in his majority opinion, acknowledged that it was a very close case. And Justice Alito, in his concurring opinion, noted that it was very difficult to reconcile section 703 and section 704 of title VII.

In addition, I would note that the Supreme Court reached the same result advocated by the United States, albeit on the different grounds.

Mr. NADLER. But the interpretation stands differently now, back where the EEOC had urged it.

Mr. AGARWAL. It is correct, your honor, that the Supreme Court decided the case on different grounds than had been advocated by the——

Mr. NADLER. And we are back with the EEOC interpretation as preceding?

Mr. AGARWAL. That is correct.

Mr. NADLER. Thank you.

During this Administration, the EEOC has referred over 3,200 cases of discrimination under title VII, yet of these cases the DOJ has filed suit in only seven cases. Why so few, seven out of 3,200?

Mr. AGARWAL. Thank you, Mr. Chairman. I think you need to put those numbers into historical context to fully appreciate what they mean.

During the last 4 years of this Administration, we have filed suit on between 1 to 2 percent of EEOC referrals sent to us. That is the same percentage as were filed during the last 4 years of the Clinton administration.

Mr. NADLER. And yet, as I referenced in my opening statement, the number of cases has gone down rather drastically.

Mr. AGARWAL. Again, I think to fully appreciate what those numbers mean, I would urge the Committee to also look at the success

rate that the department has had. In our cases, we have prevailed in every pattern and practice case, with one exception——

Mr. NADLER. We haven't gotten to pattern and practice yet. We are talking about individual cases for the moment.

Mr. AGARWAL. And, again, I think if you put those numbers into historical context, we are doing about as much in terms of filings as our predecessors. And I would also note——

Mr. NADLER. Wait a minute. You file 1 to 2 percent currently and historically, you are saying, of the referrals by the EEOC.

Mr. AGARWAL. That is correct.

Mr. NADLER. And yet the number of referrals and the number of filings has gone down considerably. Given the fact—I mean, 1 to 2 percent sounds like an awfully low numbers. If the number of referrals has gone down—this is essentially what you are saying. So it is only 3,200, I don't know what it was before, 4,000, let us say, shouldn't you then have the resources to up the percentage, to go to 3 percent?

Mr. AGARWAL. I am not sure that it is the resource issue, Mr. Chairman. Since joining the division last year, I have made it a priority to have the Employment Litigation Section reach out to the EEOC to determine if there are ways in which we can improve our already-good cooperation.

One of the first things that I did upon joining the division was to reach out to Naomi Earp, who is the chairwoman of the EEOC. And during the course of the last year, members of the leadership of the section have flown around the country to meet with EEOC regional attorneys to determine if there are ways——

Mr. NADLER. Let me ask you one question before going on to pattern and practices. Why is it that under this Administration, and previous Administrations, only 1 or 2 percent of cases are filed of the referrals that the EEOC thinks are legitimate cases, if it is not a resource question?

Mr. AGARWAL. That is a very good question, Mr. Chairman. And I would note that the EEOC itself only brings suit on a relatively small percentage of charges that are filed with it.

Mr. NADLER. But that is not an answer.

Mr. AGARWAL. Not all of the cases in which the EEOC finds reasonable cause end up being suit worthy after each department——

Mr. NADLER. Yes, but 1 to 2 percent?

Mr. AGARWAL. Those are what the numbers have been historically. And, after further investigation has been done, sometimes we find that they are just simply not appropriate.

Mr. NADLER. Alright.

My last question is the Employment Section has brought very few title VII pattern and practice cases. On average, you filed about a third fewer pattern and practice cases than the previous Administration each year. Given that employment discrimination is still a significant problem, why has the number of pattern and practice cases gone down by about a third?

Mr. AGARWAL. Again, Mr. Chairman, I would take issue, respectfully, with that characterization. We have filed, during this Administration, on average two pattern and practice cases a year. That is the same average as happened during the last 4 years of the Clinton administration.

In addition, we have filed three pattern and practice cases within the last fiscal year and six within the last 2 fiscal years.

During the last 3 years of the Clinton Administration, they filed three pattern and practice cases, total. So in the last 2 years, we managed to double that amount.

Mr. NADLER. We can get back to those statistics later, but my time is expired.

I recognize the Ranking Member of the Subcommittee, Mr. Franks.

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

And, again, Mr. Agarwal, thank you. I suppose one of the dark marks on any nation is the practice of discriminating or abrogating of the civil rights of their fellow human beings within society. And that is also true of the United States, especially since the very core essence on which we were founded is that we held certain truths to be self-evident, that all men were created—and women—and that this is what made them equal.

I find the great tragedy, somehow, in civil rights discrimination is that somehow the intent is to miss the miracle of each human being and somehow to forget that each person is a child of God. And what concerns me is that somehow we have forgotten, as 2-year-olds understand, they can be a colorblind society, they are fascinated by one another's differences, but never are they instigated toward discrimination or toward diminishing each other on that basis.

So I guess one of the things that disturbs me a little bit is this term, "reverse discrimination." It is a hard one to address, but I guess first of all I want to ask a really hard thing of you. Can you define reverse discrimination for me?

Mr. AGARWAL. I think as that term has been used, it refers to discrimination against White Americans, Caucasians.

Mr. FRANKS. Yes, well, I think you are right, obviously, but I would maintain that reverse discrimination is kind of a misnomer that should be discarded, because, first, it suggests that a member of the majority cannot suffer discrimination. Of course, that is not true. The chromosomes that one inherits, whether Black or White or otherwise, and the percentage of similarly born individuals, should not determine the extent of one's protection under civil rights laws.

I know that your office has recognized that. The reason I believe that is so important is because if we can truly look at this on the basis of a totally colorblind perspective, I think therein lies the hope of somehow, someday, making your office totally unnecessary. And I hope that we can do that.

Do you agree, obviously, that all Americans, even those that are of a predominant race or religion, should deserve equal protection under the law?

Mr. AGARWAL. Absolutely, Ranking Member Franks.

Mr. FRANKS. So let me just give you a snowball question here and ask you if you could give us an overview of the cases that you prosecuted regarding religious discrimination over the years.

Mr. AGARWAL. Thank you for that question. We have filed four pattern and practice cases alleging religious discrimination during this Administration.

In your opening statement, you referenced our case in Los Angeles. I will also tell you a little bit more about our case that is pending against the New York Transit Authority.

In that case, New York had a policy of allowing individuals to wear head coverings, turbans, khimars, baseball caps, prior to September 11th. After the events of that day, they changed their policy to selectively enforce it.

So after the change in policy, individuals could wear baseball caps, for example, but they couldn't wear turbans or khimars. And it is our position that they have been unable to justify that selective enforcement.

And we think it is particularly important after the events of September 11th to enforce title VII's prohibitions on religious discrimination, certainly on behalf of all Americans, but in particular on behalf of Muslim Americans.

Mr. FRANKS. Are there any emerging trends or patterns that seem to be changing in the whole enforcement mechanism? What do you see out there as far as trends that you either find encouraging or ominous?

Mr. AGARWAL. We are actually very encouraged by the level of cooperation we have received from Muslim and Arab groups. We have had very good outreach with those groups and we feel like we have a very good pipeline of information such that if any members of those group feel like they are suffering discrimination, they are able to call the Civil Rights Division and get a prompt response.

We have monthly meetings with those groups and we like to feel that we are on top of this.

Mr. FRANKS. Well, Mr. Agarwal, I guess I would just end with sort of a narrative a little bit on the situation we have in Guantanamo. I know it seems completely unrelated, but I find it unique that in the United States, in a prisoner of war camp, that we paint arrows on the floors there at taxpayer expense, aiming toward Mecca.

We have a taxpayer-funded system for the P.A. there, that people can have their prayers broadcast five times a day for 20 minutes. We bring in special food for their religious practices. We buy prayer cloth. We buy prayer rug. We buy the Koran that can only be held with rubber gloves. We do a great deal to try to accommodate religious freedom, and I think that is altogether appropriate.

Because if we forget, as a people, that religious freedom is at the core of the rest of our freedoms, then I am afraid we will lose them all.

Thank you, sir.

Mr. NADLER. Thank you. Before I call on the Chairman of the Committee, let me congratulate you on the head covering case against the New York Transit Authority.

But I also ask you, what is a khimar?

Mr. AGARWAL. A khimar is a head covering worn by Sikhs, people of Sikh faith.

Mr. NADLER. Thank you.

I now recognize the distinguished Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Well, Mr. Chairman, this is one of the more amazing hearings I have ever been before, attended and participated in.

Now, I am being explained by this deputy that not only is everything okay, but it is the way it went during the Clinton administration, so we should all be proud of the job you are doing. I mean, I find this an incredible hearing on that basis.

I have got one, two, three, four, five—four questions that are based on cases that have come out of this section. But clearly we are either going to have to have some more meetings off the record or informally, not hearings like this where there are the 5 minutes back and forth.

It has been my impression for years that employment discrimination has been under-prosecuted, left unattended, ignored. And now, on the 25th of September, I am told that really, Congressman, wherever you got those impressions, everything is really not only okay, but it is like it was during Clinton.

Well, let me tell you something. The Clinton administration didn't leave me breathless either, so telling me that you are not any worse than they are does nothing for me whatsoever. I mean, let me make that very clear.

So what this hearing devolves around now is either your section has been unbeknownst to the Chairman of this Committee, been doing a pretty good job, because we are not here to demand that you become superlative if you are doing okay. We would encourage you.

But you are telling me that things aren't as bad as most people think they are, especially the people who are discriminated in this case, that they just don't understand. And so far, listening to this hearing, I don't think they are going to understand.

But I have a responsibility to get to the bottom of this, and so what I want to suggest is that this Subcommittee and all those interested meet with you and all the people in the first row, or others, so that we really begin to learn what is really coming off here.

For us to be arguing back and forth and talking about reverse discrimination should be analyzed in a color-free society, I don't know what zone that takes me out to. But this finding of reverse discrimination is just absolutely mind blowing.

I mean, we are now having cases coming forward where White people are being racially discriminated against, frequently by a minority person themselves. I find all of this totally unacceptable.

I am going to leave you the questions I would have presented for you to send back in writing.

But, Chairman Nadler, we have got to get to the bottom of this, and I am not sure if this mechanism—because Members have to feel inclined to do their little political defense or attack or whatever it is. We do that little dance in nuanced terminology.

But we are in a society where we don't even have a full employment system in America. I mean, our country is being ravaged by growing numbers of people that, one, don't have a job, but growing numbers of people that have a job that are afraid they are not going to have a job, not through discriminatory practices, but through economic policy.

We have growing numbers of people that desperately need part-time work, and poverty gives way to a lot of social maladjustment in our society. Poverty is the source of lots of problems.

Dr. Paul Farmer calls it the pathologies of power, of a people that are locked in and can't get out, and we are meeting here with a great attitude that our records are great. We are working hard as anybody that you have ever seen over there, and so we should be happy about it.

I am very, very dismayed about this, and I propose to meet with the Members of this Committee and its Chairman to determine how we really do that.

To tell me that you prosecuted six out of 2,300 cases referred for possible prosecution, and say, well, that is as good or better than anybody that preceded us, that is not a good answer. That is unacceptable to me.

We are trying to eliminate discrimination based on race or sex in this country. And we can't do it by defending in this kind of way.

So I thank you for your kind attention and hope I gain your cooperation after this hearing.

Mr. AGARWAL. Absolutely, Congressman.

Mr. NADLER. Thank you.

I now recognize for 5 minutes the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. Mr. Chairman, I appreciate it. I am fine at this time. I would yield time to my Ranking Member if he would like, but if not, I am fine.

Mr. NADLER. The gentleman yields back. I now recognized the gentleman from Alabama for 5 minutes.

Mr. DAVIS. Thank you, Mr. Chairman.

Let me make sure I am pronouncing your name right, sir. Is it Agarwal?

Mr. AGARWAL. Agarwal.

Mr. DAVIS. Thank you, Mr. Agarwal. Let me pick up where my Chairman left off and where the Chair of the Subcommittee left off. Let me try to put these numbers in some perspective.

How many times in the Bush administration era, since 2001, has the Civil Rights Division of the Department of Justice brought an action against a Fortune 500 company?

Mr. AGARWAL. With respect, Congressman, the Employment Litigation Section has jurisdiction over State and local employers.

Mr. DAVIS. You have no jurisdiction over private employers, whatsoever?

Mr. AGARWAL. Our jurisdiction over private employers is limited to USERRA.

Mr. DAVIS. Okay. I was not aware of that. Well, let me shift to another question, then. What about criminal prosecutions? What is the most significant criminal prosecution that your department has brought, in your opinion?

Mr. AGARWAL. Congressman, we have brought a number of criminal matters as part of our cold case initiatives to examine civil rights era murders that took place.

I should note, however, that I don't oversee our criminal section, so my knowledge of that area is somewhat limited, with apologies, Congressman.

Mr. DAVIS. What about voter suppression cases under the voting rights division, cases where there is an effort to suppress or to

thwart someone's capacity to exercise the right to vote. Has the department brought a single case that fits that category?

Mr. AGARWAL. Again, with respect, Congressman, cases such as that would be within the purview—typically would be within the purview of our criminal division, and I am just not up to speed on those figures.

Mr. DAVIS. Well, I think you are the third individual from the Administration who has testified in my limited tenure on the Committee. And I have asked the voter suppression question three times and the answer I have gotten each time has been check with somebody in another desk.

Mr. AGARWAL. Congressman, I will be happy to take that question back to the department, and we will get an answer for you.

Mr. DAVIS. Let me pick up another area. One of the criticisms that, as you know, have been raised, is that there has been some tendency on the part of the department to change positions, to have taken one set of decisions and then to have changed it, to have decided that, well, we initially thought this was an example of discrimination and then to decide, no, we no longer think that.

Let me turn to one case the Supreme Court ruled on 2 years ago, *Burlington Northern and Santa Fe Railway v. White,* retaliation case. The issue in the case, as I understand it, is the scope of the retaliation clause in title VII.

You are aware of that case, Mr. Agarwal?

Mr. AGARWAL. Yes, sir.

Mr. DAVIS. As I understand it, the Justice Department took a narrow interpretation, did it not, of what the retaliation clause meant? Is that a fair interpretation?

Mr. AGARWAL. Yes, sir, it is. We took a slightly narrower rationale than was adopted by the Supreme Court.

Mr. DAVIS. You took a narrower rationale than the EEOC had typically adopted.

Mr. AGARWAL. That is correct.

Mr. DAVIS. And the Supreme Court ultimately rejected the department's position?

Mr. AGARWAL. That is correct. Congressman Davis, as I——

Mr. DAVIS. In fact, wasn't it an eight-to-one ruling?

Mr. AGARWAL. That is correct, Congressman.

Mr. DAVIS. Slow down for 1 second, because we have a limited amount of time, and I want to make sure I pursue this. What does that say to you, Mr. Agarwal, that you have presumably trained lawyers who are knowledgeable about the scope of title VII and the retaliation clause, and your trained lawyers came up with a position that eight justices rejected.

It is not an eight-to-one liberal court. I think it is thought anecdotally to be a five-to-four conservative court, sometimes six to three on these issues. Who was the one?

Mr. AGARWAL. Justice Alito wrote a concurrence in that case.

Mr. DAVIS. And he is the new guy. What does it say to you that eight justices on a conservative court disagreed with the department's interpretation of the retaliation clause in title VII.

Mr. AGARWAL. Congressman, at the time the department submitted its brief, six circuit courts of appeals, including a majority of the circuit courts that had addressed the issue, agreed with the

position that we ultimately took, including the sixth circuit in that case.

Justice Breyer, in his majority opinion, acknowledged that it was a very difficult case.

Mr. DAVIS. Well, let me try to put this in some perspective, because I think the Chairman used his time wisely to make a very broad point, and I will echo that. Some of us have the expectation that the Department of Justice seeks to thwart racial discrimination against historically discriminated against groups.

I don't think that is a radical perspective on my part, that the Department of Justice should seek to thwart discrimination against historically disadvantaged groups. I think that is the primary aim of title VII.

I suppose it is true, as Mr. Franks points out—if I could just briefly finish, Mr. Chairman—I suppose it is true, as Mr. Franks points out, that, sure, there are these reverse discrimination cases that emerge.

But the thrust of title VII has been to alleviate discrimination against people who have historically not enjoyed the protection of the law. And I think it is troublesome to some of us when we see the department take narrow interpretations of the retaliation clause, narrow interpretations of back-pay provisions in title VII, narrow interpretations of equal protection clause. And then when we see the department depart from long-settled, longstanding interpretations—the last thing I would say to you, Mr. Agarwal, we understand that Administrations change hands and that your Administration is more conservative than its immediate predecessor.

Some of us believe that there ought to be a core set of beliefs that the Department of Justice safeguards, irrespective of the ideology of the party that sits in power. And, unfortunately, what I think my Chairman was saying is there is some sense that this Administration has substituted ideology for analysis and that it has bent over backwards to pull back the protections in title VII.

That doesn't compare well with, for example, the Bush I administration, 1989 to 1993. Some of us are sitting on this Committee—in fact, all three of us to my right, Mr. Watt, Mr. Scott and myself, because of interpretations of the Voting Rights Act that were reached notably by an expansive interpretation adopted by Bush I.

What we see with this Administration, unfortunately, is a tendency to narrow and to truncate these rights instead of either taking a traditional view, or, God forbid, a heroic view.

I yield back.

Mr. NADLER. Thank you. The Chair will now recognize the distinguished Ranking Member for 1 minute.

Mr. FRANKS. Mr. Chairman, thank you.

Mr. Chairman, I, in sincere deference to Mr. Davis, I know that some of the questions he asked were not hostile in any way. However, they were outside the purview of the focus of this Committee, since this is on the Employment Litigation Section of the office, which is what Mr. Agarwal oversees.

And I just thought it is important to recognize that he really wouldn't be expected to be able to know some of these things. But I appreciate his willingness to get an answer for Mr. Davis.

Thank you.

Mr. NADLER. Thank you, I now yield back—I yield back? I yield 5 minutes.

Mr. WATT. Mr. Chairman, may I just ask a question? Is this hearing limited to the Employment Section of civil rights? I thought this was a general Civil Rights Division.

Mr. NADLER. It is concentrated on the Employment Section. We have had a different hearing on some of the others. But it is open to anything on the division. Of course, Mr. Agarwal is only from one part of the division.

Mr. WATT. I understand that, but did we specify that, or the Justice Department——

Mr. NADLER. Yes, we did. We did in the hearing notice. This is concentrating on the Employment Section. We have had a previous hearing. We will have additional hearings on the Civil Rights Division generally. The division has a number of different sections and we are holding a series of hearing.

The gentleman from Virginia.

Mr. SCOTT. Is it Mr. Jordan's turn?

Mr. NADLER. He has passed.

Mr. SCOTT. Okay, thank you.

Mr. NADLER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Agarwal, is your budget sufficient for you to do your job, or do you need more money?

Mr. AGARWAL. Our budget is sufficient.

Mr. SCOTT. So any shortcomings that you have cannot be blamed on Congress failing to appropriately fund your agency?

Mr. AGARWAL. We have no funding complaints, Congressman.

Mr. SCOTT. Does your office work on discrimination based on military service? Returning Iraqi veterans could look to you for help?

Mr. AGARWAL. Absolutely, that is all done under USERRA.

Mr. SCOTT. Do you find that many National Guard and reservists are having trouble retaining their jobs under the various laws that protect them?

Mr. AGARWAL. We have seen such instances, yes.

Mr. SCOTT. And what have you done?

Mr. AGARWAL. When the Department of Labor refers a complaint to us, if they are unable to reach a settlement with the employer, we will then investigate the matter ourselves and bring suit if appropriate.

We have bought 15 lawsuits under USERRA, including the first-ever class action brought by the United States under that statute.

Mr. SCOTT. Are any Federal agencies guilty of failing to protect the National Guard and reservists' rights to their jobs?

Mr. AGARWAL. Congressman, with respect, that issue falls within—I believe it is the Office of Special Counsel. The Justice Department Employment Litigation Section does not have jurisdiction to sue other parts of the Federal Government.

Mr. SCOTT. Thirty-two hundred referrals. Are those all Government agencies that are found by EEOC to be discriminating?

Mr. AGARWAL. Yes, Congressman.

Mr. SCOTT. Do you have the discretion to go after private sector employers?

Mr. AGARWAL. Not under title VII, only under USERRA.

Mr. SCOTT. Under USERRA you can go after private sector employers, pattern and practice or individual cases?

Mr. AGARWAL. Class actions or individual cases, yes, sir.

Mr. SCOTT. Have you brought pattern and practice cases involving national origin?

Mr. AGARWAL. Yes, sir, we have brought four pattern and practice cases on behalf of Blacks and Hispanics.

Mr. SCOTT. In your own employment practices, could you tell us how many minorities you have who have been hired in the last 6 years? If you have that information available, if not right now, could you provide it for us?

Mr. AGARWAL. I have that information for the last 5 fiscal years, Congressman. Within those past 5 fiscal years, 27 percent of new hires into the division have been minorities. That compares to a national average, as found by the ABA, of only about 9 percent of attorneys who are minorities, so we have managed to triple the average.

Mr. SCOTT. And how do you define minorities?

Mr. AGARWAL. That is defined by—there is an ABA study I believe from 2004.

Mr. SCOTT. Does that include women?

Mr. AGARWAL. I don't believe that it does. No.

Mr. SCOTT. And what has happened to the 3,200 referrals, minus the handful that you actually pursued? What happens to the rest of them?

Mr. AGARWAL. Those charging parties are sent a letter informing them that they have the right to bring suit on their own by retaining private counsel or a legal aid agency.

Mr. SCOTT. What does legal aid agency mean?

Mr. AGARWAL. Some individuals that are unable to afford private counsel, we will refer them to a legal aid organization.

Mr. SCOTT. Legal Services Corporation?

Mr. AGARWAL. Something like that, yes.

Mr. SCOTT. And they can bring discrimination cases?

Mr. AGARWAL. Yes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. I thank the gentleman.

And I yield now—the gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I guess there is a tendency sometimes for us to kind of segment—compartmentalize is what they used to call it when President Clinton was in office—into little silos here. But I am deeply troubled by something that I don't think is something that we can ignore.

We have had testimony from the attorney general and various people in that office about the politicization of hirings of U.S. attorneys. And there is a profound article dated July 23, 2006, in which the "Boston Globe" reporter made some interesting charges, which I would like to go through with you and have you either confirm or refute.

He said in an acknowledgement of the department's special need to be politically neutral, hiring for career jobs in the Civil Rights

Division under all recent divisions, Democrat and Republican, had been handled by civil servant, not political appointees.

But in the fall of 2002, then-Attorney General John Ashcroft changed the procedures. The Civil Rights Division disbanded the hiring committees made up of veteran career lawyers. Are you aware that that happened?

Mr. AGARWAL. Yes, Congressman.

Mr. WATT. Okay, all right. For decades, such committees have screened thousands of resumes, interviewed candidates and made recommendations that were only rarely rejected.

Now, hiring is closely overseen by Bush administration political appointees to Justice, effectively turning hundreds of career jobs into politically appointed positions. The profile of the lawyers being hired has since changed dramatically.

According to the resumes of successful applicants to the voting rights, employment litigation and appellate sections. Under the Freedom of Information Act, the "Globe" obtained the resumes among hundreds of pages of hiring data from 2001 to 2006.

Hires with traditional civil rights backgrounds, either civil rights litigators or members of civil rights groups, have plunged. Only 19 of the 45 lawyers hired since 2003 in those three 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.

Meanwhile, conservative credentials have risen sharply. Since 2003, the three sections have hired 11 lawyers who have 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 in the Bush-Cheney campaign. Several new hires work for prominent conservatives, including Whitewater prosecutor Kevin Starr, Meese, Trent Lott, Pickering, six listed Christian organizations that promote socially conservative views.

The changes in those three sections are echoed in varying degrees throughout the Civil Rights Division according to current and former staffers. At the same time, the kind of cases the Civil Rights Division is bringing has undergone a shift.

The division is bringing fewer voting rights and employment cases involving systematic discrimination against African-Americans and more alleged reverse discrimination against Whites and religious discrimination against Christians.

There has been a sea change in the types of cases brought by the division, and that is not likely to change in a new Administration because they are hiring people who don't have an expressed interest in traditional civil rights enforcement, said one former employee.

Do you have any dispute with anything that I have read here?

Mr. AGARWAL. Yes, I do, with respect, Congressman.

Mr. WATT. Well, I whispered to my colleague on my left here, Mr. Scott, that I don't see much—I see some gender diversity in this row behind you. But this doesn't look like a civil rights litigating section to me. Now, maybe I am just stereotyping people.

Tell me what about this you disagree with. Maybe that would be constructive, and give us some numbers on——

Mr. NADLER. The gentleman's time has expired. The witness——

Mr. WATT.—hiring, and give it to us in writing, if you would. But give us whatever you want to say in response to what I am saying.

Mr. NADLER. The witness can respond briefly now and then, hopefully, more fully in writing.

Mr. AGARWAL. Sure, a couple of things. First of all, let me clarify my answer about the hiring committees. I understand that that allegation has been made.

I wasn't at the department in 2002, so I don't have first-hand knowledge.

Mr. WATT. Well, that is part of the problem. There aren't any experienced lawyers over there. That is part of the point that the article is making.

Mr. AGARWAL. In terms of diversity——

Mr. WATT. How long have you been there?

Mr. AGARWAL. I have been with the department for 2 years, Congressman.

Mr. WATT. And they sent you over here to testify about what is going on in the employment discrimination area.

Mr. AGARWAL. I wasn't happy with that decision either, Congressman.

Mr. WATT. Okay, well, that explains that. You are just as unhappy about it as I am, maybe from a different aspect, but at least we got some reaction out of you.

Go ahead. I will shut up and let you explain whatever you want to explain.

Mr. AGARWAL. Let me just say with respect to diversity in the ranks of the Civil Rights Division, I think we have excellent diversity. The head of the Employment Litigation Section is a Hispanic individual. He was a first Hispanic——

Mr. WATT. Give me those numbers in writing. I want to know your general reaction to what I just said to you here, which is that the drawdown of experienced attorneys doing anything other than reverse discrimination cases—is there a staff over there who can do traditional civil rights cases?

Why would we be surprised if the number of cases is diminishing if the staff is not even attuned to that kind of discrimination?

Mr. AGARWAL. Congressman, until very recently, two of the deputy chiefs in the Employment Section were African-Americans. One of those deputies left because he accepted a promotion to head up another component of the department.

And, in terms of our cases, we have enforced title VII, all of its provisions, on behalf of all Americans. We have brought four pattern and practice cases on behalf of African-Americans and Hispanics.

We have brought two cases on behalf of African-Americans——

Mr. NADLER. Mr. Agarwal, the time is expiring, and I wanted to let you answer his question, but his question is not about how many pattern and practice cases you brought. We went through that before.

His question is about the drawdown. How many attorneys are still in the division who have experience bringing these types of traditional civil rights cases.

That is the question, correct?

Mr. WATT. Well, that is part of it, I guess. Yes.

Mr. NADLER. And the rest you can answer in writing, but answer that please.

Mr. AGARWAL. A number of them. Two of our deputy chiefs, including our principal deputy, have been with the Employment Litigation Section for decades. They are long-term veterans. They oversee——

Mr. NADLER. And how many such people are left?

Mr. AGARWAL. I don't have an answer as to the average length of tenure.

Mr. WATT. How many of the people sitting behind you have been with the department longer than 3 years? Everybody that has been with the department longer than 3 years, raise your hand, that is, on the front row there.

Mr. AGARWAL. There are four people from the department. Two of them——

Mr. WATT. They can raise their hands.

If you have been with the department more than 4 years, raise your hand.

Two of about 12 or 13, 14.

Mr. AGARWAL. Four. We have four other people from the department here, Congressman.

Mr. WATT. Where are they? They aren't raising their hands.

Mr. NADLER. No, he is saying that there are only four other people are here from the department. Not everybody there is from the department, apparently.

Mr. WATT. And one of them that did raise their hands was legislative affairs, not litigation.

Mr. AGARWAL. She is a valued member of the team.

Mr. WATT. I appreciate that.

Mr. NADLER. The time of the gentleman has experienced.

Mr. Agarwal, you will submit written answers, I assume, to the questions.

Mr. AGARWAL. Absolutely.

Mr. NADLER. The witness is excused.

Mr. ISSA. Mr. Chairman?

I am sorry, I came back for just this opportunity.

Mr. NADLER. The gentleman is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman, and I will be brief.

I do find it interesting that the gentleman on the other side of the aisle, who wanted, in fact, everyone in your department to have less than roughly 2 years experience, because they would have had the entire Administration change all of you out 2 years ago.

So I don't think there are any question that the continuity——

Mr. WATT. Would the gentleman yield on that point?

Mr. ISSA. Well, sure, what the heck? I have got all the time you have got.

Mr. WATT. How many of these people are political appointees versus career people?

Mr. AGARWAL. Two political appointees.

Mr. WATT. You see, we are talking about drawing down the number of career lawyers——

Mr. ISSA. Thank you, and reclaiming my time.

Mr. WATT.—not political.

Mr. NADLER. The gentleman from California controls the time.

Mr. ISSA. Thank you, and reclaiming my time, I recognize that opportunities exist for attorneys for a lot higher money outside of what we pay in Government. In fairness to the record, I think if we were asked to have people behind us raise their hands and say how long we were able to hold the best and brightest attorneys working for us, what a surprise. It is very difficult to hold them for a long time, because, in fact, every one of them is making a financial sacrifice by working for the Federal Government, rather than private practice, every day.

I do have one area that even though I talked about not expanding what we do, but rather doing well what your charter is, I do have one question for you, which has to do with nonmilitary, private sector discrimination.

As I understand it, currently, that is the one area that you are limited. That falls to the State, that you can investigate public employees, but you are limited as to private companies' discrimination.

Mr. AGARWAL. The EEOC has jurisdiction over private employers under title VII.

Mr. ISSA. Right, and the question I have for you is, when we are looking at the most efficient way to broaden the amount of investigations, the quality of them and so on, do you think the present makeup is correct, knowing that the EEOC essentially is an organization that historically gives people the right to sue but does very few actual enforcements?

Mr. AGARWAL. That is a very good question, Congressman. With respect, I actually haven't given that much thought. We have a very good working relationship with the EEOC, but I think that is something that we would have to—the best allocation, I think that is something we would have to take back and really think about.

Mr. ISSA. And I would appreciate it, and I would appreciate if you don't mind, responding both to this Committee, and, with the indulgence of the Chairman, to the Government Reform and Oversight Committee, because that is a critical question I think that is the heart of today's hearing.

I appreciate your telling us what you have accomplished. Well, a majority is telling us what may not have been accomplished to their satisfaction, but we do have an obligation both on this Committee and next door on the Government oversight and reform to look for efficiency. What are the organizations and personnel that are going to give us the highest enforcement of that which we have agreed on a bipartisan basis with the signature of at least one President at some time to do?

And I would appreciate, to the extent that you can, take it back and try to get us full writings.

And, with that, Mr. Chairman, I appreciate the indulgence and yield back the remaining time.

Mr. NADLER. I thank you, and I thank the witness.

You are excused. I would ask the second panel to step forward and take your seats.

While they are taking their seats, I will introduce the second panel.

Professor Richard Ugelow is a veteran of the Department of Justice, having served 29 years as a trial attorney in the department, and rising to the post of senior trial attorney and ultimately deputy section chief in the Employment Litigation Section of the Civil Rights Division.

Before joining the department, Mr. Ugelow served his country as a captain in the Army Judge Advocate General Corps. Currently, Mr. Ugelow is a member of the faculty at Washington College of Law, specializing in employment discrimination litigation and clinical legal education.

Janet Caldero is a custodian in the New York City Public Schools. She has been a participating witness in an investigation to the New York Board of Education's hiring practices for custodians and was a beneficiary of a settlement entered into by the Department of Justice and the city of New York regarding discrimination in the hiring of school custodians.

Eric Dreiband is a partner in the Washington office of the law firm Akin Gump Strauss Hauer and Feld and represents companies in civil rights, employment discrimination and wage and hour litigation.

Before joining Akin Gump, Mr. Dreiband served as the general counsel to the Equal Employment Opportunity Commission and as deputy administrator of the Department of Labor's Wage and Hour Division during the administration of President George W. Bush.

Mr. Dreiband also served 3 years as an associate independent counsel in the office of Independent Counsel Kenneth Starr. He is a graduate of Northwestern University School of Law.

Jocelyn Frye is the general counsel for the National Partnership for Women and Families in Washington, D.C. Ms. Frye's work covers a wide range of employment discrimination and workplace-related issues, including efforts to ensure equal enforcement of employment laws.

She currently directs the national partnership's workplace fairness program and in that capacity has worked to address employment barriers facing low-income women, including obstacles that make it difficult for many women to transition from welfare to work. She is a graduate of Harvard Law School.

Your written statements will be made part of the record in their entirety. I would ask that you now summarize your testimony, or shortly 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.

Before we begin, it is customary for the Committee to swear in its witnesses.

If you could please stand and raise your right hands and take the oath? Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information and belief?

Let the record reflect that each of the witness answered in the affirmative.

You may be seated.

Now, let me state before we begin the testimony, there is now a vote on the floor. There are, in fact, four votes on the floor, 12

minutes remaining in the first vote. The three subsequent votes will be 5-minute votes.

We will recess for the votes. I ask the Members to return as soon as the last vote is called and you have an opportunity to vote so that we can resume with the witnesses. I think we will get in the testimony of one witness, at least, before we have to go to the vote.

So I will first recognize, in this order, Professor Ugelow.

TESTIMONY OF RICHARD UGELOW, PRACTITIONER IN RESIDENCE, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. UGELOW. Good morning, Mr. Chairman and Members of the Committee, and thank you for the opportunity to testify today.

I joined the law faculty at American University following 29 years as a member of the Employment Litigation Section of the Civil Rights Division. I started in the Employment Litigation Section in 1973 as a trial attorney, following 4 years of active duty in the Army's Judge Advocate General Corps.

In 1989, I became deputy section chief in the Employment Litigation Section. I served in that capacity until I was removed in May 2002 by then-Assistant Attorney General Ralph Boyd.

Today is a most appropriate time to hold a hearing on the oversight of the Employment Litigation Section. In just 4 days, on September 29, a forum will be held at the Georgetown University Law Center, celebrating the 50th anniversary of the Civil Rights Division. The successes of the division over the last 50 years are indeed worthy of a celebration.

My testimony today addresses the Civil Rights Division's enforcement of title VII of the 1964 Civil Rights Act, an act that prohibits discrimination in employment based on race, sex, religion and national origin.

I am deeply saddened to say that this Administration has been severely lax in its enforcement of title VII. With a little more than one remaining in office, this Bush administration has filed only 47 title VII lawsuits.

By contrast, the Clinton Administration filed 92 lawsuits in its 8 years. The Bush I administration filed 81 lawsuits in its 4 years. And the Reagan administration filed 99 cases in its 8 years in office.

In particular, this Administration has been derelict in using title VII to ensure that African-Americans and Latinos are free from employment discrimination. In the first 2 years of the George W. Bush administration, a total of seven title VII cases were filed, which I submit is virtual non-enforcement, and likely was interpreted as such by the employer community.

It is also noteworthy that in almost 7 years, the employment litigation has filed only three pattern or practice or systemic cases that seek to vindicate the rights of African-Americans. During the same time, the Administration has filed two pattern or practice cases alleging reverse discrimination.

This Administration does not fare any better when looking at its use of title VII authority to file suits based upon individual charges of discrimination. The Administration has filed 10 cases that allege discrimination based upon race, and two of those cases were re-

verse discrimination, or 20 percent of the cases were reverse discrimination cases. Not one of these cases alleges discrimination against Latinos.

My review of the section's case filings suggest that enforcement efforts have focused on cases raising claims of religious discrimination. I do not doubt that these are worthy and important cases, and I do not wish to minimize their significance.

However, one must ask if those cases are more or less important than acts of discrimination against African-Americans and Latinos, and what that says about the department's priorities and its use of available resources.

Try as I might, I cannot find a rational reason for this Administration's lack of enforcement. Surely, it cannot be that there suddenly has been a reduction in employment discrimination in the workplace.

I can only conclude that this Administration has made a conscious decision to reduce enforcement. I leave it to this Committee, and others, to determine the rationale for that decision.

I urge Congress to maintain vigorous oversight of the Employment Litigation Section and the entire Civil Rights Division, in order to ensure that civil rights laws are fairly and vigorously enforced.

Thank you for the opportunity to testify today, and I will be pleased to answer any questions you may have.

[The prepared statement of Mr. Ugelow follows:]

PREPARED STATEMENT OF RICHARD S. UGELOW

Statement of Richard S. Ugelow
Washington College of Law, American University
September 25, 2007
Before the United States House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Good morning, Mr. Chairman and members of the Committee, and thank you for the opportunity to testify today. My name is Richard Ugelow, and I am a Practitioner-in-Residence at the Washington College of Law at American University. I joined the law faculty at American University in June 2002. In 1973, following four years of active duty service in the Army's Judge Advocate General Corps, I began my career as a trial attorney in the Employment Litigation Section. In 1989, I became a Deputy Section Chief in the Employment Litigation Section. I served in that capacity until I was removed in May 2002 by then Assistant Attorney General Ralph Boyd.

Today is a most appropriate time to hold a hearing on oversight of the Employment Litigation Section of the Civil Rights Division. In just four days, on September 29, a forum will be held at the Georgetown University Law Center celebrating the 50th Anniversary of the Civil Rights Division. The Division has a storied and well deserved reputation for enforcing fairly and vigorously the nation's anti-discrimination laws. That history will be the subject of Saturday's commemoration.

Unlike other components of the Department of Justice, the Civil Rights Division's mission is to be an agent of social change. The Division was created in 1957 to undo the status quo of segregation, to secure the rights and opportunities that had been denied to African-Americans, and to protect the civil rights of all Americans. Eliminating discrimination against African-Americans was at the heart of the creation of the Civil Rights Division. In 1964, with the passage of the Civil Rights Act, the breadth and scope of the Division's responsibilities were expanded beyond voting rights to include housing, education, public accommodations, fair credit, programs receiving federal financial assistance, and employment. In particular, Congress passed Title VII of the Civil Rights Act which prohibits employment discrimination not only based upon race but also sex and national origin. The Employment Litigation Section was given responsibility for enforcing Title VII. In 1990, Congress passed seminal legislation that prohibited discrimination in employment based upon disability.

During the time I was in the Division, I observed that this statutory mandate was admirably and conscientiously fulfilled in an even-handed and judicious fashion by both Republican and Democratic Administrations. From time-to-time the enforcement pendulum may have swung to the right or to the left but it always seemed to settle in the middle. That is, until now. The George W. Bush Administration, at least in the area of employment rights, had sought to significantly limit enforcement in the area of discrimination targeted to African-Americans and Latinos. I will discuss the basis for this conclusion after a discussion of the Section's historic activity.

History of Enforcement of Title VII by the Employment Litigation Section

Consistent with the core mission of the Civil Rights Division, the Employment Litigation Section in its early days concentrated its efforts on securing equal employment opportunities for African-Americans. Enforcement actions were brought against some of this nation's largest employers that maintained restrictive employment practices that had the purpose or effect of denying jobs to African-Americans or relegating them to the lowest rung of the employment ladder. For example, the television and movie industries, and national trucking and steel companies were targets of the Employment Section's enforcement efforts. Thousands of jobs were made available to historically underrepresented groups and of equal importance the Section's litigation program put on notice other employers and employer groups whose practices were vulnerable to challenges as being discriminatory.

In 1972, Title VII was amended to extend its reach to the employment practices of state and local government agencies and enforcement authority was given by Congress to the Department of Justice. There are approximately 18 million state and local government employees in the United States. The 1972 Amendments to Title VII transferred private sector enforcement authority to the Equal Employment Opportunity Commission.

Today, it is taken for granted that there are African-American, Asian, Hispanic, and female police and fire officers and officials at all level of government service. Regrettably, this was hardly the case in 1972. The Employment Litigation Section led the charge to the integration of state and local governments and opened up job opportunities for minorities and women, often in the face of extremely hostile opposition. While the overt and intentional barriers to equal employment opportunity fortunately are largely behind us, minorities – especially African-Americans and Latinos – face subtle and less apparent barriers to equal employment opportunities. Indeed, the task facing the Employment Litigation Section – to identify and root out employment discrimination wherever it exists – may be even more difficult today than in 1964 or even in 1972.

At all times since its creation, the Employment Litigation Section has been the nation's premier Title VII law enforcement agency. I say with some pride that the Section, with a staff of approximately 30 trial attorneys, has had a major impact in breaking down the artificial barriers that denied fully qualified individuals employment opportunities based upon race, religion, national origin and sex.

Because of its limited staff resources, the broad scope of its enforcement authority, and the large and varied universe of discriminatory employment practices, the Employment Litigation Section has always needed to make difficult and often painful enforcement choices. It simply was not possible, nor is it today, to file suit on every meritorious claim of discrimination. During my time at the Department of Justice, enforcement decisions considered, among other factors, the uniqueness of a claim of discrimination; the number of individuals potentially affected by the litigation; whether successful litigation would have an impact beyond the immediate employer; and the

precedent setting value of the litigation. The decisions based on applying these factors resulted in a vigorous and balanced enforcement program.

During the 29-years I was privileged to work in the Employment Litigation Section, the Section never lost sight of the Civil Rights Division's core mission --- to address discrimination based upon race. For example, the Section took the lead in opening up desirable police and fire fighter positions to African-Americans, Latinos, and women in cities like Los Angeles, San Francisco, Buffalo, Cincinnati, Miami, Atlanta, Chicago, Milwaukee, San Diego, Fort Lauderdale, and many other jurisdictions. The Section also sued several school systems to open teaching and administrative positions to African-Americans. Similarly, the Section sued more than 60 Detroit and Chicago suburban communities that maintained practices for municipal employment that had the purpose or effect of denying fully qualified African-Americans the opportunity to even apply for a job.

The importance of the Employment Litigation Section in eliminating job discrimination on behalf of all Americans, but particularly African-Americans, cannot be overstated. No other organization has the expertise and resources to take on this difficult and challenging task. On the other hand, the failure to use that enforcement responsibility vigorously, yet fairly, has unfortunate consequences. Title VII compliance depends, in part, on the self-evaluation of recruitment, hiring, promotion, and other employment practices by employers. State and local governmental employers generally will undertake prophylactic measures when a threat exists – real or perceived – of Department of Justice involvement. If that threat is removed, human nature suggests that employers will relax their guard and not evaluate their employment practices and decisions to ensure that they are non-discriminatory.

Types of Cases Brought By the Employment Litigation Section

I wish to emphasize that it is not simply the number of cases filed that is important; the type or subject matter of cases are similarly important. That is to say the employer community watches to see if the Section emphasizes race discrimination cases, sex discrimination cases, religious discrimination cases, testing procedures, promotional decisions, entry-level hiring, recruitment, or residency requirements. Also critically important is whether the Department routinely seeks a systemic remedy or individual relief.

Theories of Liability Under Title VII

Title VII authorizes two types of cases: disparate treatment cases pursuant to section 706; and pattern or practice cases pursuant to section 707. Each type of case is important but serves a different goal and purpose.

Disparate treatment cases brought pursuant to section 706 of Title VII involve individual allegations of purposeful or intentional discrimination. Overwhelmingly, the majority of Title VII suits involve individual claims of disparate impact. The Department of Justice annually receives from the Equal Employment Opportunity Commission

several hundred charges of individual claims of discrimination to consider for litigation. The Department's role is to identify those charges of individual discrimination that raise cutting edge issues or claims that otherwise would not be resolved without the participation of the Department of Justice. After all, there is a large private sector employment bar available to take on routine, meritorious cases. It is the difficult and challenging case that warrants invoking the prestige and resources of the Department of Justice.

Unlike cases brought under a disparate treatment theory, as reinforced by the Civil Rights Act of 1991, cases brought under a disparate impact theory pursuant to the Attorney General's pattern or practice authority 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.

Pattern or practice cases are the most important and significant cases brought by the Department of Justice because they offer the opportunity to make the greatest change. 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 filed sends a very powerful message that the Department of Justice is actively enforcing Title VII.

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 Department of Justice 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 thousands 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 are no other organizations available to fill the void if the Department of Justice fails to bring such suits.

Reduced Enforcement Efforts by the Department by Justice

The Civil Rights Division's Title VII enforcement efforts under this Administration significantly have been reduced. This reduction has sent a real or perceived message that the Department of Justice has retreated on enforcement.

In the first two years of the Bush Administration, a total of seven Title VII cases were filed by the Department of Justice and two of those cases were filed and staffed by the U.S. Attorney's Office for the Southern District of New York.[1] Seven cases in two

[1] *United States v. City of New York and New York City Dept. of Parks and Recreation*, No. 1:01-cv-04437-DC-MHD, filed June 18, 2002; and *United States v. City of New York and New York City Hous. Auth.*, No. 1:02-cv-044699-DC-MHD (S.D.N.Y. filed May 31, 2001).

years is virtual non-enforcement. The old adage that actions speak louder than words is at play here. Employers could correctly assume that the Department of Justice was curtailing its Title VII enforcement responsibilities. This is not the message that the Department should send.

While the Department has become more active in the last two years, likely as a result of Congressional prodding, its enforcement record is hardly stellar. Since January 20, 2001, the Bush Administration has filed only 47 Title VII cases, or an average of less than seven cases a year.[2] 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.[3] 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 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 and Latinos.

Of the 47 Title VII cases brought by the Bush Administration, twelve include a claim of a pattern or practice or systemic discrimination. Seven of these twelve cases contain an allegation of race discrimination. However, two of the race discrimination cases are "reverse" discrimination cases, alleging discrimination against whites.[4] Another case alleges discrimination against Native Americans[5] and one case was filed by the U.S. Attorney's Office for the Southern District of New York. Thus, the Employment Litigation Section can lay claim to filing and staffing exactly *three* pattern or practice cases in almost seven years that allege discrimination against African-Americans. It is troubling that the Employment Litigation Section's first pattern or practice case was not filed until April 3, 2006, more than five years into the Bush Administration[6] By comparison, in its first two years the Clinton Administration filed 13 pattern or practice cases, eight of which raised race discrimination claims.

The Bush Administration's record fares no better when considering its use of section 706 enforcement authority. Thirty-seven cases alleging a violation of section 706

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[2] http://www.usdoj.gov/crt/emp/papers.html, last visited September 18, 2007.

[3] 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. Dist. of Columbia*, No. C.A. 02-2338(RMU) (D.D.C. filed Aug. 5, 2004); *Jane Doe II and the United States v. Dist. of Columbia*, No. C.A. 02-2339(RMU) (D.D.C. filed Aug. 5, 2004); and *Jane Doe III and the United States v. Dist. of Columbia*, No. C.A. 02-2340(RMU) (D.D.C filed Aug. 5, 2004). These cases raise a single issue, so the number of filed cases has arguably been inflated.

[4] *United States v. Bd. of Trustees of S. Illinois Univ.*, No. C.A. 06-4037-JLF (S.D. Ill. Filed Feb. 8, 2006), and *United States v. Pontiac, Michigan Fire Dep't.*, No.2:05cv72913 (E.D. Mich. filed July 27, 2005).

[5] *United States v. City of Gallop*, No. CIV 04-1108 (D.N.M. filed Sept. 29, 2004).

[6] *United States v. VA. Beach Police Dep't.*, No. 06cv189 (E.D. Va. filed Apr. 3, 2006).

have been filed since January 20, 2001,[7] only ten of which allege that the defendants engaged in race discrimination in violation of Title VII. Two of the ten are reverse discrimination cases[8] and one of the ten was filed by the U.S. Attorney's Office for the Southern District of New York.[9] At best, the Employment Litigation Section has to date filed seven cases under its section 706 authority on behalf of African-Americans.[10] It should not go unnoticed that not one of the section 706 cases initiated by the Employment Litigation Section alleged discrimination against Latinos. The lack of enforcement on behalf of traditional minority groups is appalling and inexplicable, especially in light of the numbers of referrals of individual charges received by the Employment Litigation Section from the Equal Employment Opportunity Commission.

From 2000 until July 14, 2006, the EEOC referred more than 3,200 individual charges of discrimination to the ELS.[11] It is inconceivable that there were only seven litigation-worthy suits to be filed on behalf of African-Americans and none involving acts of discrimination against Latinos in that group. These numbers suggest to me that there has been a radical and troubling shift in the priorities of the Employment Litigation Section – a position change that is at odds with the core mission of the Department of Justice. In sum, these developments represent a disturbing retreat from the Department's historic commitment to the vigorous enforcement of Title VII. [12]

The Employment Litigation Section's case filings suggest that enforcement efforts are focused on cases raising claims of religious and sex discrimination. I have no reason to doubt that these are worthy and important cases and I do not wish to minimize their significance. One must ask if those cases are more or less important than acts of discrimination against African-Americans and Latinos and what the answer says about the Department of Justice's priorities.

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[7] Two of the 47 cases filed by the Employment Litigation Section since January 20, 2001 contain allegations that both sections 706 and 707 were violated.

[8] *United States v. City of Indianapolis*, No. 1:07-cv0897-DFH-WTL (S.D. Ind. Filed July 11, 2007) and *United States v. The Village of Woodmere*, No. 1:07cv1541 (N.D. Ohio file May 25, 2007).

[9] *United States v. City of New York and New York City Hous. Auth.*, No. 1:02-cv-044699-DC-MHD (S.D.N.Y. filed May 31, 2001).

[10] The Clinton Administration filed 72 section 706 cases, of which 12 alleged violations of race discrimination.

[11] Letter from the Department of Justice to addressee dated July 14, 2006 (on file with the author).

[12] Indeed, the Employment Litigation Section vigorously enforced Title VII in recent Republican Administrations. During the four years of Bush I, a total of 81 Title VII cases were filed, including 24 cases alleging a pattern or practice discrimination. During the eight years of the Regan Administration, the Section filed 99 cases, including 64 cases alleging a pattern or practice of discrimination. (Taken form statistics of the Employment Litigation Section on file with the author).

Future Congressional Oversight

I urge this Committee to maintain vigorous oversight of the Employment Litigation Section. I know from personal experience that Congressional interest in the Section's activities and accomplishments is a great motivator. I believe that the Section will be a better steward of Title VII if it must report to Congress on a regular basis.

Thank you for the opportunity to testify today, and I will be pleased to answer any questions you may have.

Mr. NADLER. I thank the witness.

With that, the Subcommittee will stand in recess. All Members are asked to return promptly after the last vote, so we don't hold the witnesses too long.

And the Committee is now in recess.

[Recess.]

Mr. DAVIS. [Presiding.] The oversight hearing on the Employment Section of the Civil Rights Division of the U.S. Department of Justice will come to order. I invite all witnesses to retake their seats as the hearing commences. I remind all witnesses that their written statements will be made part of the record in its entirety.

And the Chair is informed that the next witness is Janet Caldero.

Ms. Caldero, you may proceed.

TESTIMONY OF JANET CALDERO, BEECHHURST, NY

Ms. CALDERO. Good afternoon. I would like to thank Chairman Conyers, Chairman Nadler, and Ranking Member Franks and Congressman Davis for giving me the opportunity to testify today.

My name is Janet Caldero, and I work as a custodian in public schools in Queens. In New York City, custodians are building managers for public schools. We hire our own staff and manage our own budgets.

These are good-paying, supervisory jobs with civil service protections, and I am proud to do the work I do. I am especially proud to be one of the very few women in the New York City system. I am here today on behalf of all of them, and one other fellow female custodian has taken the time to be here today with me.

Before I became a custodian, I had worked in public schools for many years, as a secretary and then a handyman. At that time, I knew of exactly one woman custodian.

In a workforce of close to 900, there were fewer than 10 women holding these jobs. It was hard to break in and learn how to get the job if you were an outsider.

In 1992, I was hired as a provisional custodian. Being provisional means that you have no job security. Many of the women and minorities who worked as custodians back then were hired provisionally.

When I was hired, I was a single mom with two teenagers at home. I needed this job, and I worked hard to get it.

It was about the time I was hired that the Justice Department began to investigate the New York City Board of Education's hiring practices for custodians.

In 1996, after several years of investigation, the Justice Department sued the Board of Education. The lawsuit alleged the board's hiring practices discriminated against women and minorities.

While the case was in court, I talked to the attorneys for the Justice Department many times, as did several of the other women and minorities who were working provisionally. I understood the Justice Department attorneys to be working on my behalf, and on behalf of other women like me, who were working hard to succeed in a place where a lot of our male colleagues thought we didn't belong. I thought of them as my attorneys.

In about 2000, I learned that the Justice Department and the Board of Education settled the lawsuit, and the Board of Education had agreed to extend permanent employment and retroactive seniority to women and minorities who had been hired provisionally.

As a result, those of us on the job were more visible, and I think this sent a message to other women and minorities that they could do this work, as well.

After these benefits were awarded, a group of White male custodians objected and argued that the settlement discriminated against them as White men. Then, in 2002, long after the Justice Department had signed the settlement, I got a call from an American Civil Liberties Union lawyer.

She told me that the Justice Department had changed its position and was no longer defending parts of the settlement in the face of the White male custodian attacks, including the awards to me and most of the other female beneficiaries.

I didn't believe her. I had heard nothing from the Justice Department. I immediately called the attorney at the Justice Department whom I had been working with before. But, instead, I was transferred to someone I had never heard of.

I asked him whether it was true that the Justice Department was no longer defending my interest. He said the Justice Department was continuing to defend the settlement.

The attorney from the ACLU sent me a brief the Justice Department filed in court that listed the names of the beneficiaries it was still defending. Fewer than half of us were on that list. I wasn't on it.

When I called the new Justice Department lawyer, he refused to answer any of my questions. The ACLU then entered the case representing me and more than 20 other beneficiaries whom the Justice Department had abandoned.

Since 2002, the Justice Department has argued that the awards it won for us discriminated against White men, who still make up the vast majority of New York school custodians. We have had to live with the possibility that we might lose our seniority and have our salaries reduced.

If this happens to me, for instance, I would have to sell my home. Those who receive permanent employment have to worry about losing their jobs.

Last year, the trial court ruled against the Justice in a large part, but the fight isn't over. The Justice Department and the White male custodians will almost certainly appeal, and so our uncertainty on the job continues.

I don't fully understand the legal issues in this case, but I do know that it is hard to be a woman custodian because too many people feel women can't do the job. The Justice Department came to me saying that the United States government wanted to change this.

I trusted the Justice Department and then it betrayed and abandoned me and many others. This was unjust and unfair, and I hope that no one else ever has to go through this experience. The Justice Department needs to honor its commitments. I also believe that it should spend its energies fighting on behalf of people like me,

women and minorities trying to succeed in jobs they have long been denied.

Thank you.

[The prepared statement of Ms. Caldero follows:]

PREPARED STATEMENT OF JANET CALDERO

Good morning. I'd like to thank Chairman Conyers, Chairman Nadler, and Ranking Member Franks for giving me an opportunity to testify today.

My name is Janet Caldero, and I work as a custodian in a public school in Queens. In New York City, Custodians are the building managers for public schools. We hire our own staff and manage our own budgets. These are good-paying supervisory jobs with civil service protections, and I am proud to do the work I do. I am especially proud to be one of the very few women in New York City doing this work. I am here today on their behalf, and one of the other female custodians has taken the time to be here with me today.

Before I became a Custodian, I had worked in public schools for many years as a secretary and then a handyman. At that time I knew of exactly one woman custodian. In a workforce of close to 900, there were fewer than ten women holding these jobs. It was hard to break in and learn how to get the job if you were an outsider.

In 1992, I was hired as a provisional Custodian. Being provisional means that you have no job security. Many of the women and minorities who worked as Custodians back then were hired provisionally. When I was hired, I was a single mom with two teenagers at home. This was a job I needed and a job that I worked hard at.

It was about the time I was hired that the Justice Department began to investigate the New York City Board of Education's hiring practices for Custodians. In 1996, after several years of investigation, the Justice Department sued the Board of Education. The lawsuit alleged the Board's hiring practices discriminated against women and minorities.

While the case was in court, I talked to attorneys for the Justice Department many times, as did several of the other women and minorities who were working provisionally. I understood the Justice Department attorneys to be working on my behalf and on behalf of other women like me who were working hard to succeed in a place where a lot of our male colleagues thought we didn't belong. I thought of them as my attorneys.

In about 2000, I learned that the Justice Department and the Board of Ed had settled the lawsuit, and the Board of Ed had agreed to extend permanent employment and retroactive seniority to women and minorities who had been hired provisionally. As a result, those of us on the job were more visible, and I think this sent a message to other women and minorities that they could do this work too.

After these benefits were awarded, a group of white male custodians objected and argued that the settlement discriminated against them as white men.

Then, in 2002, long after the Justice Department had signed the settlement, I got a call from an American Civil Liberties Union lawyer. She told me that the Justice Department had changed its position and was no longer defending parts of the settlement in the face of the white male custodians' attacks, including the awards to me and most of the other female beneficiaries. I didn't believe her. I had heard nothing from the Justice Department.

I immediately called the attorney at the Justice Department whom I had worked with before. But instead I was transferred to someone I had never heard of. I asked him whether it was true that the Justice Department was no longer defending my interests. He said the Justice Department was continuing to defend the settlement.

The attorney from the ACLU sent me a brief the Justice Department had filed in court that listed the names of the beneficiaries it was still defending. Fewer than half of us were on that list. I wasn't on it. When I again called the new Justice Department lawyer, he refused to answer any of my questions.

The ACLU then entered the case, representing me and more than 20 other beneficiaries whom the Justice Department had abandoned. Since 2002, the Justice Department has argued that the awards it won for us discriminate against white men, who still make up the vast majority of New York City school custodians. We have had to live with the possibility that we might lose our seniority and have our salaries reduced. If this happened to me, for instance, I would have to sell my home. Those who received permanent employment have worried about losing their jobs.

Last year, the trial court ruled against the Justice Department in large part. But this fight isn't over. The Justice Department and the white male custodians will almost certainly appeal and so our uncertainty on the job continues.

I don't fully understand the legal issues in this case. But I do know that it's hard to be a woman Custodian because too many people feel women can't do the job. The Justice Department came to me saying that the United States government wanted to change this. I trusted the Justice Department, and then it betrayed and abandoned me and many others. This was unjust and unfair and I hope that no one else ever has to go through this experience. The Justice Department needs to honor its commitments. I also believe that it should spend its energy fighting on behalf of people like me—women and minorities trying to succeed in jobs they have long been denied.

Mr. DAVIS. Mrs. Caldero, thank you.

We proceed to Eric Dreiband.

You have 5 minutes, Mr. Dreiband.

TESTIMONY OF ERIC S. DREIBAND, PARTNER, AKIN GUMP STRAUSS HAUER & FELD

Mr. DREIBAND. Thank you, Representative Davis, Ranking Member Franks and Members of the Subcommittee. I thank you and the entire Subcommittee for affording me the privilege of testifying today.

My name is Eric Dreiband, and I am a partner at the law firm of Akin Gump Strauss Hauer and Feld. Prior to joining Akin Gump, in September of 2005, I served as the general counsel of the United States Equal Employment Opportunity Commission. As general counsel of the EEOC, I directed the Federal Government's litigation of the Federal employment discrimination laws.

I also managed approximately 300 attorneys and a national litigation docket of about 500 cases a year. The EEOC enforcement authority over title VII is plenary, with the exception of litigation against public employers.

Title VII vests the EEOC with independent litigation authority against private employers. The employment protections of the Americans with Disabilities Act incorporate title VII's enforcement scheme and so the EEOC also litigates disability discrimination claims. EEOC enforces two other statutes, the Equal Pay Act, which prohibits sex-based wage discrimination and the Age Discrimination in Employment Act.

Collectively, then, the Congress has vested the EEOC with authority for enforcing a broad array of employment discrimination laws, including laws that protect American workers against discrimination on the basis of race, color, religion, sex, national origin, age and disability.

I was honored to contribute to the enforcement of the Federal civil rights laws when I served at the EEOC. Every member of the Administration with whom I worked unambiguously and enthusiastically supported the EEOC's efforts to continue and improve upon its enforcement programs

This included officials at the Department of Justice, including especially the Civil Rights Division and the Office of the Solicitor General. During my tenure at the EEOC, the commission continued its tradition of aggressive litigation. We obtained relief for thousands of victims of discrimination and the EEOC's litigation program recovered more money for victims of discrimination than at any other time in the commission's history.

The commission filed hundreds of cases every year and recovered literally hundreds of millions of dollars for victims of discrimination. Here are some examples.

In *EEOC v. Morgan Stanley,* I personally intervened and negotiated, with the help of others at the EEOC, a historic $54 million settlement of a sex discrimination case brought by the EEOC on behalf of a class of women who worked for a major Wall Street Investment firm.

We also obtained one of the largest EEOC settlements ever in the agribusiness industry. In EEOC versus Rivera Vineyards, the commission sued and recovered substantial relief for a group of employees, mostly Hispanic women, who were allegedly sexually harassed, retaliated against for complaining and segregated into certain jobs, based on gender.

Likewise, in *EEOC v. Abercrombie and Fitch,* the EEOC resolved a nationwide race and sex discrimination case against one of the Nation's largest retailers. In that case, the EEOC alleged the defendant maintained recruiting and hiring practices that excluded minorities and women and adopted a restrictive marketing image and other policies that limited minority and female employment.

In *EEOC v. Seafarers International Union,* I appeared on behalf of the commission before the United States Court of Appeals for the 4th Circuit and successfully defended the EEOC's position that the Federal age discrimination protections extend to apprenticeship programs. And as a result of that case, workers who are over age 40 and may need training are protected against age discrimination.

And in Supreme Court litigation, the EEOC worked with the Civil Rights Division and the solicitor general of the United States. In *General Dynamics v. Cline,* for example, we filed a brief on behalf of alleged age discrimination victims.

Likewise, in *Pennsylvania State Police v. Suders,* we successfully defended the rights of Nancy Drew Suders after she claimed that she was the victim of shocking and despicable sex discrimination by her employer.

The commission also worked successfully with the Civil Rights Division and the solicitor general in *Maldonado v. City of Altus, Oklahoma.* In the United States Court of Appeals for the 10th Circuit, we defended the rights of several individuals who asserted claims of race and national origin discrimination and the 10th Circuit agreed with us.

Finally, it is important to remember that the folly and disgrace of unlawful discrimination continues to plague our Nation. Enforcement of the civil rights laws vest the EEOC and the Civil Rights Division with sacred responsibilities that speak to the very essence of who we are as a people and who we aspire to be.

It was my professional and personal privilege to serve with all of those women and men of the EEOC and the Civil Rights Division. These are individuals who have dedicated their lives to our continuing struggle to live up to the legacy of Anthony Burns, William Lloyd Garrison, Frederick Douglass, Abraham Lincoln, Charles Sumner, Susan B. Anthony, Martin Luther King, Jr., Everett Dirksen, Roy Wilkins, Evan Kemp, Jr., and countless others.

Mr. DAVIS. Mr. Dreiband, let me ask you to close. We have a very tight time constraint today as we literally have to vacate the room, so if you could quickly wrap up.

Mr. DREIBAND. I am finished. Thank you, and I look forward to your questions.

[The prepared statement of Mr. Dreiband follows:]

PREPARED STATEMENT OF ERIC S. DREIBAND

Good morning Chairman Conyers, Subcommittee Chairman Nadler, Ranking Member Franks, and Members of the Subcommittee. I thank you and the entire Subcommittee for affording me the privilege of testifying today. I am Eric Dreiband, and I am a partner at the law firm of Akin Gump Strauss Hauer & Feld LLP here in Washington, D.C.

Prior to joining Akin Gump in September 2005, I served as the General Counsel of the United States Equal Employment Opportunity Commission ("EEOC"). As EEOC General Counsel, I directed the federal government's litigation of the federal employment discrimination laws. I also managed approximately 300 attorneys and a national litigation docket of approximately 500 cases.

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I was honored to contribute to the enforcement of the federal civil rights laws when I served at the EEOC. Every member of the Administration with whom I worked unambiguously and enthusiastically supported the EEOC's efforts to continue and improve upon its enforcement programs. This included officials at the Department of Justice, including especially the Civil Rights Division and the Office of the Solicitor General.

During my tenure at the EEOC, the Commission continued its tradition of aggressive litigation. We obtained relief for thousands of victims of discrimination, and the EEOC's litigation program recovered more money for victims of discrimination than at any other time in the Commission's history. The Commission filed hundreds of cases every year and recovered, literally, hundreds of millions of dollars for victims of discrimination. Here are some examples:

In *EEOC v. Morgan Stanley,* we negotiated a historic $54 million settlement of a sex discrimination case brought by the EEOC on behalf of a class of women who worked for a major Wall Street investment firm.

We also obtained one of the largest EEOC settlements ever in the agribusiness industry. In *EEOC v. Rivera Vineyards,* the Commission sued and recovered substantial relief for a group of employees, mostly Hispanic women, who were allegedly sexually harassed, retaliated against for complaining, and segregated into certain jobs based on gender.

Likewise, in *EEOC v. Abercrombie & Fitch,* the EEOC resolved a nationwide race and sex discrimination case against one of the nation's largest retailers. In that case, the EEOC alleged that the defendant maintained recruiting and hiring practices that excluded minorities and women and adopted a restrictive marketing image, and other policies, that limited minority and female employment.

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The Commission also worked successfully with the Civil Rights Division and the Solicitor General in *Maldonado v. City of Altus, Oklahoma.* We filed the govern-

ment's brief in the United States Court of Appeals for the Tenth Circuit and, in so doing, defended the rights of several individuals who asserted claims of race and national origin discrimination. The Tenth Circuit agreed with us.

We also issued the EEOC *Regional Attorney's Manual*. The *Regional Attorney's Manual* established national standards for the EEOC's litigation program.

Finally, it is important to remember that the folly and disgrace of unlawful discrimination continues to plague our nation. Enforcement of the civil rights laws vests the EEOC and the Civil Rights Division with sacred responsibilities that speak to the very essence of who we are as a people, and who we aspire to be. It was my personal and professional privilege to serve with all of those women and men of the EEOC and the Civil Rights Division who have dedicated their lives to our continuing struggle to live up to the legacy of Anthony Burns, William Lloyd Garrison, Frederick Douglass, Abraham Lincoln, Charles Sumner, Susan B. Anthony, Martin Luther King, Jr., Everett Dirksen, Roy Wilkins, Evan Kemp, Jr., and countless others.

Thank you, and I look forward to your questions.

Mr. DAVIS. Thank you, Mr. Dreiband.

My next witness is Jocelyn Frye. Before you go, Ms. Frye, may the Chair inquire if there is any representative of the Department of Justice who is here in the hearing room today, signaled by a show of a hand?

May the record reflect that there is no representative of the Department of Justice who remains in the hearing room.

Ms. Frye, you have 5 minutes.

TESTIMONY OF JOCELYN FRYE, GENERAL COUNSEL, WORKPLACE FAIRNESS PROGRAM, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES

Ms. FRYE. Thank you, Congressman Davis, and in his absence, to the Chair and the Ranking Member and the other Members of the Committee.

My name is Jocelyn Frye. I am general counsel at the National Partnership for Women and Families. I appreciate the opportunity to testify today.

I know that given the time constraints that we have, I want to focus on a series of concerns that we have raised and the testimony that I submitted and also some recommendations.

I first want to start by saying that we are strongly committed to the mission of not only the Department of Justice, but particularly the work of the Employment Section. From the perspective of many advocates, we care deeply about the broad mission of ensuring equal employment opportunity and eliminating discrimination in the workplace.

Our view is that the Employment Section should do a number of things, but, at a minimum, it should be fully committed to vigorous enforcement of employment discrimination laws. It should be a strong leader in investigating allegations of job discrimination and advance legal arguments in the courts that extend maximum protections to victims of discrimination, particularly under title VII of the 1964 act.

Unfortunately, over the last 6.5 years, there are a number of concerns that we have had about the direction of the Employment Section, and I will lay them out for you. The first is a decline in the Employment Section's overall enforcement numbers and their litigation numbers.

As others have mentioned, they are on track to file roughly about half of the title VII cases that were filed in the prior Administra-

tion. Second, there is a concern about perceptions of decreased emphasis on cases that have traditionally been pursued and have been a high priority. And one example was race discrimination cases involving African-Americans.

I would also add a concern about gender discrimination cases, as well. Thirdly, there has been a concern about a fewer number of pattern and practice cases, disparate impact cases and cases that, as a general matter, are used to uncover systemic practices in the workplace that can have larger effects on a larger number of employees.

There are, again, a fewer number of those cases under this Administration than the prior Administration. Reversals of longtime legal positions in cases and the end result is less protection for discrimination victims. And it makes it much harder for people to vindicate their rights.

Allegations of improper political influence in terms of attorney hiring and also the decisions, ultimately, that are made in the direction of different cases. Lastly is just a concern about the lack of leadership and visibility to draw attention to the persistence of employment discrimination, the legal protections that are available and the obligation of public employers to comply with the law.

There are many components of each one of those concerns, but that is the broad summary of the concerns that we have raised. In terms of recommendations, I want to offer several for the Subcommittee to consider.

The first is that we believe that this section ought to have consistent support for legal interpretations that provide maximum protections to discrimination victims. It is essential that the Employment Section and the Civil Rights Division, more broadly, advance legal arguments that preserve and do not roll back the ability of victims of employment discrimination to vindicate their rights.

Increased transparency and accountability—as many of you, I am sure, are even more aware than we are, it is very hard sometimes just to figure out how many cases this section is bringing on a regular basis. And we believe that it is crucial to have regular reporting. How many complaints are they filing? How many resolutions are there? That type of thing would go a long way to ensuring that we have regular accountability of the work of the section.

Thirdly, establishing high goals and priorities—there ought to be something that we can measure the success of the section by rather than sort of rhetoric. We would love for them to have some clear goals and priorities in terms of their direction.

Eliminating improper political influence and the hiring process and also case decisionmaking. Allegations of political preferences and affiliations that trump solid experience in civil rights enforcement when making attorney hiring decisions has harmed the stature, morale and ultimately the effectiveness of the section.

Regular oversight hearings like this are crucial. And, lastly, leadership and visibility, it is essential that the leaders of the Employment Section are viewed as leaders on employment discrimination. The Employment Section has a critical role to play in preserving, defending and upholding rights and protections of critical importance to ensure fair treatment in the workplace.

We believe the section's records over the past 6.5 years has fallen short of what is needed to make the promise of equal employment opportunity a reality for all workers.

Thank you for the opportunity this morning.

[The prepared statement of Ms. Frye follows:]

PREPARED STATEMENT OF JOCELYN C. FRYE

Testimony of Jocelyn C. Frye, General Counsel, National Partnership for Women & Families before the United States House of Representatives Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Oversight Hearing
on the
Employment Litigation Section of the Civil Rights Division of the Department of Justice
September 25, 2007

Thank you for the invitation to testify this morning. My name is Jocelyn Frye and I am the General Counsel at the National Partnership for Women & Families. Since our founding in 1971, the National Partnership has been at the forefront of efforts to ensure equal employment opportunity for women. As a critical part of that work, we have monitored federal agency enforcement of employment discrimination laws, including the work of the Department of Justice (DOJ). We have focused special attention on the enforcement of Title VII of the Civil Rights Act of 1964 (Title VII), the landmark antidiscrimination law that prohibits discrimination in employment based on race, color, sex, ethnicity, and religion. Title VII has been instrumental in expanding women's employment opportunities, and remedying discriminatory workplace practices used to deny or limit women's work options. The National Partnership has spent years – before federal agencies, Congress, the courts, and the public – working to secure Title VII's critical protections for all to ensure that our workplaces operate free of discrimination. I also have the privilege of co-chairing the Employment Task Force of the Leadership Conference on Civil Rights. In that capacity, I work with many leading national advocacy and legal organizations to ensure vigorous enforcement of employment discrimination laws, and advance equal employment opportunity principles in workplaces across the country.

I. Overview and Introduction

Today's spotlight on the work of the Employment Litigation Section (Employment Section or Section) of the Department of Justice's Civil Rights Division is particularly timely in light of the pending leadership change at DOJ's helm. My testimony will focus on the record of the Employment Section over the past six and one-half years, specifically with respect to Title VII enforcement, from our perspective as advocates firmly committed to the Employment Section's mandate to uphold and enforce important federal protections against employment discrimination.

Commitment to Equal Justice Under Law. This hearing is especially appropriate in a year that marks the Civil Rights Division's fiftieth anniversary. It is a historic milestone for a Division with a vitally important mission and rich legacy. The Civil Rights

Division was born at a remarkable time in our nation's history, when the push for equal rights and equal justice under law was a fresh but potent, emerging force, just beginning to penetrate and challenge the consciousness of America. The quest for equality and fairness was urgent and vocal, yet elusive and unrealized. In that climate of uncertainty, the Civil Rights Division often was called upon to step into the most contentious and volatile situations to enforce the law and seek justice, even if it meant standing alone. That is precisely as it should have been then, and as it should be today – it is the leadership, fortitude, resilience, and determination we should expect from the nation's civil rights lawyer.

The work of the Employment Section – and, indeed, the Civil Rights Division as a whole – should reflect and build on this legacy. It is crucial that the Employment Section's record is one that demonstrates its unwavering commitment to full and vigorous enforcement of employment discrimination laws using every available enforcement tool at its disposal. That commitment should not ebb and flow based on disdain or preferences for a particular law or legal theory, or the popularity or political connections of the parties involved. Partisanship, ideological agendas, and political influence can never replace sound, forthright civil rights enforcement, and any implications to the contrary undermine the integrity of the Section and the Civil Rights Division, and damage the overall credibility of employment discrimination and other civil rights law enforcement efforts.

Discrimination Persists. While the civil rights movement paved the way for enormous progress in eroding discriminatory employment practices and barriers, discrimination remains an all-too-real obstacle to success in today's workplaces. Far too many women, people of color, older persons, people with disabilities, and others continue to face discriminatory attitudes and practices that deny them jobs, limit their career advancement opportunities, or interfere with their workforce mobility. Women and people of color continue to lag behind their white male counterparts in accessing upper level managerial positions, moving into non-traditional fields, earning the highest wages, and ascending the career ladder. Statistics compiled by the Equal Employment Opportunity Commission (EEOC) indicate that individuals filed more than 75,000 charges alleging employment discrimination in FY2006 under the various statutes it enforces.[1] While many of these charges fall outside the jurisdiction of DOJ,[2] these EEOC charge numbers at a minimum demonstrate the sizable number of employees who believe they have faced employment discrimination.

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[1] U.S. Equal Employment Opportunity Commission, *Charge Statistics FY1997 Through FY2006*, http://www.eeoc.gov/stats/charges.html. The Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act (which clarifies that Title VII also cover pregnancy discrimination), Title I and V of the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Equal Pay Act, sections 501 and 503 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991.

[2] DOJ, through the Employment Section of the Civil Rights Division, enforces Title VII against state and local employers. EEOC enforces Title VII against private sector employers.

II. The Employment Litigation Section's Record Raises Serious Concerns About the Commitment to Vigorous Enforcement and Equal Employment Opportunity

As an advocacy organization that cares deeply about achieving equal employment opportunity and eliminating discrimination in the workplace, the National Partnership believes it is crucial to have an Employment Section within DOJ's Civil Rights Division fully committed to and engaged in vigorous enforcement of employment discrimination laws. The Employment Section must be a strong leader in investigating allegations of job discrimination, rooting out and challenging discriminatory employment practices, pursuing comprehensive remedies for discrimination, and utilizing every available enforcement tool to ensure compliance with the law. We expect the Section to advance legal arguments and theories in the courts that extend maximum protections under Title VII to employment discrimination victims, and send the message to state and local employers that illegal workplace discrimination will not be tolerated. Unfortunately, the past six and one-half years have prompted serious, troubling questions about the strength and scope of the Employment Section's Title VII enforcement efforts. Among the concerns:

- A decline in the Employment Section's overall enforcement and litigation numbers.
- Perceptions of decreased emphasis on cases that traditionally have been a high priority, such as race discrimination cases involving African Americans.
- Fewer pattern or practice cases and disparate impact cases that could be used to uncover systemic practices that affect large numbers of employees.
- Reversals of legal positions in key cases, resulting in less protection for discrimination victims and making it much harder for discrimination victims to vindicate their rights.
- Allegations of improper political influence affecting attorney hiring and case decisions.
- Lack of leadership and visibility, to draw attention to the persistence of workplace discrimination, the legal protections available, and the obligation of public employers to comply with the law.

These concerns have cast doubt on the Administration's commitment to vigorous, serious civil rights enforcement and, instead, have created the perception of a conscious effort to rollback and curtail vital protections.

A. Brief Overview of the Employment Section's Title VII Enforcement and Litigation Authority

The Employment Section is responsible for enforcing Title VII as it applies to state and local employers. The Section's authority is derived from two provisions under Title VII – section 706 and section 707.[3] Section 706 authorizes the Attorney General to file lawsuits against state or local employers that allege discriminatory treatment of

[3] 42 U.S.C. 2000e-5(c) (section 706) and 42 U.S.C. §2000e-6 (section 707).

individuals in employment. These cases stem from charges initially filed with and investigated by the EEOC, and subsequently referred to DOJ for additional action. Section 707 authorizes the Attorney General to file lawsuits against state or local employers that allege a "pattern or practice" of discrimination affecting large numbers of employees. These cases can involve policies that treat employees differently for improper reasons, or policies that are facially neutral but nonetheless have the effect of discriminating against a particular group of employees. Cases filed under section 707 typically are larger, more complex cases that have the potential to affect large numbers of employees. As such, these cases often can garner greater public attention and help educate employees and employers about employment discrimination protections. As a general matter, many of the concerns about the Employment Section's work over the last six and one-half years grow out of the declining number of section 707 case filings, particularly those alleging disparate impact violations.

B. Declining Litigation and Enforcement Numbers

Of grave concern to many advocates has been the apparent diminished productivity of the Employment Section over the last six and one-half years. According to published reports and available data, the Employment Section has filed 44 Title VII cases and is on track to file just over half the number of Title VII cases filed during the prior Clinton Administration.[4] Even more troubling has been the shifting composition of the cases filed, with fewer pattern or practice cases alleging race and gender discrimination, and fewer cases involving discrimination against African Americans and Latinos. For example, the listing of complaints on DOJ's website indicates that over the last six and one-half years the Employment Section has filed 13 complaints under section 707 alleging a pattern or practice of discrimination.[5] Four were filed on behalf of African Americans and Latinos, one of which was filed initially by the US Attorney's Office for the Southern District of New York. Only two were filed on behalf of women, two on behalf of white men, one on behalf of American Indians, and four were based on allegations of religious discrimination. Only four included disparate impact claims. Again, these numbers fall well below the number of complaints filed during the previous Administration.[6]

Questions about these trends frequently have been met with swift denials from Employment Section and Civil Rights Division leaders, complete with "dueling numbers" to refute any criticisms. But the publicly available record tells a different story.

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[4] These numbers are based on a review of Employment Section complaint filings listed on the DOJ website through September 20, 2007, http://www.usdoj.gov/crt/emp/papers.html (website last visited September 20, 2007). There are three complaints filed on the same day that stem from one case involving allegations of sex discrimination by the District of Columbia Fire and Emergency Medical Services Department. See *Jane Doe and US v. District of Columbia*, *Jane Doe II and US v. District of Columbia*, and *Jane Doe III and US v. District of Columbia*, (filed August 5, 2004). Those complaints are counted as one case for purposes of the overall numbers cited herein. For a discussion of the cases filed during the Clinton Administration, *see* Testimony of Helen Norton, Civil Rights Division Oversight Hearing Before the US Senate Committee on the Judiciary, June 21, 2007.

[5] *Supra* n. 4.

[6] *Id.*

The numbers reflect what many advocates have observed – fewer case filings, fewer cases with systemic impact, fewer cases on behalf of African Americans and women.

The apparent decline in the Employment Section's litigation and enforcement numbers is particularly disheartening for advocates who look to the Employment Section to advance cases that small advocacy and legal organizations simply do not have the resources to bring. The Employment Section is uniquely positioned, with access to resources far beyond those of most public interest and legal organizations, to litigate large, complex cases challenging discriminatory employment practices. One such high-profile case can make an enormous difference by sending a message to employers that the power of the federal government will be brought to bear against those who discriminate when making employment decisions. The deterrent impact of an aggressive, active Employment Section litigation docket cannot be minimized. Conversely, declining litigation numbers at a minimum create a perception – and at worst confirm the reality – of less rigorous scrutiny of potential employment law violations.

C. De-emphasis of Longstanding Enforcement Priorities

The creation of the Civil Rights Division was fueled, in part, by rising opposition to entrenched discrimination against African Americans throughout American society. The push for racial equality helped provide the legal framework for challenges to other forms of inequality, such as longstanding discrimination aimed at women. While discrimination has evolved in the decades that have followed, with cases becoming increasingly complex and discriminatory practices becoming subtler and more nuanced, there has been a striking consistency in the employment discrimination charges filed with the EEOC in one important respect. Charges alleging race discrimination remain the largest number of discrimination charges filed with the EEOC each year, followed by sex discrimination charges.[7]

While we do not have access to the precise breakdown of charges referred by EEOC to DOJ, it would be reasonable to expect race and gender discrimination claims to comprise a significant portion of both the EEOC referrals and the complaints filed by the Employment Section. But a different trend has emerged over the past six and one-half years. Available data reveal fewer race discrimination cases alleging a pattern or practice of discrimination against African Americans, and fewer gender discrimination cases alleging a pattern or practice of discrimination against women. Indeed, the Employment Section did not initiate a pattern or practice case alleging race discrimination against African Americans until last year.[8] The Section filed two pattern or practice cases alleging race discrimination against White men, one in 2005 and one in 2006, before it

[7] *See, e.g.*, US Equal Employment Opportunity Commission, *Charge Statistics FYI997 Through FY2006*, http://www.eeoc.gov/stats/charges.html; US Equal Employment Opportunity Commission, *Charge Statistics FYI992 Through FY1996*, http://www.eeoc.gov/stats/charges-a.html.

[8] An earlier pattern or practice race discrimination complaint filed in June 2002 was initiated by the US Attorney's Office for the Southern District of New York. *See US v. City of New York and New York City Department of Parks & Recreation*, June 19, 2002. The first case initiated by the Employment Section under the Bush Administration alleging a pattern or practice of race discrimination aimed at African Americans was filed in April 2006. *See US v. Virginia Beach Police Department*, April 3, 2006.

initiated the case alleging discrimination against African Americans.[9] And, according to the complaints listed on its website, the Section has filed the same number of pattern or practice cases alleging discrimination against men as it has filed alleging such discrimination against women.

These numbers raise serious concerns, but not because the Section is enforcing Title VII's protections for different groups – Title VII rightly protects individuals from employment discrimination regardless of race, sex, ethnicity, color, or religious background. Rather, these numbers are disconcerting because they suggest a lack of attention to pattern or practice cases on behalf of African Americans and women, groups that historically have filed the largest percentage of Title VII complaints. In the past, such cases have been an Employment Section priority, but the record of the current Administration suggests that priority no longer exists.

D. Reversals of Position in Key Cases

The credibility and integrity of the Employment Section – as well as the Civil Rights Division as a whole – rests in part on the accuracy and soundness of the legal positions it takes before the courts. In several cases, however, the Section has reversed course or changed position dramatically, undermining the rights of plaintiffs in the process. Among the examples, the Section moved to dismiss a consent decree involving a police department that used an allegedly discriminatory selection test case,[10] the Section withdrew its support for previously negotiated remedies in a lawsuit alleging race and gender discrimination against a group of custodians,[11] the Section withdrew from a high-profile case against a transportation police agency whose physical fitness test disproportionately excluded and allegedly discriminated against women.[12] In each of these cases, the Section had invested considerable investigatory and litigation resources. The change in position effectively diminished the value of the Section's previous work, and sent a message of disinterest or weakened commitment to the courts and litigants involved.

Particularly troubling, DOJ – and the Employment Section to the extent it has been consulted – also has reversed course in cases before the Supreme Court. In *Ledbetter v. Goodyear Tire and Rubber*,[13] DOJ failed to defend the EEOC's longstanding position that discriminatory paychecks could trigger Title VII's 180-day charge-filing deadline. The case was brought by Lilly Ledbetter, a 19-year employee of Goodyear. After discovering she was being paid significantly less than her male colleagues, she sued, took her case to a jury, and won. Unfortunately, her victory was short-lived and ultimately eviscerated by a sharply divided Supreme Court. The EEOC supported Ms. Ledbetter's pay discrimination claim, filing an *amicus* brief in the lower court. But when the case

[9] *See US v. Pontiac, Michigan Fire Department*, July 26, 2005; *US v. Board of Trustees of Southern Illinois University*, February 8, 2006.
[10] *US v. Buffalo Police Department*, No. 73 CV-414 (W.D.N.Y.).
[11] *US v. NYC Board of Education*, No. 96-CV-0374 (E.D.N.Y.).
[12] *Lanning v. SEPTA*, 181 F.3d 478, 488 (3d Cir. 1999) (Lanning I), *Lanning v. SEPTA*, 308 F.3d 286, 289 (3d Cir. 2002) (Lanning II).
[13] 550 US ___ (2007).

arrived in the Supreme Court, DOJ switched positions and filed an *amicus* brief siding with the employer. In doing so, the Administration effectively lent support to the employer's efforts to rollback employees' rights and make it much more difficult for workers to bring pay discrimination claims.

In *Burlington Northern & Santa Fe Railway Co. v. White*,[14] DOJ again filed an *amicus* brief that contradicted a well-established EEOC interpretation. The case examined the scope of Title VII's protections against retaliation, which are triggered when individuals file, report, or assist with complaints of discrimination. Although EEOC guidance interpreted the provision broadly, DOJ urged a much narrower reading, limiting the retaliation protections only to retaliation affecting the terms and conditions of employment. Under the DOJ rule, retaliation by the employer outside of the workplace setting would not be covered. The Supreme Court rejected this narrower argument and deferred to the EEOC interpretation.

In both of these cases, DOJ failed to defend EEOC positions and, instead, advocated rules that would make it harder for victims to bring employment discrimination claims. This posture creates confusion for the courts and undermines agency deference principles.[15] More importantly, it also is completely contrary to the role DOJ – and the Employment Section – should play in helping plaintiffs to vindicate their rights.

E. Political Influence in Attorney Hiring and Case Decisionmaking

There have been many published reports of allegedly improper political influences at DOJ, including the Civil Rights Division, driving DOJ's policy agenda, and affecting hiring and case decisions. The extent to which politics have played a role in attorney hiring or case decisions in the context of the Employment Section is unclear. Reports of political maneuvers used to usurp DOJ's longstanding attorney hiring process, or overturn case decisions made by career staff, are alarming because they suggest a calculated effort to thwart vigorous enforcement and manipulate outcomes.[16] What is clear, however, is that sound, effective civil rights enforcement cannot be held hostage by political preferences or agendas. We expect every administration, regardless of political affiliation, to enforce our employment discrimination and civil rights laws. Moreover, it is essential that every DOJ division to take whatever steps are necessary to remove any implication of political bias or other efforts to undermine vigorous enforcement of the law.

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[14] 126 S.Ct. 2405 (2006).

[15] Indeed, in the *Ledbetter* argument before the Court, several justices took note of the fact that the Solicitor General had taken positions contrary to the expert opinion of the EEOC on several occasions. *See* Transcript of Oral Argument of Glen Nager in *Ledbetter v. Goodyear*, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1074.pdf.

[16] *See, e.g.*, Dan Eggen and Amy Goldstein, *Political Appointees No Longer to Pick Justice Interns*, Wash. Post, April 28, 2007, at A2; Dan Eggen, *Justice Dept. Hiring Changes Draw Fire*, Wash. Post, January 12, 2003, at A8.

III. Recommendations and Next Steps

To address these concerns, several steps could be taken:

- ***Consistent support for legal interpretations providing maximum protections to discrimination victims***. It is essential that the Employment Section – and the Civil Rights Division and Department of Justice – advance legal arguments that preserve, and do not rollback, the ability of victims of employment discrimination to vindicate their rights. The failure to defend such legal protections, particularly when they reflect longstanding positions of the federal government, is troubling and inappropriate. The inconsistencies reflected in the government's reversal of position in court cases and shifting legal arguments undermines public confidence in federal agency enforcement efforts, diminishes the authority and integrity of agencies when they appear in court, and weakens the available protections for individuals who experience employment discrimination.

- ***Increased transparency and accountability.*** Questions of political influence and partisanship are particularly harmful in the context of civil rights enforcement. Even the perception of such factors influencing law enforcement efforts is damaging to the integrity of the legal process. We believe it is crucial to have regular reporting of the Employment Section's enforcement statistics, such as: the number of complaints filed annually broken down by the bases for these complaints, the number of cases of resolved each year, and a report summarizing any changes in legal positions taken in cases. This information would minimize persistent questions about the Section's record. It also could be used as one measure of the Section's overall effectiveness and productivity.

- ***Establishment of Enforcement Goals and Priorities.*** Establishing clear enforcement goals and priorities on an annual basis could be a useful mechanism for understanding and measuring the scope and direction of the Section's enforcement efforts. The development of such goals and priorities helps encourage regular analysis and evaluation of enforcement and other data to identify areas where greater enforcement may be needed. It also can be a tool for directing targeted resources at particular enforcement problems. One enforcement goal that we believe is particularly important is increasing the number of cases challenging systemic employment practices, especially those with a disparate impact on women and people of color.

- ***Eliminating improper political influence from the attorney hiring process and case decisionmaking.*** Allegations of political preferences and affiliations trumping solid experience in civil rights enforcement when making attorney hiring decisions have harmed the stature, morale, and ultimately the effectiveness of the Employment Section, the Civil Rights Division, and the Department of Justice as a whole. The public, the courts, policymakers, and advocates alike – all of us must have confidence that the agencies responsible for enforcement of employment discrimination and other civil rights laws are committed to putting faithful adherence to the law before politics or political advantage. Anything less is unacceptable. Recent changes reported

publicly regarding modifications to the attorney hiring process to diminish the role of political appointees is welcome, but additional steps may be necessary to correct past mistakes.

- ***Regular Oversight.*** Oversight of the Employment Section's activities is critical to ensure Section accountability, inform Congress and the public about the Section's work, and provide for an independent assessment of the Section's effectiveness. Such oversight should be fair, even-handed, and thorough; and can be an invaluable mechanism for helping to advance the Civil Rights Division's broad mission.

- ***Leadership and visibility***. It is essential that leaders of the Employment Section and the Civil Rights Division be visible leaders on employment discrimination issues. The persistence of workplace discrimination demands that every public official charged with enforcement of employment discrimination laws use every available opportunity to uphold the principles of equality enshrined in our constitution and civil rights laws, and emphasize the importance of compliance with the law.

Conclusion

The Employment Section has a critical role to play in preserving, defending, and upholding rights and protections of critical importance to ensure fair treatment in the workplace. We believe the Section's record over the past six and one-half years has fallen short of what is needed to make the promise of equal employment opportunity a reality for all workers. Thank you for the opportunity to participate in today's hearing and I look forward to answering your questions.

Mr. DAVIS. Thank you, Ms. Frye. Let me thank all the witnesses for your conciseness, given our time constraints.

I will begin the questions by recognizing myself for 5 minutes.

And, Ms. Frye, if I can again with you, the first witness and the first panel today, Mr. Agarwal, from the Justice Department made a number of assertions to the effect that this Administration's civil rights enforcement record, at least with respect to employment cases, was comparable, if not identical, to that of the Clinton administration.

Would you care to comment on that representation?

Ms. FRYE. Well, it is certainly not our understanding of their record, just based on a review of the complaints that we have access to on their Web site. And I first want to concur with the comment that I believe the Chair of the Committee made, Mr. Conyers, which is this also has to be understood in a broader context.

The Clinton administration wasn't necessarily the high water mark when it comes to employment discrimination cases generally, but it is certainly a measure that we want to use. But when you look at the numbers overall in this Administration, they have fallen well short of the Clinton administration.

When you look at title VII complaints overall, again, they are roughly about half of where the Clinton administration was on track to do, maybe 45, maybe close to 50, but that is roughly half of where the Clinton administration was.

If you look at pattern and practice cases, again, they are on track to do about half. They have done 13 thus far. What is of most concern is that when you look at some of the areas where they have traditionally focused, discrimination against African-Americans, they have four.

The first case that was initiated by the Employment Section actually wasn't brought until last year. They have two that are pattern and practice cases involving women. They have the same number involving discrimination against women as they have against men.

Those numbers, again, are quite low. We are looking at the big picture, and over 6.5 years, the record just doesn't reflect the level that we would think that they ought to be at.

Mr. DAVIS. Ms. Frye, let me pick up on that. As someone who is knowledgeable in the area of civil rights employment law, do you have any empirical reason to believe that there has somehow been dramatically less discrimination in the last 6 years than there was under the Clinton administration?

Ms. FRYE. No. I certainly don't have any evidence like that. And if you look at the Equal Employment Opportunity Commission, where they receive charges of discrimination, they receive thousands of charges a year. And while not all of those are meritorious, certainly a good percentage are.

Mr. DAVIS. The private filings with EEOC I take it are roughly consistent during the last 6-year period with the decade before that, which would suggest there has not been drop off of as a systemic matter in discrimination claims in this country.

You would agree?

Ms. FRYE. I would agree.

Mr. DAVIS. Let me turn to you, Mr. Dreiband. You talked very eloquently about the historic mission of the Department of Justice. Give me some perspective on that.

What conclusion do you make when you hear Ms. Frye talk about a pattern of less enforcement than before, when you hear Ms. Frye talk about a pattern of changing position, changing the size of the Justice Department tends to back in these cases. What does that say to you about this Administration's commitment to the historic mission of the Department of Justice, if you could be very brief?

Mr. DREIBAND. Well, what Ms. Frye described is not what I experienced as a member of the Administration. I mean, I was appointed by the President to serve as the EEOC general counsel, and I found an unwavering commitment to fair and effective and aggressive enforcement of the civil rights laws.

Mr. DAVIS. Do the numbers mean anything to you? What do the numbers suggest?

Mr. DREIBAND. Well, I mean, I am familiar with the numbers at the EEOC, and all of those numbers were much higher during my tenure as general counsel than they were during the previous Administration, including number of title VII lawsuits filed, a lot more money recovered under our tenure, than under our predecessors.

We set records for recovery. Through the EEOC's litigation program, recovered literally hundreds of millions of dollars. And in the Civil Rights Division, my dealings with people there were always professional, cordial and reflected a commitment to effective law enforcement.

So with regard to the particular numbers, I am not as familiar as Ms. Frye is with the number of cases, for example, Civil Rights Division has filed. I do know that in my dealings with them they always expressed to me——

Mr. DAVIS. Are the numbers relevant to you, Mr. Dreiband? Ms. Frye put a lot of stock I the numbers, the fact that she ticked off three or four categories where there is a significant numerical decline in the cases brought by this Justice Department and those brought by the previous ones. And what I am trying to press you on is what do those numbers mean to you? How do you explain that drop in numbers?

Would it be your position that there has been a drop in the amount of acts of discrimination somehow that have occurred in the last 6 years? Any empirical basis to believe that?

Mr. DREIBAND. Well, I didn't see any kind of drop off in terms of the charge filing data that we had at the EEOC, nor did I see at EEOC any kind of reduction in number of lawsuits, in fact, the opposite. We brought more cases at the EEOC.

Now, at the Justice Department, I didn't review their files.

Mr. DAVIS. Let me cut you off simply because of time constraints.

Ms. Caldero, I will ask you just one quick question before I turn to the Ranking Member. As a private litigant, what did it say to you, if you can be extremely brief, what did it say to you as a litigant when the Justice Department changed sides in your case?

Ms. CALDERO. I felt that they acted very unprofessional, and I felt betrayed by them, that they didn't stand up for the settlement agreement like they had told us that they would.

Mr. DAVIS. Did it cause you to question the department's commitment to equal justice.

Ms. CALDERO. Absolutely. The other female custodians and myself, we look at them now as the injustice department, not the Justice Department.

Mr. DAVIS. I turn now to the Ranking Member for 5 minutes.

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

Mr. Chairman, I think if it is all right, I am going to address Mr. Dreiband and ask him kind of along some of the same line of questions that you were asking.

We have heard some conflicting testimony today, and I quite honestly and sincerely don't know which is correct, so let me give this to you in a two-part question.

Some of the testimony here has indicated that there has been a drop in racial discrimination and an increase in cases intervened on based on religious discrimination. And my first question is, do you think that is true?

And, number two, along the lines that the Chairman mentioned, do you think that there is any difference or any trend in society where there is any trend, downtrend, toward the racial discrimination and uptick in religious discrimination?

Mr. DREIBAND. Well, with regard to religious discrimination, certainly the EEOC has seen an increase in the number of religious discrimination charges filed with the EEOC. And so as a result one could envision more religious discrimination lawsuits being filed both by private litigants and by the EEOC and the Justice Department.

That could explain what apparently is the different numbers that people have talked about. I am not personally familiar with the Justice Department's statistical record with regard to religious versus race discrimination claims. But I do know, as I say, that there has certainly been an increase in the number of religious discrimination charges.

I know at EEOC, for example, we filed, when I was general counsel, hundreds of title VII cases a year alleging race discrimination, as well as religious discrimination. And we brought lawsuits without fear or favor to any defendant or without regard to the type of discrimination we encountered.

Our goal and the efforts we undertook was to eradicate unlawful discrimination where we found it, of whatever kind.

Mr. FRANKS. So is it your testimony, Mr. Dreiband, that the trends, whatever they may be, are more reflective of the cases filed with the EEOC? And, secondarily, in overall numbers, it is also your testimony that in terms of the previous Administration that your enforcement numbers have been up, rather than down. Is that correct?

Mr. DREIBAND. Well, that is certainly true with regard to the EEOC's litigation program, yes. The EEOC has filed more title VII cases under this Administration, recovered more money for victims of discrimination under this Administration than the EEOC did under the previous Administration.

With regard to charges, it is important I think to note that the EEOC receives charges from individuals all over the United States and, as those numbers change, we do see a trend at times with the

outcome being more types of lawsuits reflecting the types of charges that the commission receives.

Mr. FRANKS. Thank you, sir.

Professor Ugelow, in your testimony, I was curious, do you assert that the section is disregarding the laws it is mandated to enforce or really simply pursuing what might be reasonable interpretations that you disagree with?

Mr. UGELOW. Oh, I think they are ignoring litigation against African-Americans——

Mr. FRANKS. You think they are disregarding the laws. Is that correct?

Mr. UGELOW. I don't think they are enforcing the laws fairly and vigorously.

Mr. FRANKS. Okay, let me go ahead and follow up. The division and the section have been criticized, as you know, in some quarters, certainly even here today, for initiating actions where the alleged victims were either White or Christian or men. And do you agree that the division deserves the criticism and, if so, help me understand why you think they understand the criticism in that regard.

Mr. UGELOW. Well, implicit in your question is if we do one type of case, we can't do another type of case. And I don't think that that is correct. You can do religious discrimination cases without ignoring cases involving Latinos and African-Americans.

And my contention to you, Congressman, is that the section has deliberately reduced its enforcement of the civil rights laws as they affect African-Americans and Latinos. It is not either-or. Religious discrimination cases are important. We can all agree on that.

But there ought to be vigorous enforcement across the board. And if you look at the numbers, where the section has filed 47 cases in almost 7 years in office, that is below what the 3 prior Administrations filed. So something is going on. They are not doing something.

It is the same staff, the same number of attorneys, same number of support staff, but they are not doing their job.

Mr. FRANKS. And, Ms. Frye, let me turn that question to you.

Do you think that the division has been fairly criticized for bringing these cases where the victims were either White or Christian or men? Do you think that there is a fair criticism there for them bringing and initiating those actions, and, if so, why?

Mr. DAVIS. And, Ms. Frye, the gentleman's time has expired with that question. You can answer the question, given our time constraints.

Mr. FRANKS. Thank you, Mr. Chairman.

Ms. FRYE. I want to be clear. I don't think that anybody criticizes the department, I certainly don't mean to, for bringing legitimate cases of discrimination, regardless of who it involves, whether it is a White male or a person because of their religious belief.

That is not really the concern. It is a broader concern about what the docket looks like overall. And the reality is that since the inception of the division, and I think it is also the case that since the beginning of the EEOC, the largest number of complaints that they see are race discrimination cases, followed by sex discrimination.

And when you look at their record now, the reality is that there have been a significant drop off in the number of cases involving African-Americans and Latinos and women. And that is a concern.

Mr. DAVIS. Ms. Frye, thank you.

On behalf of the Subcommittee, the Chair notes that no other Members on either side are present, and we thank on behalf of the Subcommittee the Ranking Member. And I thank all of our witnesses for appearing here today and for your testimony. I apologize to you that we had unexpected time constraints in the form of votes, and expected time constraints in the nature of the fact that we have to vacate the room to prepare for another hearing. But we thank you for your patience.

Without objection, all Members 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 your answers are made part of the record.

Without objection, all Members will have 5 legislative days to revise and extend their remarks and submit any additional materials for inclusion in the record.

And, with that, the hearing into oversight of the Employment Section of the Civil Rights Division of the U.S. Department of Justice is adjourned.

[Whereupon, at 12:47 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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

Before we begin today, I would like to take note of the fact that today is the 50th anniversary of the integration of Central High School in Little Rock, AR. When those nine brave students walked into that school, they made a mark on American education and paid tribute to our civil rights. Fifty years later, while discrimination has been erased from most of our laws, it has yet to be fully achieved in our actions. It is through the work of this Subcommittee, the full Committee and Congress that I hope we can soon see the day where "equality" is found in both our hearts and deeds.

Deny an otherwise qualified person a job, and you deny that person dignity, the ability to feed his or her family, possibly health insurance and all the necessities that go along with gainful employment. Deny someone a job that person has trained for, or has worked at, for many years, and you are destroying what might be a lifetime of work.

One of the most important missions of the Department of Justice is to protect all Americans against employment discrimination on the basis of race, religion, gender, disability or national origin. Hopefully, in the not too distant future, that list will include sexual orientation and gender identity, but that is a battle for another day.

Today we are concerned with how well the Department of Justice is enforcing the law.

In many other areas, this Committee has brought to light decisions made at the Department of Justice that have been guided more by political considerations than by the merits of an issue. Sometimes, it is not so much politics as it is ideology.

Today we will examine a number of cases in which the Department seems to have gone against established civil rights policy, or even turned its back on consent decrees to which it had committed itself. As in other parts of the Department, we have received reports of poor morale, departures of career staff, and political interference with the Section's important work. I am concerned that this pattern may also be present in the Employment Section.

The Justice Department's Employment Litigation Section is mandated to enforce Title VII of the Civil Rights Act of 1964 and various other civil rights laws that prohibit employment discrimination. As challenges to discriminatory employment practices are usually factually and legally complex, and often take several years to litigate, the Justice Department is uniquely positioned to lead the charge in those cases.

The Bush Administration, however, has filed only 47 Title VII cases since 2001. By comparison, the Clinton Administration filed 34 cases in its first two years and a total of 92 by the end of its term. Also, in many cases, the Bush Administration has reversed the position taken by about all pervious administrations in the middle of a case, or has opposed settlements to which it had previously been a party. One of the witnesses has been a victim of discrimination in such a case and will describe her experiences.

Also at issue is the exit of a significant numbers of career lawyers in the Section and the hiring of lawyers who have little experience in civil rights.

There is nothing more Un-American than bigotry. When those charged with fighting discrimination fail to do so, the government provides tacit support for discrimination. Discrimination destroys families and tears at the fabric of our nation. We are at our strongest as a people when we use the talents and abilities of all our citizens to their fullest extent. To that end, the enforcement of our discrimination laws must be above partisan and political influence. The promise of our nation's civil rights laws is only met when the Justice Department applies them aggressively and in an even-handed fashion. We will examine today whether that promise is being honored by the current Justice Department.

I look forward to our witnesses' testimony and I thank you for being here to testify.

PREPARED STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION (ACLU)

WASHINGTON
LEGISLATIVE OFFICE

Written Testimony of the American Civil Liberties Union
Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the
Committee on the Judiciary
U.S. House of Representatives

Oversight Hearing
on the Employment Section of the Civil Rights Division of the
U.S. Department of Justice

September 25, 2007

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The American Civil Liberties Union (ACLU) is a national, nonpartisan public interest organization of more than 500,000 members, dedicated to protecting the constitutional and civil rights of individuals. Through its Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, and through its Racial Justice Program, the ACLU has long been a leader in the legal battles to ensure the full equality of women and people of color. This commitment includes fighting for equal employment opportunities and the removal of barriers to entry to employment for women and people of color. For example, the ACLU Women's Rights Project has been a participant, either as *amicus* or direct counsel, in virtually all of the major gender discrimination in employment cases before the Supreme Court.[1] The ACLU Women's Rights Project has also successfully litigated many employment cases in lower courts, most recently winning significant jury verdicts in 2006 in *Espinal v. Ramco Stores* (a sexual harassment case brought on behalf of immigrant women retail store workers) and *Lochren v. Suffolk County Police Department* (a pregnancy discrimination case on behalf of female police officers forced onto unpaid leave for the duration of their pregnancies).

As part of this commitment, since 2002 the ACLU Women's Rights Project has represented a group of 25 African-American, Hispanic, Asian, and female public school custodians in the case *United States v. New York City Board of Education*. The Civil Rights Division of the United States Department of Justice brought this case in 1996, alleging that the New York City Board of Education discriminated on the basis of sex and race in recruiting and hiring public school custodians. In 1999, the Justice Department and the Board of Education entered into a settlement agreement that, among other things, provided permanent jobs and retroactive seniority to approximately 60 female and minority custodians whom the Board of Education had previously employed

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[1] Examples of cases in which the ACLU has participated include *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, 127 S. Ct. 2162 (2007) (when equal pay claims may be brought; *Burlington Northern & Santa Fe Railway Co., v. White*, 126 S. Ct. 2405 (2006) (whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace and how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (whether an employer is vicariously liable in a sexual harassment claim when the complaint is constructively discharged); *Nevada Dep't. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (whether the Family and Medical Leave Act binds state employers); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (whether plaintiff, in a sex discrimination case, must present direct evidence of sex discrimination to receive a "mixed-motive" jury instruction); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (whether ADA permits employer to deny employment to disabled individual out of concern for his or her health) ; *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) (whether plaintiff in a complaint for an employment discrimination claim must present specific facts in order to establish a *prima facie* case); *EEOC v. Waffle House*, 534 U.S. 279 (2002) (whether an agreement between employer and employee to compel arbitration precludes the EEOC from pursuing victim-specific judicial relief); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (what showing is necessary for a Title VII disparate impact case); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (whether exclusion of "macho" woman from partnership in accounting firm violated Title VII); *California Federal Savings and Loan v. Guerra*, 479 U.S. 272 (1987) (whether Title VII prohibits employment practices favoring pregnant workers); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (whether Navy violated Constitution in providing different employment benefits to male and female servicemembers).

"provisionally." In 2002, however, in the face of a challenge to the settlement by white male custodians, the Justice Department reversed its position and began to attack the very awards it had won through the settlement as to the majority of these individuals. It has continued this attack to this day. The ACLU intervened in this case on behalf of 25 of the individuals whom the Justice Department abandoned, including Janet Caldero, who is testifying before the committee today.

We appreciate the opportunity to submit this testimony to the Subcommittee describing the positions taken by the Employment Section of the Civil Rights Division in *United States v. New York City Board of Education*. Below, we set out the potential consequences of these positions both for the individuals whose interests are at stake in this case and for civil rights enforcement generally. We also describe necessary safeguards to prevent the Civil Rights Division from harming the individuals that it previously undertook to protect.

The Justice Department's Case Against the New York City Board of Education

While the job title "custodian" may evoke images of a low-wage employee who pushes a broom, custodians actually act as building managers in New York City public schools. Each custodian hires, manages, and supervises a staff of cleaners, handypersons, and boiler operators; in the largest schools in the city, a custodian may oversee between ten and twenty workers. Custodians also are solely responsible for their own significant budgets, overseeing payroll for their employees and contracting with outside vendors. The custodian position has civil service protections and is a highly paid position, with potential for significant raises and increases in managerial responsibility should a custodian successfully seek to transfer to larger schools. Historically, these positions have also been almost exclusively the province of white males.

For example, in 1993, approximately the time the Justice Department began to investigate the New York City Board of Education for discrimination in recruiting and hiring custodians, the Board of Education employed 13 women out of 865 custodians. In other words, the workforce was 98.5 percent male. Only 36 of the 865 custodians were African-American, and only 29 were Hispanic. Four were Asian. In other words, the workforce was over 92 percent white in one of the most diverse cities in the world. Moreover, many of the women and people of color who were employed as custodians were employed "provisionally," meaning that they had no civil service protections, no job security, and no right to seek the transfers and assignments that custodians typically rely on to increase their salary and management authority.

The Board of Education did very little to recruit applicants for the civil service custodian exam. As a result, potential applicants historically learned about the job and the steps necessary to obtain it by word of mouth from incumbent employees. As courts and social scientists alike have recognized, this dependence on word-of-mouth advertising tends to replicate the demographics of the workforce. White male employees are most likely to know and refer opportunities to other white males. In addition, the fact of an overwhelmingly white male workforce itself sends a powerful exclusionary

message. Several people of color and women who eventually became custodians testified that at one point they either believed or were explicitly told that a woman or a minority would never be allowed to do the custodian job. The evidence in the case showed that through the 80s and 90s, women and people of color applied for the custodian civil service exams at far lower rates than would be expected from their representation in the qualified workforce.

Those who did take the examination faced further hurdles. The evidence in the case showed that otherwise qualified African-Americans and Hispanics passed the civil service examination for the job at much lower rates than did white test-takers and that the civil service examination had not been shown to accurately measure the skills needed for effective performance on the job.

Based on these facts, the Department of Justice argued that the Board of Education had discriminated against women, African-Americans, Hispanics, and Asians in recruiting for the custodian position and had discriminated against African-Americans and Hispanics in testing for the job, in violation of Title VII. In 1999, when the Justice Department and the Board of Education settled the case, as part of that settlement the Justice Department sought to remedy the effects of that past discrimination by making sure that more women and people of color were on the job. The settlement thus provided that those women and minorities who had previously worked as provisional custodians—doing the same job as civil service custodians but without the same protections and benefits—would receive permanent employment and retroactive seniority.

These awards began to disrupt what had previously been a closed system by making sure that there were more women and minorities on the job, as there would have been in the absence of discrimination. Because of the awards, women and minorities were permanently on the job and could compete to transfer to larger schools with greater supervisory authority. They were thus better positioned to serve as trailblazers and mentors to women and minorities on their staffs and to recruit women and minorities for the custodian job through their own networks. The closed system not only reflected discrimination; it perpetuated it. Placing the beneficiaries on the job thus not only corrected the effects of past discrimination; it also helped prevent its recurrence.

It is also worth noting what the settlement did not do. It didn't require the Board of Education to meet goals for hiring women or people of color. It didn't require any benefit be given to anyone who wasn't already competently serving as a custodian. And it didn't require that any white male custodian be laid off, or demoted, or disqualified for promotions. The settlement agreement's awards were modest efforts toward leveling the playing field within a system that had long given white men a leg up.

Finally, the settlement also explicitly stated, "If any provision of this Settlement Agreement is challenged, the United States and Defendants shall take all reasonable steps to defend fully the lawfulness of any such provision."

The Justice Department's Change of Position

At the time of the settlement agreement's approval by the court, a small group of white male custodians objected to providing permanent employment and retroactive seniority to the settlement beneficiaries, arguing that the awards discriminated against them as white men. They were eventually permitted to intervene in the case to take discovery and make their arguments. In 2002, the white male intervenors asked the court to immediately strip all the beneficiaries of the awards they received under the settlement, pending final resolution of the case.

After six years of hard-fought litigation to place more women and people of color on the job and to protect the awards of the beneficiaries under the settlement, in April 2002 the Bush Administration's Justice Department suddenly replaced the longstanding attorneys on the case with new counsel, radically changing its legal position and the complexion of the case, in violation of its commitment to defend the settlement. In papers filed with the court, in the face of the white males' motion to immediately strip the beneficiaries of their permanent employment status and retroactive seniority, the Justice Department declined to defend the awards for 32 of the 59 beneficiaries under the settlement. It did so without explanation.

Moreover, the Justice Department gave *no* notice to the relevant beneficiaries of its decision to abandon its fight on their behalf. For years, many of individuals who ultimately became beneficiaries had actively assisted the United States in its prosecution of the case, providing Justice Department attorneys with information about the custodian position and Board of Education processes. They thought of the Justice Department attorneys as their attorneys, or at least as attorneys representing their interests.

Yet the affected beneficiaries only learned of the Justice Department's attack on its own settlement when by happenstance the ACLU learned of this development. In August of 2002, the ACLU informed the beneficiaries of the Justice Department's actions and their potential consequences. Indeed, those beneficiaries who called the new Justice Department attorneys to seek further information were initially told that they had been misinformed, that there was no change in the United States' position and that the United States was continuing to fully defend their interests. The beneficiaries were not permitted to speak to the former attorneys on the case, with whom they had long cooperated and communicated.

The ACLU entered the case, representing 25 of the abandoned beneficiaries, in October 2002. In 2003, the Justice Department further modified its position, declining to defend the full awards of an additional 10 beneficiaries. The NAACP Legal Defense and Education Fund intervened in the case on behalf of these individuals (who again, had been given no notice by the Justice Department of the change in position) in 2004. Ever since, in active and contentious litigation that continues to this day, the ACLU and the NAACP Legal Defense and Education Fund have defended the Justice Department's settlement agreement against the Justice Department's attacks that the settlement unlawfully discriminates against white males.

The Potential Consequences of the Justice Department's Change in Position

1. Potential effects on the beneficiaries.

The permanent employment status that beneficiaries received under the settlement provided them with valuable civil service protections and allowed them to remain as long as they wished at a particular school rather than being subject to repeated moves that undermined their authority and their ability to do their jobs. It also allowed them to acquire seniority and thus compete successfully for transfers to larger, higher-paying schools, and to be eligible for temporary assignment to assist in the care of other schools for an increased salary. The retroactive seniority awards enhanced the beneficiaries' ability to compete for transfer to larger schools with the greater authority, visibility, and salaries that such transfers bring.

By arguing that the awards made to the majority of beneficiaries are unlawful, the Justice Department has placed the beneficiaries at risk. The Justice Department eventually acknowledged beneficiaries had purchased houses, made retirement plans, taken on family obligations, and bypassed other employment opportunities based on their expectation of permanent, stable employment. As a result, it does not currently argue that any beneficiary should lose permanent employment. However, its continued attacks on the legality of these awards certainly place beneficiaries at some risk that a court will find the awards of permanent employment unjustifiable. If the beneficiaries lost permanent employment, under current civil service law, they would almost definitely lose their jobs rather than reverting to provisional status.

Moreover, the Justice Department has directly attacked the beneficiaries' seniority and sought to strip the beneficiaries of these awards. Were the Justice Department to succeed in its arguments that the awards discriminate against white male employees, presumably a court would be obligated reconstruct circumstances as they existed in 1999, removing beneficiaries from the higher-salaried schools to which they had transferred by dint of their seniority and placing them in smaller, lower-paying buildings. Again, beneficiaries who have taken on financial obligations based on their current salaries, such as house payments or family care obligations, or who have bypassed other opportunities based on reasonable expectations that they would continue to earn their present salaries, would be placed in untenable positions.

Had the ACLU and the NAACP Legal Defense and Education Fund not intervened, the beneficiaries in this case may well have lost salary, supervisory authority, and perhaps even their jobs, with significant consequences for their financial stability and their careers. While we have been successful at holding these consequences at bay so far in the litigation, as set out below non-profits such as the ACLU are not an adequate substitute for the Civil Rights Division of the Justice Department.

2. Potential effects on civil rights law and civil rights enforcement.

Not only does the Justice Department's reversal of position have the potential to work harsh effects on the beneficiaries in this case, the arguments that it today presses have serious implications for civil rights enforcement. As the Board of Education has argued in its continued defense of the awards to beneficiaries, the Justice Department has taken "positions so inimical to its responsibilities as the enforcer of Title VII as to amount to a voluntary self-emasculation and a virtual evisceration of Title VII in pattern-or-practice, disparate impact, and other suits on behalf of disadvantaged classes."

First, the Justice Department has argued and continues to strenuously argue today that in order to be lawful, the settlement agreement must be shown only to benefit individuals who are proven to be direct victims of the Board of Education's hiring discrimination or recruitment discrimination. In so doing, the Justice Department has in effect declared affirmative action, which by its nature focuses on a disadvantaged class rather than narrowly limiting its benefits to specific disadvantaged individuals, as an unlawful means to break down past patterns of job segregation.

The settlement in this case reflects just such an affirmative action remedy. By ensuring that women and people of color were represented in the custodian workforce, with seniority that allowed them to compete for larger, higher profile schools, the settlement partially remedied the effects of the past discrimination that had resulted in disproportionately low numbers of women and people of color on the job. Equally importantly, these provisions helped to prevent future discrimination, by opening the closed system that had perpetuated the overwhelmingly white, male demographics of the workforce and showing by example that women and minorities could successfully hold these jobs, thus enabling more effective recruitment of women and minorities in the future. While the settlement beneficiaries included individuals who were victims of the Board of Education's discriminatory practices, as the Board of Education stated at the time the settlement was approved, "[t]he Agreement [did] not [specifically] seek to identify potential victims of discrimination from among minority and female takers of the challenged examinations or from other sources for the purposes of granting relief." In other words, while the affirmative action measures of the settlement agreement overlapped to some extent with compensatory relief for individual victims of discrimination, it had a broader purpose and function. The Justice Department today rejects this purpose and function as a form of discrimination against the white males who even after entry of the settlement continued to hold the vast majority of custodian positions in New York City schools.

Second, the law has long treated affirmative action measures adopted by public employers through settlement the same as any voluntary affirmative action measure adopted by an employer to attempt to remedy past discrimination or segregation in the workforce. That is, if it is lawful for an employer to undertake such a measure on its own, it is also lawful for a settlement agreement to fashion such measures. Employers have also long been granted a measure of discretion in crafting and adopting these measures, in order to encourage voluntary compliance with antidiscrimination mandates and in recognition of employers' prerogatives to fashion solutions to past discrimination within their own workforce. As a result, employers' voluntary affirmative action

measures have been a vitally important method of removing obstacles to the full participation of women and people of color in the workforce.

In this case, however, the Justice Department has argued that for an employer to adopt voluntary attempts to cure its own discrimination, its prior discrimination must be proved by the same standards used to prove discrimination in the courtroom. That is, it has argued that in order for the settlement's awards to beneficiaries to be lawful, (1) the inital allegations of discrimination must be proven; (2) each beneficiary's status as a victim of this precise form of discrimination must be proven; and (3) each award must be proven to precisely remedy the exact scope of each beneficiary's injury. Yet this has never been the law. The Supreme Court and federal courts of appeal have repeatedly held that formal findings of discrimination are not a prerequisite to voluntary affirmative action under either Title VII or the Constitution, precisely because requiring a finding or admission of liability would impose a heavy disincentive on employers otherwise motivated to remedy the effects of their own past discrimination.[2] Moreover, in the context of a settlement, it makes no sense to impose such demanding standards of proof. The purpose of settlement is to resolve claims and avoid litigation. If employers must engage in lengthy post-settlement litigation (eight years and counting in the current case) and justify their actions in entering into a settlement by proving their own past discrimination and the precise injuries suffered by victims of that discrimination, Title VII settlements will quickly become a thing of the past. Moreover, employers will quickly give up undertaking voluntary measures to correct discrimination or segregation in their workforce, as such measures under law are subject to the same scrutiny as Title VII agreements. The Justice Department's actions in this case thus directly conflict with the long-recognized Title VII policy of promoting voluntary measures to ensure equal opportunity in the workplace and promoting settlement of discrimination cases. If successful, its arguments will have the effect of shutting down employers' own vitally important efforts to break down patterns of race and sex segregation on the job.

Again, in the present case, the ACLU has thus far been largely successful in stemming the impact of the Justice Department's arguments. In this case, the beneficiaries were lucky in that they attracted the attention and assistance of non-profits willing to devote significant resources to this litigation. However, non-profits lack the resources and capacity to step into the place of the Civil Rights Division with any regularity or to enter into multiple cases of this type. The Justice Department plays a crucial rule in making real the promise of civil rights laws, a role that the Department has abandoned in this case and threatens to abandon far more broadly.

Appropriate Congressional Responses

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[2] *See, e.g.*, *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 630 (1987); *Wygant v. Jackson v. Board of Education*, 476 U.S. 267, 289-90 (1986) (O'Connor, J., concurring); *United Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003); *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991); *Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988); *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1041 (7th Cir. 1987).

The Justice Department's actions in *United States v. New York City Board of Education* serve as a reminder of the need for close scrutiny of Justice Department nominees in the confirmation process, including probing inquiries addressing their commitment to civil rights enforcement. Those individuals entrusted with the responsibility of upholding the United States' commitment to equality must be held to a demanding standard by Congress.

More specifically and narrowly, one of the most troubling aspects of the Justice Department's actions in *United States v. New York City Board of Education* has been its failure to notify those individuals potentially affected by its abrupt shift in legal positions of its abandonment of these individuals' interests. Had ACLU attorneys not learned about the case and taken it upon themselves to contact the affected individuals, it is not clear whether or when the beneficiaries would have learned of the Justice Department's shift, nor would they have had an opportunity to appear in this ongoing litigation centered on their employment status. Recent conversations with the Justice Department attorneys in this case confirm that they continue to believe they have no obligation to contact affected beneficiaries before entering into agreements or stipulations that specifically compromise these individuals' interests.

A statutory provision requiring the Justice Department, should it seek to amend or revise an executed settlement or consent decree to which it is a party, to give full and complete notice to any third-party who would be directly affected by such an amendment or revision, would ensure that this pattern is not repeated. Such notice would also permit affected individuals to appear and be heard on questions going to the heart of their livelihood, should they desire. Basic fairness requires such notice.

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